EMPLOYMENT TRIBUNALS

Claimant: Mrs J Foster

Respondent: Rigid Containers Ltd

HEARD AT: Bury St Edmunds ET **ON**: 6th & 7th March 2017

BEFORE: **Employment Judge Postle**

REPRESENTATION

For the Claimant: Miss Williamson (Counsel)

For the Respondents: Mrs Welch (Solicitor)

JUDGMENT

1. The Claimant was not unfairly dismissed.

REASONS

1. The Claimant brings a claim to the Tribunal that she was unfairly dismissed, particularly that the procedure and the investigation leading up to the dismissal and appeal was in some way flawed and that the decision to dismiss was outside the range of the reasonable responses test. The Respondents advanced the reason for the Claimant's dismissal was conduct in the obtaining of a skip without authority for personal use and putting it through the company books.

2. In this Tribunal we have heard evidence from the Respondents: Mrs Lawson, a member of the HR team, Mr Iddon and Mr Maynard, all giving their evidence through prepared witness statements. For the

Claimant we heard evidence from the Claimant and also Mr Roche, a previous employee of the Respondents, again giving their evidence through prepared witness statements. The Tribunal also had the benefit of a bundle of documents consisting of 167 pages.

3. The facts of this case show that the Claimant was originally employed in the capacity of Office Support in November 1989 until her dismissal for gross misconduct on 20th September 2016. The Respondent is a manufacturer of corrugated cardboard packaging on four sites across England. At the time of the Claimant's dismissal she was employed as a Quality Manager based at the Respondent's Selby site. The Claimant at the time reported to the Respondent's then site Director, Mr Roche, whom is was rumoured throughout the site, was involved in some form of personal relationship with the Claimant.

4. Mr Roche prior to the Claimant's dismissal left the Respondents under a settlement agreement and it is said by the Respondents that he is currently under investigation by Yorkshire Police in relation to activities connected with his employment at the Respondent's site. Related to that the Police investigation has also led to the dismissal of Mr Scott, the Respondent's Procurement Manager also at the Selby site.

5. In June 2016 the Claimant's hours were altered, ultimately with her agreement to ensure the hours the Claimant worked and her co-workers were more accessible to the company's customers. In effect they were regularising not only the Claimant's hours but a number of other employees at that site. The hours were regularised in order to, as I said, to best meet the needs of the Respondent's customers. The Claimant was not in any way singled out in this process in the change or alteration in hours.

6. The Claimant for the last five and a half years has made no claims for overtime payments in her capacity as Quality Manager and it appears to be the case that no other managers have made claims for overtime payments. Such payments would only be made in exceptional circumstances and would have to be properly authorised. The Respondents have a scheme authorised and agreed with HMRC that if an employee has carried out some exceptional work beyond the normal call of duty they will be authorised to take their family or a partner out for a meal up to a maximum sum of £60.00 which is not taxable and is to be treated as an expense and will then have to be claimed through their expense claim forms. It must be used as a meal voucher, it cannot be bartered or used for anything else or a cash equivalent. This is an agreement that the Respondents have with the HMRC to make sure tax is not paid on the meal and it goes through as an expense. It is also the case that where there are properly incurred mileage expenses pursuant to the Respondent's policies at page 44, which states expenses incurred on behalf of the company shall be submitted for reimbursement within 30 days after the actual expenses have been incurred.

7. On or around late August 2016 as a result of investigations being conducted by Mrs Lawson into issues at the Selby site, she became aware of some emails between the Claimant and Mr Scott (94 to 96). These emails appeared to reveal that the Claimant had ordered a skip through one of the Respondent's suppliers for her own use to be delivered to her home which would have been paid for by the Respondents and on the face of it, no proper authorisation had been obtained. Mrs Lawson then found out from the accounts department there was an invoice from Mytum Waste April 2016 (103 – 104) which showed a skip had indeed been delivered on 20th April to the Claimant's home and invoiced to the Respondents. The Claimant would and should have been aware that it was not permitted to use the business accounts of the Respondents for her own personal use. Further investigations by Mrs Lawson revealed there was no purchase requisition or purchase order number which is required for all purchases. The accounts department then requested Mr Scott to raise a purchase order number after the event (106). The box on the invoice marked customer order number is blank and should not occur. There should always be a purchase order first and clearly, on the face of it, no proper authorisation had been obtained from Mr Roche or indeed anybody else.

8. The process for ordering goods at Selby is that Mr Scott would raise a purchase order and a purchase order number on the SAP system and either Mr Barnes or Mr Roche would authorise it. So that when goods arrive, they are checked in and then booked in the SAP system with a delivery note so the accounts can see the goods have been received then when an invoice comes in they clearly can match it up and pay the invoice.

