



EMPLOYMENT TRIBUNALS

Claimant: Ms Sarah Holcroft

Respondent: Applegarth Hotel Limited

Heard at: Carlisle

On: 20 November 2019

Before: Employment Judge Humble

REPRESENTATION:

Claimant: In person

Respondent: Mr Sangha, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.
2. The claimant contributed to her dismissal to the extent of 35%, and a Polkey reduction of 35% is also applicable.

REASONS

The Hearing

1. The hearing took place on 20 November 2019. The claimant was self-represented, and she gave evidence on her own behalf. The respondent was represented by Mr Sangha of Counsel, and evidence was given by Suzanne Mumford, the respondent's Managing Director, Michelle Clancy a manager of the respondent, and Kevin Clancy, the husband of Mrs Clancy and another of the respondent's managers.

2. There was an agreed bundle of documents which initially extended to 283 pages. Some additional documents comprising copies of text messages and correspondence were put forward by the claimant, which she said were omitted from the bundle, and these were admitted and added to the bundle at pages 284-296.

3. The claimant informed the Tribunal that the respondent had failed to disclose CCTV footage and much of her cross examination focussed upon the alleged absence of that CCTV footage. The Tribunal accepted the respondent's submission, and the evidence of all three of its witnesses, that the only available CCTV footage which showed the relevant interaction between the claimant and the respondent's management was disclosed. This footage last approximately 12 seconds and was viewed by the Tribunal.

4. Evidence in chief was taken as read based on written witness statements provided by the parties. The claimant said that she suffered from dyslexia and so some allowance was made for that by allowing her companion, Mr Paul Stone, to read any relevant documents, although in the event he was only required to read the closing submission. Mrs Clancy said that she also suffered from dyslexia, along with an anxiety disorder. The Tribunal indicated that her legal representative could read any document to her as might be required, and that it was open to her to request breaks to assist her if she was suffering from particular anxiety.

5. The evidence and closing submissions were concluded on the afternoon of 20 November 2019 and, due to time constraints, Judgment was reserved.

The Issues

6. The claimant brought a claim for unfair dismissal and the issues were identified at the outset of the hearing as follows:

6.1 Whether the respondent was able to show a potentially fair reason for the dismissal in accordance with Section 98(1) and (2) Employment Rights Act 1996. In this case the respondent relied upon conduct as the potentially fair reason for dismissal.

6.2 If the respondent could show that the dismissal was for a potentially fair reason, the tribunal would go on to assess whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

6.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

6.2.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

6.2.3 whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

6.3 If the claimant was unfairly dismissed, whether any award should be reduced for contributory fault and/or by way of a Polkey reduction.

7. The Tribunal indicated that the case would be dealt with as a split hearing, with liability to be determined first but also invited evidence and submissions on contributory fault and Pokey, which would be determined, if required, at the liability stage.

The Law

8. The Tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

“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 sub-section (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.”*

Then by sub-section (2):

“A reason falls within this sub section if it:

- b) relates to the conduct of the employee...”*

Then by sub-section (4):

“Where the employer has fulfilled the requirements of sub-section (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.”*

9. In considering this alleged misconduct case, the Tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance, which addresses the reason for dismissal, and does not do so on the second and third limbs where the burden is neutral.

11. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

“It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.”

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

12. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

13. The Tribunal must take in to account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the Tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

14. The Tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to her own dismissal. If so, to what extent did she contribute to her dismissal to reduce the level of any compensation to which she would otherwise be entitled having regard to the principles in Nelson v BBC (No.2) [1979] IRLR 346, CA.

15. The Tribunal were also referred to the cases of Hollier v Plysu [1983] IRLR 260, EAT, Software 2000 Limited v Andrews [2007] ICR 825 EAT, and Hill v Governing Body of Great Tey Primary School [2013] IRLR 274, EAT.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the Tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

16. The respondent is a business which operates Applegarth Villa, a hotel based in Windermere, Cumbria (“the Hotel”). The business is owned by Alan Mumford and Suzanne Mumford, who is also the managing director of the business. Michelle Clancy, the daughter of Mrs Mumford, manages the hotel on a day-to-day basis along with her husband, Kevin Clancy. The claimant worked with the respondent for over two years and she was employed as a head housekeeper. There was some dispute as to whether she had the formal title of Head Housekeeper but, irrespective of the job title, it was not in dispute that she had supervisory responsibility for the other housekeeping staff.

