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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109839/2021

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**Hearing held by Cloud Video Platform (CVP) on 18 & 19 November 2021 and
14 January 2022 (in Chambers)**

Employment Judge R Mackay

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Ms Y Daly

**Claimant
Represented by
Mr McGrade
Solicitor**

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Screwfix Direct Ltd

**Respondent
Represented by
Mr Piddington
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant having been fairly dismissed by the Respondent, the claim is dismissed.

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REASONS

Background

1 This is a claim for unfair dismissal. The Claimant originally submitted her claim without the benefit of legal advice. She subsequently appointed a firm

of solicitors who prepared and lodged revised details of claim. These were accepted in substitution for those originally lodged.

2 The Respondent defended the claim asserting that the Claimant was fairly
5 dismissed for “some other substantial reason” (being a refusal on her part to attend work) or, in the alternative, conduct.

3 Prior to the commencement of the hearing, the Claimant’s solicitor sought to amend the statement of claim with the addition of further particulars. Counsel for the Respondent opposed the amendment. Having heard both parties, the amendment, which did little more than add context to the Claimant’s position,
10 was allowed.

4 Counsel for the Respondent prepared a draft list of issues. Following modification arising from the amendment permitted, these were agreed subject to one point. That point related to the appropriateness of considering a final written warning issued to the Claimant in respect of prior disciplinary proceedings. Mr Piddington argued that the Tribunal should not engage in
15 any factual enquiry or detailed scrutiny of the previous decision. Mr McGrade accepted that this was not a case where the final written warning was relied upon in the decision to dismiss. It was, however, he submitted relevant in assessing the reason for the Claimant’s refusal to attend work.

20 5 Having heard parties’ representatives, the Tribunal agreed that it was not appropriate to have a detailed scrutiny of the previous disciplinary process but that it was permissible to hear evidence on the process to the extent that it was being presented as a factor in the Claimant’s refusal to attend work.

6 Parties produced a joint bundle which was before the Tribunal. They also
25 helpfully agreed a chronology and cast list.

7 The Tribunal heard evidence from three witnesses for the Respondent, Mr Gerry Millar, Mr Sam Crumley and Ms Liza Perez. The Claimant gave evidence on her own behalf.

List of Issues

8 Subject to the caveat above, the following is the agreed list of issues

1. ***Unfair Dismissal***

5 1.1 *It is agreed that C was dismissed.*

1.2 *What was the reason for C's dismissal?*

10 1.2.1 *R relies upon C's refusal to attend work as being a fair reason pursuant to s.98(1)(b) ERA 1996 (some other substantive reason) or s.98(2)(b) Employment Rights Act ("ERA") 1996 (conduct) in the alternative.*

15 1.2.2 *C maintains that the reason for the dismissal was her unwillingness to accept accusations of racism and homophobia which arose from the previous disciplinary procedure. C maintains that Liza Perez had upheld a substantial number of the allegations against the C to punish C for having raised issues relating to the Area 1 Fun WhatsApp Group.*

1.3 *Was the decision to dismiss within the band of reasonable responses in all the circumstances?*

20 1.4 *Was the procedure adopted by R reasonable having regard to the size and administrative resources of the Respondent (s.98(4) ERA 1996)? In particular C maintains that Gerry Miller should not have conducted the disciplinary hearing because:*

1.4.1 *He had previously been a notetaker for the investigation of a previous disciplinary.*

25 1.4.2 *He had a friendly relationship with Stuart Severin, who had set up the Area 1 Fun WhatsApp Group.*

1.4.3 *His wife was subject to an investigation into her involvement in the Area 1 Fun WhatsApp Group.*

5 1.5 *In the event that the tribunal make a finding that the procedure was unfair, would C have been dismissed in any event (Polkey v AE Dayton Services Limited [1987] IRLR 50)?*

10 1.6 *For the avoidance of doubt, R maintains that the Claimant has not pleaded or alleged that the FWW issued in respect of previous disciplinary proceedings was manifestly inappropriate or issued in bad faith, nor did R rely on the final written warning to dismiss, and consequently it is not appropriate for the tribunal to engage in a factual enquiry and detailed scrutiny of the previous decision; Beattie v Condorrat War Memorial & Social Club UKEATS/0019/17, Wincanton Group plc v Stone UKEAT/0011/12/LA, Bandara v BBC UKEAT/0335/15/JOJ, Fallahi v TWI Limited EA-2019-000110-JOJ*

15 2 **Remedy**

2.1 *In the event of a finding of unfair dismissal:*

2.1.1 *What is the appropriate basic award?*

2.1.2 *What compensatory award is just and equitable?*

2.1.2.1 *Has C failed to mitigate her loss?*

20 2.1.3 *What adjustment (if any) is appropriate in light of the findings made in respect of paragraph 1.4 above?*

25 2.1.4 *Was C's conduct prior to dismissal such that would make it just and equitable to reduce the basic and/or compensatory awards pursuant to s.122(2) and/or 123(6) ERA 1996? If so, what is the appropriate reduction?*

2.1.5 *R maintains that C failed to follow the ACAS Code of Practice on Grievances and Disciplinarys by failing to appeal the decision to dismiss her and consequently a reduction of up to 25% should be made to any compensation awarded.*

5 2.1.6 *Any compensatory award for ordinary unfair dismissal is capped at 52 weeks' gross pay; s.124 Employment Rights Act 1996.*

Findings in Fact

9 The Respondent is a large supplier of trade tools, accessories and hardware
10 products. It has stores (sometimes referred to as trade counters) across the
UK.

10 The Claimant commenced employment on 28 December 2015. Her role was
branch manager at the Respondent's store in Ayr. She reported to an area
manager, Mr Stuart Severin.

15 11 In October 2020, a supervisor in the branch managed by the Claimant made
a complaint about alleged inappropriate behaviour by the Claimant. In broad
terms, the allegations against her were that she made a number of comments
of a discriminatory nature, had otherwise behaved inappropriately, and had
managed her team in a way that was inappropriate and at times belittling.

20 12 This led to an investigation conducted by Mr Severin. Mr Severin interviewed
employees managed by the Claimant. The Claimant was also interviewed as
part of the investigation. He was accompanied at the investigatory meetings
by another area manager, Mr Gerry Millar.

25 13 Another area manager, Mr Sam Crumley, was appointed to conduct a
disciplinary hearing with the Claimant. The hearing took place on 19
November 2020. The Claimant put forward a number of defences to the
allegations against her (which the Respondent had characterised as
amounting to gross misconduct).

- 14 During the course of the hearing, the Claimant produced copies of WhatsApp messages. The WhatsApp group included Mr Severin as area manager and the managers of the stores for which he had responsibility. It had been set up by Mr Severin.
- 5 15 The exchanges included material which was inappropriate, offensive and discriminatory.
- 16 Mr Crumley communicated his decision to the Claimant in the course of a telephone call on 24 November 2020. This was followed up in writing on 7 December 2020. Despite its very considerable length (extending to almost
10 seven closely typed pages), the letter lacks clarity as to Mr Crumley's findings in relation to each of the specific allegations. During the course of an appeal exercised by the Claimant (referred to below), he confirmed which allegations he had upheld and which he had rejected. He upheld allegations that the Claimant had made two inappropriate comments, that she behaved
15 inappropriately in her management of her team, and that she allocated tasks in a discriminatory way.
- 17 Mr Crumley issued the Claimant with a final written warning to last 12 months. He also decided that she should transfer to another store. Transfers are permitted under the Claimant's contract and are common within the
20 organisation. The Claimant was offered a right of appeal.
- 18 A separate investigation took place in relation to the material in the WhatsApp group. This led to Mr Severin leaving the Respondent as part of what was described as a "*confidential agreement*". The store managers themselves were each issued with disciplinary warnings, referred to by the Respondent as "*records of conversations*". Mr Crumley (who was not involved in disciplining the other managers) drew a distinction between the Claimant's
25 activities which related to subordinates and the activities contained in what was set up to be a "fun" group amongst peers.

19 The Claimant exercised her right of appeal. Ms Liza Perez, divisional director was appointed to hear the appeal.

20 In the period between the issuing of the final written warning and the outcome of the appeal, it was agreed that the Claimant could remain on unpaid leave
5 from work.

21 In considering the appeal, Ms Perez sought clarification from Mr Crumley as to which of the specific allegations he had upheld. She also reviewed each of the allegations afresh with a view to reaching her own conclusions. She did so with reference to the statements and other material gathered as part
10 of the investigation.

22 The appeal outcome was communicated by letter of 19 February 2021. As part of that, Ms Perez upheld a number of (more serious) allegations which had not been upheld by Mr Crumley. Whilst this was an unusual approach which left the Claimant feeling more aggrieved than she had following the
15 initial outcome, the Tribunal was satisfied that it was within Ms Perez's powers to revisit matters and that she did so having regard to the material before her. It was not satisfied that she acted in bad faith. Her approach was more of a reflection on the inadequacy of the initial outcome letter and the Claimant's desire for clarity. Moreover, she decided not to uphold certain of
20 the allegations upheld by Mr Crumley.

23 The final written warning was upheld by Ms Perez and the Claimant was asked to return to the Respondent's store in Irvine. The area manager was at that time Mr Millar. The Claimant was asked to contact the Mr Miller to discuss her return to work with effect from 1 March 2021.

25 24 The Claimant did not contact Mr Millar regarding her return to work. In email exchanges with Ms Perez, she indicated an unwillingness to return or to transfer to a different branch. She confirmed that she would not resign.

25 By letter of 5 March 2021, the Claimant was invited to a disciplinary hearing.
The allegation against the Claimant was that she had been unauthorised in
her absence from work since 1 March 2021. The letter presented an
alternative/additional consideration, namely an apparent breakdown in the
5 relationship between the Claimant and the Respondent.

26 A disciplinary hearing took place on 9 March 2021 chaired by Mr Millar. The
Claimant expressed an unwillingness to accept the findings of the earlier
disciplinary process and the findings on appeal in particular. She saw
accepting the sanction and moving store as an admission of guilt which she
10 was not prepared to contemplate.

27 During the course of the disciplinary hearing, the Claimant maintained the
position that she would not return to work either at Irvine or at any other trade
counter. Following an adjournment, Mr Millar communicated his decision to
dismiss the Claimant.

15 28 The principal reason for the decision to dismiss was the Claimant's refusal to
return to work in circumstances where the earlier disciplinary warning
remained in place. He considered that there was an impasse which could not
be resolved.

29 During the course of her evidence, the Claimant challenged Mr Millar's
20 involvement in the disciplinary hearing. She referred to his having been
involved in the investigation into the original grievance, his friendship with Mr
Severin and the fact that his wife was one of the store managers implicated
in the WhatsApp group. The Tribunal was not satisfied that Mr Millar acted
in a way which was inappropriate. It was clear that his primary desire was to
25 encourage the Claimant back to work.

30 The Claimant did not raise any objection to his being involved at the time and
is noted as having thanked him at the conclusion of the hearing. Moreover,
in describing what she said was a breakdown in trust between her and the
Respondent, the Claimant indicated that she did not mean Mr Millar.

31 The dismissal was confirmed by letter of 17 March 2021. The Claimant did not appeal against the decision.

Observations on Evidence

5 32 The Tribunal found all of the Respondent's witnesses to be broadly credible and reliable. In giving evidence, the Claimant was clearly very aggrieved which led to a tendency to give lengthy answers which were not always relevant. She was on occasion reluctant to accept points which were not in her favour. An example is her use of the phrase "carry on" banter which she did not accept involved jokes containing sexual innuendo (despite that having been made clear in training attended by her). Otherwise, she was accepted as credible and reliable.

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33 Leaving aside the substance of the initial disciplinary process, none of the material facts was, in any event, in dispute.

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Submissions

34 Parties helpfully produced written submissions following the conclusion of the evidence. These were considered subsequently by the Tribunal in Chambers.

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35 In summary, Mr Piddington submitted that the dismissal was fair having regard to the Claimant's refusal to return to work. He presented this as falling either within the "some other substantial reason" for dismissal under section 98(1)(b) of the Employment Rights Act 1996 ("**ERA 1996**"), failing which it was a reason which amounted to conduct under section 98(2)(b) ERA 1996. He argued that the Tribunal should not look behind the earlier final written warning with reference to *Wincanton Group Plc v Stone UK EAT/0011/12/LA* amongst other authorities. He pointed to the fact that there was no suggestion of bad faith or manifest inappropriateness in the earlier process. As an alternative, he submitted that the earlier process was in any

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event fair. Likewise, he pointed to what he said was the procedural and substantive fairness of the ultimate dismissal.

36 On behalf of the Claimant, Mr McGrade submitted that the reason advanced
for the dismissal was not accepted. He pointed to the Claimant's position in
5 the revised ET1 that the reason was her refusal to accept the earlier
disciplinary sanction which, in her oral evidence, she extended to include
being punished for having raised the issue of wrongdoing in the WhatsApp
group. He submitted that she was entitled to maintain her position that she
did not accept certain of the accusations made.

10 37 A key feature of the submissions for the Claimant was the role of Mr Millar in
conducting the disciplinary hearing which led to the dismissal. Having regard
to his involvement, it was submitted that there was bias or at least the
perception of bias which ought to have been avoided. Mr McGrade referred
to a number of authorities including ***Slater v Leicestershire Health***
15 ***Authority [1989] IRLR 16*** and ***Porter v Magill [2002] AC 357***. He referred
to the size of the Respondent and the ease with which another manager could
have been allocated to the process.

38 In his submissions in reply, Mr Piddington argued that there was no further
contractual or legal right to challenge the final written warning. In relation to
20 bias, he submitted that bias should not be considered as it would in a judicial
process. For an internal employment process, that would be unduly onerous.

39 In his submissions in reply, Mr McGrade accepted that it was not the role for
the Tribunal to determine the fairness of the final written warning. He
repeated his submission that it was necessary, however, for the Tribunal to
25 consider the reason for the Claimant's refusal to return to work and the
approach of the Respondent in dealing with the earlier allegations.

40 Both representatives made submissions on remedy.

Deliberations & Decision

41 The Tribunal first considered the reason for the dismissal and was satisfied
that the reason was the Claimant's refusal to return to work. It is clear that
there was an unwillingness by the Claimant to accept the earlier disciplinary
5 sanction, but it was the Claimant's overriding refusal to return to work, rather
than her reason for the refusal, which led Mr Millar to dismiss. Standing the
Claimant's approach, he had little alternative; indeed the Claimant invited her
dismissal. She wanted to "*clear her name*" and saw this Tribunal as the place
to do so.

10 42 In this context, the Tribunal preferred Mr McGrade's submissions that it was
appropriate to look into the earlier disciplinary process to the extent that it had
a bearing on the Claimant's refusal to return to work.

43 Whilst the Respondent's assessment of the allegations against the Claimant
in the earlier disciplinary process was not well handled given the deficiencies
15 in the initial findings, it was satisfied that neither the issuing of the final written
warning or the conduct of the appeal process were designed to punish the
Claimant for raising the WhatsApp issue. As Mr Piddington submitted, both
managers involved classified the conduct as gross misconduct entitling the
Respondent to dismiss. Had they wished to punish the Claimant in this
20 context, it was open to them to dismiss at an earlier stage. The Tribunal was
also satisfied that the final written warning and the appeal were conducted in
good faith and neither was manifestly inappropriate.

44 In terms of the label to be applied to the dismissal, whilst the Respondent
referred principally to a dismissal based on a breakdown in trust and
25 confidence, the Tribunal preferred the alternative submission that the label
for the dismissal was conduct in accordance with Section 98(2)(b) ERA 1996.
Notably, the Claimant did not suggest any breakdown in trust with Mr Millar
himself who would have been her line manager and Mr Miller was
demonstrably keen for her to return.

45 On the other hand, the Claimant did not have any lawful basis on which to
refuse to attend work.

46 Considering the test in *British Home Stores Ltd v Burchell [1980] ICR 303*,
the facts are very simple. The Respondent had a genuine belief that the
5 Claimant was refusing to attend work without authorisation. She had no legal
or contractual right to do so. No wider investigation was required.

47 To the extent that the Claimant sought to use the disciplinary hearing as a
basis to reopen the earlier final written warning process, that was not an
option open under the Respondent's disciplinary procedure (which had
10 complied with the ACAS Code of Practice).

48 Dismissal in the circumstances was clearly within the band of reasonable
responses.

49 Turning to the Claimant's challenge of bias, there are a number of features of
Mr Millar's involvement which might have led the Respondent to choose a
15 different manager. The Tribunal was not satisfied, however that there was
any bias on his part. Mr Miller attempted to facilitate a return to work.

50 In terms of perception of bias, his involvement in notetaking in the earlier
disciplinary investigation would not lead a fair-minded observer to suspect
bias. Likewise, his friendship with Mr Severin is an issue which professionally
20 he could be expected to put to one side. His wife having been involved in the
investigation, and having been given an informal disciplinary warning for her
involvement in the WhatsApp group might, conceivably, give rise to a
perception of bias. It is notable, however, that the Claimant did not see it that
way at the time. She did not challenge Mr Millar's involvement. Moreover,
25 as she noted, she did not have an issue with trust in Mr Millar and thanked
him at the conclusion of the hearing. Nothing in the meeting notes gives any
cause for concern. Mr Millar wanted her to return and had she done so she
would not have been dismissed.

51 In the agreed circumstances of the case where the Claimant was refusing to
return under any circumstances until she could “*clear her name*”, the Tribunal
was satisfied that the approach and the decision would have been no different
had another manager taken part. Looking at the matter in the round, the
5 Tribunal was satisfied that there was no apparent bias so as to amount to a
procedural failing.

52 If wrong in that, the Tribunal would have applied a 100% ***Polkey*** reduction to
the basic and compensatory awards. The Claimant accepted that she would
not have given different answers had a different manager been appointed.

10 53 In conclusion, it is noteworthy that had the findings in the Respondent’s final
written warning been clear from the outset, the Claimant might, as she herself
said, have accepted the decision. Whilst that is unfortunate, it does not have
a bearing on the Tribunal’s findings or its ultimate decision as to the fairness
of the dismissal.

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Employment Judge: R Mackay
Date of Judgment: 16 February 2022
Entered in register: 08 March 2022
20 **and copied to parties**