9. As a result of what Mrs Lawson's initial investigation had revealed the Claimant was suspended on 29th August on the grounds of suspicion of theft involving the hire of a skip for her personal use which had been paid for by the Respondents. The letter suspending the Claimant is at 120 – 121. The Claimant was on holiday at the time and that is the reason a letter was sent. The Claimant had difficulty accessing her company emails and as a result of a call to the company, Mrs Lawson spoke to the Claimant on 1st September (the note of that conversation is at 122) in which the Claimant was notified of the suspension and the reasons. The Claimant's reaction was she said "she put her hands up to doing it but was authorised by Mr Roche in lieu of payment for a meal and overtime." The Claimant attended an investigation meeting with Mrs Lawson on 5th September. The minutes of that meeting (125 – 126) the Claimant slightly altered the minutes (127 - 128) in relation to the question of overtime and whether she had claimed overtime in the past. At the investigatory meeting the Claimant contended that she thought that Mr Roche and Mr Scott had spoken to each other and the skip had therefore been authorised. The Claimant accepts that this was said in the minutes. The Claimant was unable to explain why Mr

Roche was not included in the emails concerning the hire of the skip and she had no additional evidence showing that the skip had actually been properly authorised. The Respondent/Mrs Lawson felt that it was not worth approaching Mr Roche personally. Firstly, he had left the company on what can best be described as "under a cloud" with a settlement agreement, secondly it was a strong belief by the Respondents that he had been in a relationship with the Claimant and, finally, he himself was in any event, being investigated by Yorkshire Police for fraud involving the Respondents. In the case of Mr Scott, again, he had been dismissed for gross misconduct in relation to fraud and was unlikely, again, to be a reliable witness either way.

10. The Claimant maintains that she was claiming the value of the skip and setting that off against overtime payments that she had not yet claimed, and mileage expenses going back some time and a family meal. This was despite previously the Claimant had never claimed overtime as confirmed by payroll, certainly in the preceding five years. The Claimant was therefore invited to a disciplinary hearing on 7th September 2016 and that letter at 129 clearly sets out the allegation in that, "you arranged for the delivery of a waste skip to your home address in April 2016 that was paid on the Rigid Containers Ltd account." The various documents in support of that were enclosed in the letter; the letter told her that she was entitled to call any witnesses; the Respondents did not intend to call any witnesses; she would be given the full opportunity to explain; who was going to conduct the disciplinary; and her right to be accompanied. The letter also went on to say that as the allegations might be potential gross misconduct one outcome could be summary dismissal.

11. The Claimant duly attends the disciplinary hearing on 13th September 2016. She was accompanied. The meeting was conducted by Mr Iddon, a Manager who did not know the Claimant personally and the minutes of that meeting are at 131 to 132. The Claimant clearly was given every opportunity to put forward her case in response to the allegations. The Claimant accepted she had not obtained authorisation in writing and only had verbal authorisation from Mr Roche. The Claimant maintained that the overtime was being used to set off against the cost of the skip hire. Further she had picked up Mr Thompson who dealt with the audit on a number of occasions and there were outstanding mileage expenses. In relation to this the Claimant produced an overtime sheet which was said to be signed by Mr Roche on 29th March (134). The Claimant was also claiming a meal allowance and in that respect produced a receipt in fact for someone's leaving party that she wished to set off against the skip hire. The Claimant was asked if she wanted to add anything. The meeting was adjourned so that Mr Iddon could check some matters raised by the Claimant and would get back to the Claimant with a decision on Friday. In the event he gets back to her on the Monday and nothing, in the Tribunal's view, turns on him delaying his decision until the Monday.

12. Mr Iddon's further enquiries ascertained, certainly from Mr Thompson and Kath Tymen that in fact, Kath Tymen had done a lot of the running around, particularly in January 2015, May 2015, June 2015 and February and March 2016. It would appear that the Claimant only collected the Mr Thompson in July after the skip was hired. So far as overtime sheets were concerned, it was checked again, in the last five years, no overtime had been claimed by the Claimant. It was also checked whether Mr Roche was actually at work on the day he is said to have signed the Claimant's overtime on 29th March and it turned out he was in fact on holiday that day.

13. Mr Iddon concluded in summary that he did not believe the Claimant was telling the truth about the hiring of the skip and the authorisation. Nothing had been documented or signed for. There was no paper trail or evidence to show that Mr Roche had actually authorised a skip for personal use. Indeed it was common practice at the Respondents and the Claimant must have been aware of this that you record and document everything in order to ensure that matters are settled properly. The Claimant's attempt to justify the setting off for the hire of the skip through overtime, mileage and meal vouchers, in Mr Iddon's view, did not make sense and did not add up, that, not from a financial point of view, but did not add up in the factual sense.

14. Having taken all the above factors into account known to him at the time, taking into account the Claimant's long service and disciplinary record he nevertheless felt that the Claimant had been dishonest and there was a question of trust. He therefore decided that the only sanction he should impose was dismissal and he confirms that by letter of 20th September 2016 and we see that at 139 to 141, where he sets out his reason for that in detail.