17. The claimant and Mrs Clancy enjoyed a relatively close working relationship. They each had children of a similar age and would occasionally socialise together outside of work. Mrs Clancy suffered from an anxiety and stress related illness and she would confide in the claimant about her condition and discuss the treatment which she was receiving. The claimant showed empathy, and would confide in Mrs Clancy about personal and health issues of her own.

18. On or about 17 April 2019 there was a disagreement between the claimant and Mrs Clancy in respect of some instructions which Mrs Clancy had given to the claimant and other housekeepers. In brief, Mrs Clancy had given instructions about the number of items which the housekeepers were expected to carry when they were cleaning and making up bedroom suites. The claimant objected to those instructions since she believed they were being required to carry too many items, and this resulted in a heated argument between the two women. Following that incident, the claimant "de-friended" Mrs Clancy on Facebook, that is to say she removed Mrs Clancy as a designated friend on her social media account. The claimant also resolved not to speak with Mrs Clancy on any personal issues and thereafter sought to keep their discussions only to work-related matters.

19. On the morning of 25 April 2019, the claimant was cleaning hot tubs in a specific area of the hotel when she was approached by another housekeeper, Zdenka, who said that she had been instructed by Mrs Clancy to clean that same area. The claimant informed Zdenka that she had almost finished the work and told her to carry out work in another area of the Hotel. The claimant then went to speak to Mrs Clancy about the matter and there followed a confrontation which ultimately led to the claimant's dismissal. The manner in which that confrontation developed and what was said by each of the parties was the main issue in dispute in this case and the parties gave very different versions of events as to what occurred.

20. The claimant's evidence was that she went to the office where Mrs Clancy was sat and politely asked Mrs Clancy the question, "*Michelle, how come you asked Zedenka to do those jobs? I have almost finished them.*" She said that Mrs Clancy "flipped out" and said, "*How dare you dictate to me who I give jobs to?*" and, "*Who the hell do you think you are?*" The Claimant replied, "*Sorry Michelle there's no need to scream at me I'm just asking you a valid question as you've been watching me do them all morning on your cameras*". This was a reference to security cameras which were situated in Mrs Clancy's office. The claimant added, "*I've nearly finished, is there something wrong with the way I have done them?*" She alleged that Mrs Clancy then "*ran towards me screaming*" and had "*a finger in my face*", and shouted "*You speak to everyone like shit around here, today when you walked past me I heard you say to Anna about the radios - you told her to hold her finger down for two seconds before speaking.*" The claimant responded, "*Yes, I was teaching her how to use it.*"

21. The claimant alleged there were some further remarks exchanged and she said, "*Please stop screaming at me from doing my job. I thank my staff every day for their hard work*", to which Mrs Clancy replied, "*I will do what I bloody well want now get out of this building!!*" The claimant said that she handed her keys in the office but on her way out of the building noticed that Mrs Clancy was speaking with her husband and said, "*Is this right Kevin? No verbal warning, no written warning and unfair dismissal!*" to which Mr Clancy replied, "*No Sarah, you can walk out of that door of your own free will or you can stay.*" There was some further discussion and the claimant decided to stay at the Hotel but was then challenged by Mrs Clancy

again and, after a further exchange, Mrs Clancy telephoned Mrs Mumford. Meanwhile the claimant was speaking with Mr Clancy and said, *"That's the reason nobody wants to work here...because Michelle treats people like dirt and they hand their notice in. Well I'm not going to be bullied in to that!"*

22. Mrs Clancy then returned with a telephone in her hand and passed it to Mr Clancy and said, *"[Mrs Mumford] has said you have to get out of the building now!"* to which the claimant replied, *"right fine"*. The claimant walked back into the office to hand her keys in again during which time Mrs Clancy was allegedly following her and shouting abuse. In cross examination she said that Mr Clancy was shouting, *"Fuck off knob nose!"* As she was leaving the building, the claimant turned around and shouted back, *"it should be you leaving the building not me"*.

23. The evidence of Mrs Clancy was very different. She said that, at about 10:30am, whilst she was taking a telephone call in the office, the claimant came through reception and stood at the entry to the office. She appeared to be angry about something and began shouting at Mrs Clancy about what Zedenka had been asked to do. Mrs Clancy said that she found this extremely disturbing and she could not immediately response since she was on the telephone so she tried to get the claimant to stop by putting her finger to her mouth in a gesture to ask her to be quiet. When that did not work, Mrs Clancy said that she tried to push shut the office door which was between them but the claimant pushed it back open.

24. Mrs Clancy put the telephone down and said that she was fearful of what the claimant might do and became anxious and upset, and started to cry. Despite this, she said that the claimant continued to be aggressive and used swear words towards her. Mrs Clancy said that she did not lose her temper at any stage and was trying to calm the claimant since she was unable to handle confrontational situations. She said that the claimant's aggressive tirade lasted for about two or three minutes before Mr Clancy came through and provided her with some support. Mrs Clancy said that she was unable to recall all the comments and insults used by the claimant but that she did say, *"All the staff hate you"*, *"they only work here because of me"*, and she referred to Mrs Clancy as a *"stupid fat fucking cow"*.

25. Mr Clancy, in his evidence, corroborated the latter part of the conversation as recounted by Mrs Clancy, and in particular the remarks that the staff only worked there because of the claimant and that the claimant called Mrs Clancy *"a stupid fat fucking cow"*. Having arrived on the scene, Mr Clancy sought to guide the claimant away from Mrs Clancy along the corridor and through to the reception area. He said that he attempted to calm the claimant down but with limited success and the claimant continued to complain about Mrs Clancy. Mr Clancy said that Mrs Clancy reappeared and said that she had spoken to Mrs Mumford, and that if the claimant did not calm down then the claimant should leave, or otherwise they would contact the police. Mr Clancy sought to usher the claimant to the reception area towards the exit. He informed the claimant that she should only return when she fully calmed down and they could talk further at that time. As he said this, the claimant turned around towards Mrs Clancy, who had followed them into reception area, and shouted at her. The claimant went to leave again but made a further attempt to enter the building, with Mr Clancy standing across her path to prevent her doing so. The claimant then left the building.

26. There was a limited amount of CCTV footage which related to the final part of the confrontation. This showed the claimant in the reception area walking towards

the exit with Mr Clancy behind her, the claimant then turns around and it can be seen that Mrs Clancy is also following the claimant towards the exit. The claimant turns around and waves her arms, she is clearly agitated and appears to be shouting in the direction of Mrs Clancy. Mrs Clancy also appears to be agitated and puts her arm out as if to direct the claimant out of the building. Mr Clancy then puts the palm of his hand in to Mrs Clancy's chest as if to prevent her from going any further toward the claimant. The claimant turns around and appears to shout at Mrs Clancy again before leaving the building. There was no audio on the CCTV but the Tribunal formed the impression from the clip that both women were agitated and likely to be shouting at each other.

27. It was difficult for the Tribunal to make any accurate findings as to what exactly occurred between the two women. The claimant's evidence was rather disjointed and the precision with which she claimed to recall the exact words used during the confrontation lacked credibility. On the other hand, Mrs Clancy's version of events also lacked some credibility. The suggestions that she was either too upset to respond to the claimant and that she remained calm throughout did not fit with the CCTV footage which showed her following the claimant out of the reception area and been prevented from going any further in pursuit of the claimant by Mr Clancy. It was also significant that both women became agitated during their evidence, Mrs Clancy responding assertively to the claimant, and the claimant in particular coming across as confrontational and argumentative when presenting her case and responding to cross examination. The Tribunal were of the view that the recollections of both women were less than accurate and, with the benefit of hindsight they were both, whether deliberately or otherwise, under stating their own roles in the exchange and exaggerating the culpability of the other.

28. The Tribunal held that there was animosity building up between the two women in the week or so prior to 25 April, and on the morning of 25 April the claimant perceived that Mrs Clancy was seeking to undermine her by instructing another housekeeper to do her work. The claimant went down to the office to confront Mrs Clancy about the matter and it quickly exploded in to a heated argument. On the balance of probabilities, both women raised their voices and swore at each other, the claimant did refer to Mrs Clancy as a "*stupid fat fucking cow*" and said words to the effect of, "*all the staff hate you*". Mrs Clancy said, "*fuck off knob nose*" and told the claimant to leave the hotel. Both women were culpable for the protracted heated argument, which was only resolved when Mr Clancy arrived on the scene and managed to usher the claimant out through reception. Even then both women were agitated, the claimant twice turned around and waved her arms saying "*it should be you leaving this hotel not me*" and Mrs Clancy followed her with her arm out and told the claimant in no uncertain terms to leave the Hotel. The hapless Mr Clancy, caught in the middle, put his hand in Mrs Clancy's chest to prevent her following the claimant further and then stood across the claimant's path to prevent her from re-entering the Hotel.

29. Later, on the same day of that incident, Mrs Mumford attended the Hotel and spoke with Mr and Mrs Clancy. She reviewed the CCTV footage, the only relevant part of which was before the Tribunal. In her evidence, Mrs Mumford suggested that this was carried out as part of an investigation but the Tribunal were not convinced that any form of meaningful investigation was in fact conducted. Mrs Mumford said that she interviewed several members of staff, but there were no statements put before the Tribunal from any other staff member, nor indeed any contemporaneous

statements from Mr and Mrs Clancy. Mrs Mumford said that one witness supported the explanation given by Mr and Mrs Clancy to the effect that the claimant had lost her temper and that Mr and Mrs Clancy had remained calm throughout, but in the absence of that statement the Tribunal did not accept that evidence. Mrs Mumford said that she did not disclose the staff statements since staff members were “*fearful of repercussions*”. The Tribunal doubted that, and in any event, there was nothing to prevent the respondent from disclosing redacted statements.

30. At 7:42pm on Friday 26th April the claimant sent an email to Mrs Mumford which stated as follows: “*Following yesterday’s attack on me from Michelle and been asked to leave the building I am unsure as to where I stand at the moment as no one has contacted me. Please get back to me on this email to let me know if I am dismissed/suspended/still working on Sunday?*” (page A114 of the bundle).

31. Mrs Mumford responded at 12:16pm on Saturday 27th April as follows: “*Hello Sarah, having reviewed all the CCTV footage, taken into consideration the tone of your email and the vitriolic attack on two senior members of staff in front of arriving guests you have made your position at Applegarth untenable.*

This leaves me with no alternative but to terminate your employment with immediate effect.

All formal documentation including P45 will be forwarded to your home address in due course.” (Page A113).

32. It was significant that Mrs Mumford did not, in that email, make any reference to an investigation having been conducted, nor of any other witnesses having been interviewed. When asked by the Tribunal why she did not seek to convene a disciplinary hearing, she suggested that she was concerned about how the claimant would react. She said in evidence, “*it seemed to me highly likely that she would again be volatile and unpredictable and I was nervous about the prospect of having to meet with her face to face.*” This seemed to overplay the situation, while the claimant was confrontational and argumentative there was little, if anything, to suggest that she might be physically violent towards Mrs Mumford. If Mrs Mumford was particularly concerned about meeting with the claimant face to face then steps could have been taken to alleviate those concerns such as having Mr Clancy and/or other people present at the meeting. Alternatively, she could have conducted the hearing by skype or telephone, or even appointed a third party to deal with both the investigation and disciplinary hearing.

33. On 1 May 2019 the claimant sent an email to Mrs Mumford in the following terms:

“I would like to challenge the decision to terminate my employment with immediate effect on the grounds that I believe that decision to be unfair. At no point did I attack two senior members of staff, I simply asked one member of staff a question politely, and was subject to a torrent of abuse from said member of staff. I’m sorry if you think there was a tone to my previous email, however there was not, I was just stating a fact and asking a question. I would also like to point out that there were no arriving guests at the time of the morning. I would request you keep the CCTV footage you have mentioned to go along with the rest of my evidence. I would state again that I believe this dismissal to be unfair and await your response.”

34. This email ought to have been treated as a letter of appeal, but it was not. Mrs Mumford did not refer the matter to any other independent person, but instead responded three days later as follows:

“Firstly, I would invite you to read my email correctly as I said your attack on senior members of staff was vitriolic. This can clearly be seen on the CCTV. It is also apparent on the CCTV that when escorted off the premises you attempted to return with your arms flailing around in the air in an incredibly aggressive manner. Secondly, there were guests in the building and a guest arriving early wanting to leave the car which I’m sure you will be aware is common practice. As a result of your behaviour being significantly less than professional our decision to terminate your contract stands. CCTV footage has been saved for our evidence and will be used if required.”

35. Mrs Mumford said in her evidence, *“there was nothing that [the claimant] could possibly say, that she had not said in her earlier emails that could make any difference to my investigation and my decision.”* This confirmed the Tribunal’s view that the decision to dismiss the claimant was predetermined. Mrs Mumford had not made any attempt to obtain the claimant’s side of events, relying instead on a few lines from her contained in an email, and had not carried out any meaningful investigation. The Tribunal’s view was that she was, understandably, concerned by the upset which the argument had caused to her daughter and made a quick decision that the claimant would not be returning to the Hotel. The speed with which she responded to the claimant’s email of 26 April, without convening a hearing, showed that her mind was closed to any decision other than dismissing the claimant. The Tribunal also took account of Mrs Mumford’s interpretation of CCTV footage which was not entirely consistent with the footage: the claimant does appear agitated and waves her arms but to describe these actions as *“incredibly aggressive”* is overstating matters and it is significant that she makes no mention of Mrs Clancy walking toward the claimant and putting up her arm out in a confrontational manner, or Mr Clancy putting a hand in Mrs Clancy’s chest to warn her off. Mrs Mumford’s view of the CCTV footage confirmed to the Tribunal that she had taken a one-sided view of the events, principally based upon what she was told by her daughter, and closed her mind to anything other than the dismissal of the claimant.

Conclusion

36. The Tribunal were assisted in this matter by the skeleton argument submitted on behalf of the respondent. This is available as a matter of public record and so we do not seek to recite its content. The claimant made a brief closing submission, which was read by Mr Stone on her behalf.

37. The Tribunal finds that this was a case in which the respondent entirely failed to conduct any reasonable investigation. Mrs Mumford had simply spoken with Mr and Mrs Clancy about the events involving the claimant earlier that day and took their explanation at face value. This was not entirely surprising given that Mr and Mrs Clancy are members of Mrs Mumford’s immediate family and Mrs Clancy was clearly upset by the confrontation which had taken place. Mrs Mumford took a decision at that point the claimant would not be returning to the Hotel. The Tribunal did not find that, aside from speaking with Mr and Mrs Clancy and viewing CCTV footage, any further investigation was carried out. Mrs Mumford’s rather one-sided interpretation of the CCTV footage also supports the finding that the decision to dismiss was predetermined. The Burchell test was not therefore satisfied, there was no reasonable

investigation upon which Mrs Mumford could properly conclude that the claimant had acted in such a way as to justify a summary dismissal.

38. No fair disciplinary procedure was followed. There was no disciplinary hearing and no appeal hearing was convened. The claimant was dismissed by email and, after the claimant sought to appeal her dismissal by email, the initial decision was simply confirmed by the same person who took the decision to dismiss. The Tribunal held therefore that the claimant was unfairly dismissed. The dismissal was both substantively and procedurally unfair.

39. The key remaining question for the Tribunal was whether the claimant contributed to her dismissal and, if so, to what extent, and whether any Polkey reduction should be applied.

40. It was evident that the claimant did contribute significantly to her dismissal. She confronted her general manager who reacted angrily and, during the course of the resulting heated argument, insults were exchanged and the claimant referred to her manager as a "*stupid fat fucking cow.*" The Tribunal held that both women were to blame for the altercation and the claimant must take a significant share of that responsibility. The Tribunal held that any award to the claimant shall be reduced by 35% for contributory fault, and that reduction shall apply equally to both the basic and compensatory award.

41. The Tribunal held that this was also a case in which a Polkey reduction should be applied. The Tribunal were not convinced that this was a case in which, if a fair procedure had been followed, the claimant would have been dismissed after a fixed period of time, but there was also 35% chance of dismissal if the outcome had not been pre-determined and a fair procedure had been followed. That reduction shall apply to the compensatory award only.

42. The case shall be listed for a remedy hearing. The parties are reminded however that the services of ACAS remain open to them and, taking account of the above findings, they are encouraged to seek agreement upon the sum payable.

Employment Judge Humble

Date 23rd December 2019

REASONS SENT TO THE PARTIES ON

24 December 2019

FOR THE TRIBUNAL OFFICE

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