



EMPLOYMENT TRIBUNALS

Claimant: Mrs S A White

Respondent: J Chippendale Limited

HELD AT: Manchester

ON: 14 and 15 March 2017

BEFORE: Employment Judge Howard

REPRESENTATION:

Claimant: In person

Respondent: Ms L Amartey, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal pursuant to the provisions of Part X of the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The hearing to determine the respondent's application for costs will be heard on 25 April 2017 and the following directions shall apply:
 - (1) By 29 March 2017 the respondent shall send to the claimant its application and grounds for an order for costs together with a schedule of the costs claimed.
 - (2) By 12 April 2017 the claimant shall send to the respondent any response to the application and costs claimed and a statement of the claimant's means and supporting documentary evidence which the claimant wishes the Tribunal to take into account.
 - (3) By 19 April 2017 the respondent shall send to the claimant a copy of the bundle of documents for the costs hearing.

REASONS

1. The Tribunal heard evidence from the claimant and in support of the respondent's case from the three directors of the respondent company; Mr Andrew Chippendale, Ms Amanda Harris, Mr Robert Chippendale, and from Andrew Chippendale's wife; Ms Louise Chippendale, and from Mr Peter Swarbrick, Chartered Accountant. During the course of the hearing the Employment Judge was referred to documents contained within an agreed bundle.

The Issues

2. At the outset of the hearing the Employment Judge identified and agreed the issues with the parties to be determined as follows:
 - (1) Can the respondent establish a potentially fair reason for dismissal falling within section 98(1) and/or (2) of the Employment Rights Act 1996? The respondent relies on conduct as that reason. The claimant does not dispute that as the reason but challenges fairness.
 - (2) Applying section 98(4) of the Employment Rights Act 1996, was the decision to dismiss fair in the circumstances?
 - (3) In the event that the claimant has been unfairly dismissed, do the '*Polkey*' principles apply to the claimant's dismissal, and if so, with what effect and/or did the claimant contribute to her dismissal by her conduct, and if so in what degree?
 - (4) Neither party sought an uplift or reduction in any award to reflect a breach of the ACAS Code of Conduct on Disciplinary Proceedings.
3. The claimant renewed an application for specific discovery that had been refused in the first instance by the Employment Judge on 15 February 2017. The claimant sought disclosure of an email from Amanda Harris to the respondent's solicitor, Oliver Wellock, which the claimant asserted would confirm that Ms Harris was in the office on Sunday 13 September 2015 and had direct relevance to the respondent's investigation of the claimant's alleged misconduct and the conclusion reached.
4. The respondent objected to the application on the grounds of relevance and legal professional privilege. The contents of the email related to a planning matter upon which the respondent was obtaining legal advice. In any event the email was of no relevance as it was not, and had never been, the respondent's case that the claimant had printed any documentation or engaged in any misconduct on 13 September. The conduct at issue took place on 12 September 2015 and an email sent by Ms Harris the following day was of no relevance.
5. The Employment Judge refused the claimant's renewed application, accepting that the content of the email was privileged but, in any event, the email itself was of no relevance to the issues to be determined. The claimant responded that she understood the basis of the Employment Judge's decision and did not seek to challenge it further.

6. The claimant asked the Employment Judge to admit the witness statement of Eileen Nightingale without Ms Nightingale attesting to it. The respondent agreed to that approach and the Employment Judge admitted the witness statement on that basis.

The Findings of Fact relevant to the Issues

7. As several of the respondent's witnesses shared the surname of "Chippendale" it was agreed between the parties that the claimant and the respondent's witnesses would all be addressed by their first names, and these reasons are drafted accordingly; the Employment Judge means no offence to the parties in so doing.
8. At the time of her dismissal in May 2016 the claimant, Susan, had been employed by the respondent as an Accounts Administrator for some six years. By all accounts she was a hardworking and valued member of the team and had close and harmonious working relationships with her colleagues and the directors.
9. On Saturday 12 September 2015, Robert and Andrew dropped into the office. Susan was at work and was observed by Robert and Andrew as they approached, returning swiftly to her computer and being in a state of some agitation. Robert found a two page document in the printer tray. The document was a letter of complaint about the conduct of the respondent relating to a pending planning application. It contained serious allegations which were plainly damaging to the respondent, both in the context of the planning application and also to its reputation more widely; in particular that the respondent had distributed draft letters in support of its application to children, for them to sign and submit to the Council.
10. Robert and Andrew arranged for a search history for that day to be carried out on the printer by an IT specialist, S & J Fynn. This report showed that shortly before Robert and Andrew had arrived at the office, three copies of a two page document had been printed. The claimant was working alone in the office on that day.
11. Susan initially denied knowledge of the letter when asked by Robert and Andrew, but she met with Amanda and Andrew on Monday 14 September and acknowledged that she had, in fact, brought the document in to photocopy it on behalf of one of her milk round customers, as an 'act of kindness', but that she was not aware of the actual content of the letter.
12. Amanda and Andrew decided to accept her explanation and to take no further action.
13. It was not until six months later, on 16 March 2016, that the matter arose again when the claimant encountered Andrew's wife, Louise, shopping. Louise held the firm belief that the claimant was the author of that letter. A discussion took place between the two and Louise recalled the claimant insisting that she had not written the letter, it had been written by her neighbour. Susan disputed that is what she said but the Employment Judge accepted Louise's account as the most accurate.

14. On 18 March 2016, Amanda asked to meet Susan to discuss an unrelated matter, a proposed reorganisation within the office. However, the discussion soon turned to the claimant's encounter with Louise. During the course of this conversation Susan disclosed that she had volunteered to copy the letter for the lady rather than having been asked to do so as she had previously stated, but insisted that she although she had intended to copy the letter, she hadn't actually done so and had simply returned it to the elderly lady. The claimant refused to name this lady at any stage.
15. These inconsistencies between her original and subsequent accounts caused Amanda to become concerned that Susan had been more involved in the production and distribution of the letter than she had previously believed and she suspended Susan on full pay whilst she investigated the matter further.
16. During an investigatory meeting on 24 March 2016 Susan reversed her position and stated that she had photocopied the document and had been aware of the allegation it contained, after all.
17. A further investigatory meeting was held on 31 March 2016 during which Susan was shown the printer record and was given an opportunity to provide an explanation for the printing times, which she could not. That meeting stretched over two hours and involved a thorough examination of the incident and Susan's subsequent varying explanations.
18. Susan was invited to a disciplinary hearing to consider the allegation that she had *'photocopied/typed and printed an offensive and damaging letter against the company with the intention of distributing it to other parties'*.
19. Susan was provided with all relevant evidence available to the respondent, including background information, a catalogue of events in September, printer analysis and minutes of the investigatory meetings, save for a copy of the disciplinary procedure which was provided in advance of the appeal hearing.
20. The disciplinary hearing was held by Robert on 19 May 2016. Susan had been told that a solicitor instructed by the respondent would chair the hearing, and only discovered that it would be Robert on the day. However, she elected to proceed and this had no impact on the procedural fairness of the process.
21. The claimant was accompanied by her friend, Eileen, and she was given a fair opportunity to give her account and explain the circumstances, during which she conceded that she had not initially given a truthful account of events. Robert decided to dismiss Susan for gross misconduct by a letter of that date on the grounds that she had photocopied/typed and printed an offensive and damaging letter against the company with the intention of distributing it to other parties and had misled the company in relation to it.
22. Susan appealed against her decision, which was held by Peter Swarbrick who had had no previous involvement in the matter, and the Employment Judge accepted that he approached the matter with an independent mind. During the appeal Susan confirmed that she had been aware that the lady who had given

her the letter had intended to share it with at least one other person. Peter upheld the decision to dismiss.

23. Susan challenged a number of the comments and assertions attributed to her by the respondent's witness as made up or inaccurate. Where there was a conflict between the evidence of the respondent's witnesses and Susan's the Employment Judge preferred the evidence of the respondent's witnesses. Their evidence was consistent with the documentary evidence, whilst Susan's was often at odds with it. In particular, the Employment Judge did not accept Susan's assertions that the comments attributed to her in the minutes of meetings were not said. The Employment Judge accepted those minutes as reliable.

The Law

24. The Employment Judge was guided by the EAT judgment in *British Homes Stores v Burchell* 1978 IRLR 379 EAT, being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. The Employment Judge was also guided by the Court of Appeal in *Sainsbury's Supermarket Ltd v Hitt* 2003 IRLR 23 CA that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

24. In accordance with the Employment Appeal Tribunal's guidance in *Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439, the Employment Judge was mindful, in reaching her conclusions, not to substitute her own view of what the appropriate sanction should have been for that of the respondent's, but that she should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the particular circumstances of the case.

The Tribunal's Conclusions

25. The respondent had established a potentially fair reason for dismissal; conduct, falling within S98(1) Employment Rights Act 1996.
26. The Employment Judge found that the respondent carried out a thorough and reasonable investigation upon which it formed a reasonable and genuine belief that Susan, without its knowledge or permission, had photocopied or typed and printed the letter in the full knowledge of its contents and with the intention of its further distribution.
27. The investigatory and disciplinary process was fair. Susan had a reasonable opportunity to understand the allegations and see the evidence against her and to provide her explanation. To the extent that there were any procedural shortcomings in the disciplinary process, which the Employment Judge found that there were not, these were corrected during the appeal hearing. Susan's conduct was sufficiently serious to warrant summary dismissal. The letter was self-evidently seriously damaging to the company and it was reasonable of the respondent to consider that its trust and confidence in her had been damaged beyond repair.

28. In those circumstances the decision to dismiss Susan fell within the range of reasonable responses open to a reasonable employer and her dismissal was fair, applying S98(4) Employment Rights Act 1996.
29. Accordingly the claimant, Susan White, was fairly dismissed and her claim does not succeed and is dismissed.

Employment Judge Howard

Date 29th March 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
05 April 2017

FOR THE TRIBUNAL OFFICE