15. The Claimant appealed by letter of 28th September (143) and she sets out in detail her grounds for appeal. That appeal was conducted by Mr Maynard, the Group Financial Director. The Claimant was invited to the appeal hearing by letter and again, gives her the right to be accompanied at that meeting. The minutes for the appeal are at 148 to 150 and once again, the Claimant is given every opportunity to state her case and give reasoning or evidence in support of her view that she had clear authority for the hiring of a skip for her personal use in circumstances where the company picked up the bill. Mr Maynard concluded: there certainly was no witch hunt; there was nothing in the fact that the Claimant's hours had been changed; or the fact that the skip hire came to light during the course of other investigations; there was no evidence of approval by Mr Roche; the overtime expenses and meal voucher argument were all retrospective; and the Claimant simply could not substitute such matters for the hiring of a skip. He believed there was a question of trust and he took the view that the sanction of dismissal on the facts was an appropriate sanction and there was nothing new that the Claimant had advanced that would change the view that the original sanction of dismissal was incorrect.

16. As we have all agreed in this Tribunal, the law is uncontroversial. It is for the employer to show the potentially fair reason to dismiss under section 98 of the Employment Rights Act 1986 and if the Employer satisfies that, thereafter the burden of proof becomes neutral. Once you have established a potentially fair reason to dismiss, the Tribunal will then have regard to section 98(4) of the Employment Rights Act 1996 and that deals with the issue of fairness and in doing that one considers the well trodden pathway of *British Home Stores and Burchell.*

17. Was there a reasonable investigation? In that respect the investigation carried out by Mrs Lawson was reasonable and thorough. It does not have to be a counsel of perfection. Mrs Lawson's investigation revealed that the Claimant appeared to have ordered a skip for her own personal use to be delivered to her home and the company was to pick up the bill. Mrs Lawson could find no evidence in her investigation of authorisation being obtained. The reasons for not approaching Mr Roche and Mr Scott are patently clear. They are unlikely to support the company's position bearing in mind the manner in which they left the Respondent's employment.

18. It was not a flawed investigation and in any event, the Claimant could, had she believed there was clear authority for her obtaining the skip from a manager who was entitled to give that authority, i.e. Mr Barnes or Mr Roche, have called them to the disciplinary hearing. She was notified that if she wished to call any witnesses at the same time was notified that the company would not be calling witnesses.

19. The reason for the Claimant's dismissal was that she ordered a skip for her personal use without obtaining authority and it was not paid for. She was not dismissed for having an affair and there was no witch hunt. In this case it was proper to investigate what the Respondents or Mrs Lawson perceived was a potential act of dishonesty. Mr Iddon believed that the Claimant was guilty of misconduct. He quite clearly saw on the facts before him that a skip had been ordered by the Claimant for her personal use to be delivered to her home and it was not paid for by the Claimant but was paid for by the Company. Clearly on that basis he had reasonable grounds upon which to sustain a belief that the skip had been ordered for her personal use and not been paid for. That belief was a genuine belief on the facts known to him at the time he took the decision to dismiss the Claimant. Mr Iddon considered the Claimant's attempts to justify a 'set off' that the Claimant was advancing i.e. that she had not paid for it as she was going to use unclaimed expenses, a meal voucher and unpaid overtime. Having investigated those matters discounted them. Particularly the overtime was not something that managers applied for, save in exceptional circumstances and the fact that in the five years preceding the Claimant had never claimed overtime. The claim for mileage expenses on the face of it, certainly one of the claims was post

the hire of the skip and enquiries revealed to him that Ms Tynen had done most of the running around. The meal vouchers are meal vouchers agreed with HMRC and simply cannot and should not be set off against some other equivalent value, if that were allowed not only would tax have to be paid on the benefit, but the Respondent's would be in breach of their agreement with HMRC over the meal vouchers, i.e. cannot be exchanged.

20. Was it within the range of a reasonable response by Mr Iddon? I remind myself it is clearly not for me to substitute my view what I would have done in the circumstances. Was it appropriate for Mr Iddon, with the facts known to him at the time he took the decision to dismiss, within the range of reasonable responses? Well, some might say it might be harsh, but it was an act of dishonesty, it was quite appropriate. Clearly Mr Iddon believed it was a dishonest action by an employee, he found no grounds to mitigate having considered the long service and he believed that because the act of dishonesty and lack of trust had occurred that the sanction appropriate was dismissal. Likewise on the appeal. The Claimant quite properly exercised her right of appeal. That appeal was thorough, Mr Maynard concluded that on the facts known to the dismissing officer at the time, and no new evidence being advanced before him, the sanction of dismissal was an appropriate sanction.

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Employment Judge Postle, Bury St Edmunds

Date: 3rd April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS