



Case Number 1302748/2016

# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant  
Mrs CL Pemberton

AND

Respondent  
Walsall Housing  
Group

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL (RESERVED JUDGMENT)

HELD AT Birmingham ON 18 &19 January &  
8 February 2017  
(with parties)  
17 February 2017  
(panel only)

EMPLOYMENT JUDGE GASKELL

### Representation

For the Claimant: Ms L Southan (Lay Representative)  
For Respondent: Mr P Wilson (Counsel)

## JUDGMENT

The judgment of the tribunal is that:

**The claimant was fairly dismissed by the respondent; her claim for unfair dismissal is not well-founded and is dismissed.**

## REASONS

### Introduction

1 The claimant in this case is Mrs Carrie Louise Pemberton who was employed by the respondent, Walsall Housing Group Limited, as an Assistant Manager - Lettings from 15 March 1990 until 16 May 2016 when she was dismissed. The reason given at the time for the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 27 October 2016, the claimant claims that her dismissal was unfair; there are no other claims. The respondent admits that the claimant was dismissed; but maintains that she was dismissed for a reason relating to her conduct; and that it was a fair dismissal.

3 During the three-day hearing before me, the claimant was ably represented by her friend and lay representative Ms Lorna Southan. It was apparent that, for a non-lawyer Ms Southan had a good grasp of the relevant legal principles and of the procedure. She clearly did not have the advantage of the professional training and experience of Mr Wilson - counsel for the respondent. When necessary and appropriate, the tribunal gave assistance to Ms Southan in the presentation of her case; to her credit, she readily accepted direction and guidance from the tribunal.

### **The Evidence**

4 The respondent having admitted that the claimant had been dismissed, the respondent presented its case first. The respondent called evidence from two witnesses: Mr James Wall - Community Safety Operations Manager who carried out an investigation into misconduct allegations against the claimant; and Mr Gary Brooks - Director of Housing who conducted the disciplinary hearing; and whose decision it was that the claimant should be dismissed.

5 The claimant gave evidence on her own account; and called one witness - Mrs Karen Patricia Brewer - who at the material time was a work colleague and the claimant's Trade Union Representative. Mrs Brewer is no longer employed by the respondent.

6 In addition to the witnesses who gave evidence, I was provided with an agreed bundle of documents running to some 341 pages. I have taken account of those pages from the bundle to which I was referred by the parties during the hearing.

7 The evidence given by Mr Wall and Mr Brookes was consistent; clear; and compelling. Their evidence was internally consistent; it did not vary under questioning. The witnesses were consistent with each other; and their evidence was consistent with contemporaneous documents. I have no hesitation in accepting them as reliable witnesses as to the truth.

8 Save for one aspect of her evidence, I found the claimant to be a truthful witness. But, sadly, she was unable to focus on the important issues in the case. She focused on errors and misunderstandings which she had identified in the respondent's case; without considering how, if at all, such errors imperilled the fairness of the decision to dismiss her. The following are examples: -

- (a) Much time was taken up with evidence as to who was responsible for a slightly delayed start to the investigatory meeting on 23 May 2016; and the claimant's suggestion that, because of this, the meeting was rushed. What the claimant simply failed to do was identify anything which she could or would have said, but failed to say, had the meeting been less rushed (the

respondent did not accept that the meeting was rushed at all). In large part, Mrs Brewer was called to give evidence to resolve this issue; but there was nothing about it to suggest that it was causative of any unfairness.

- (b) Similarly, the claimant made much of the proposition that it had been necessary for Mrs Brewer to intervene during the investigatory meeting because of Mr Wall's style of questioning; Mr Wall denied this. But the claimant missed the point: she could point to nothing said or unsaid because of the impugned style of questioning which imperilled the fairness of Mr Brookes' decision. Furthermore, this complaint was not raised with Mr Brookes at the disciplinary meeting. Again, calling Mrs Brewer to give evidence on this issue was quite unnecessary.
- (c) The claimant complained at the methods which had been used to obtain evidence against her from employees supervised by her but not part of the misconduct allegations. What she failed to recognise was that, whilst the impugned evidence was obtained, and was placed before Mr Brookes, it is self-evident from the letter of dismissal that he took no account of it; and that it played no part in his decision making.

9 Some of the claimant's evidence was inconsistent. In particular, I refer to her late challenge to the accuracy of the meeting notes - when no such challenge had been raised earlier including in her witness statement. When this point arose during the hearing the claimant stated that she had notes, which had not been disclosed, but which contradicted the notes produced by the respondent. She was given the opportunity to produce these notes; but, in fact, she did not have any notes of what was said at the meeting. What she produced was a series of prompts of matters that she intended to raise at the meeting.

10 The aspect of the claimant's evidence which I find to be untruthful is her claim to have briefed Mr Sagoo when they attended an exit inspection on 19 February 2016 that they would each carry out their own inspection which would then be concluded by the issue of the claimant's summary sheet and not that of Mr Sagoo. This was a crucial issue in Mr Brookes' determination; and the explanation provided to me had never been provided at an earlier stage; not in the investigation meeting; not in the disciplinary meeting; not in the claim form; and not in the claimant's witness statement. To this extent, I find that the claimant did not give an honest account.

11 On the central facts of this case there is no disagreement, but, where there is a relevant discrepancy between the evidence given by Mr Wall and Mr Brookes on the one hand, and that given by the claimant on the other, I prefer the evidence of Mr Wall and Mr Brookes and I have made my findings of fact accordingly.

## The Facts

12 The respondent is a Housing Association which owns and manages around 20,000 properties; providing homes for rent; and community-based services to local communities in Walsall. The respondent employs around 600 people. On 15 March 1990, the claimant commenced employment with the respondent; she progressed well in the respondent's employment and, immediately prior to a management restructure in 2013, her job title was Service Manager of Lettings. Following that management restructure, she was employed as Assistant Manager of Lettings; a change which the claimant regarded as a demotion. The claimant was responsible for a team of employees dealing with prospective tenants in the letting of vacant properties; and in the inspection of properties before vacation when tenancy agreements were terminated.

13 The claimant had an unblemished disciplinary record; and was clearly a highly regarded senior employee and manager. In 2011, there was a complaint of bullying against the claimant; this was investigated but not upheld; however, as an outcome from that investigation, the claimant was provided with coaching and support to assist her with her management style.

14 Prior to her dismissal, the claimant's line manager was Mrs Ann Parks; one of her line reports was Mr Amarjit Sagoo. Mr Sagoo had been working for the respondent on a fixed term contract which, in January 2016, was extended by Mrs Parks for a further 12 months. On 20 January 2016, Mr Sagoo emailed the claimant to thank her for recommending him for a contract extension; the claimant promptly replied in the following terms: -

*Hi Amarjit,*

*Sorry but I was not involved or informed of this decision, I only found out after Ann had spoken to you. It looks like my manager did not think I should be (sic) involved!*

Until this time, the claimant and Mr Sagoo had enjoyed an excellent working relationship.

15 On 26 February 2016, Mr Sagoo sent an email to Mrs Parks expressing his concern at the way in which he had been treated by the claimant as his line manager in two recent incidents. It was very much part of the claimant's case that this email had been prompted by Mrs Parks; and the documentation available suggests that this is true - to the extent that Mrs Parks found Mr Sagoo in a state of considerable upset; she asked him what was the matter; he told her of the two incidents; and she suggested that he put his concerns in writing so that she could ensure that appropriate action was taken. On the available evidence, there is nothing to suggest that Mrs Parks acted in any way improperly.

16 Upon receipt of the email, Mrs Parks took advice from Ms Victoria Roden - HR Advisor as to how she should proceed. In conjunction with Ms Roden, Mrs Parks rightly or wrongly then conducted a mini pre-investigation intended to establish whether a formal disciplinary investigation was needed. She issued a questionnaire to the claimant's other line reports asking them for information about the claimant's behaviour; she received replies from seven employees but absolutely nothing in this case turns on the contents of those questionnaires. Evidence was also gathered from three of the claimant's previous line managers. Information obtained from Sarah Johnson did form part of the eventual decision-making process; the information received from Sarah Johnson was not disputed by the claimant.

17 Having conducted this preliminary investigation, Ms Roden and Mrs Parks approached Mr Brooks with details of Mr Sagoo's complaint. Mr Brooks took the decision that the matter should be investigated under the respondent's disciplinary policy; he also took the decision that due, to the sensitivities involved; and the likely impact that the investigation would have on the claimant and other colleagues, it was in everyone's best interests that the claimant be suspended on full pay during the investigation. Mr Brooks was clear in his own mind; and made clear to others; that the suspension was an entirely neutral step. The claimant attended a brief meeting with Mr Brooks and Ms Roden on 18 March 2016; Mrs Brewer was present. The claimant was told of the investigation; and the suspension; it was explained to the claimant that suspension was an entirely neutral act; the claimant was also advised that the investigation would be conducted by Mr Wall; she was given the date of her investigatory interview. The position was confirmed in writing by Ms Roden the same day.

18 Mr Wall had available to him, and he considered, the product of Mrs Parks' preliminary investigation. He followed this up by obtaining more information from Mrs Parks by way of questionnaire. Mr Wall carried out investigatory interviews with the claimant on 23 and 30 March 2016; with Mr Sagoo on 24 March 2016; and with Mrs Parks on 29 March 2016.

19 The allegations against the claimant were that, on two occasions in February 2016, she had unnecessarily undermined and deliberately humiliated Mr Sagoo in front of the respondent's tenants: -

- (a) The first occasion arose out of a New Tenant Satisfaction Survey completed by a tenant whose viewing of the property was dealt with by Mr Sagoo. The tenant made an adverse comment to the effect that, during the viewing, Mr Sagoo had "*promised*" that a new fire would be installed in the premises; but no new fire had ever been forthcoming. When the claimant saw the survey response, she challenged Mr Sagoo about this; he insisted that he had never "*promised*" anything – he had no authority to

do so. But, he readily apologised if he had in any way raised the tenant's expectations. It transpired that the tenant had recorded his conversation with Mr Sagoo on his mobile phone. The upshot was that, on 19 February 2016, the claimant asked Mr Sagoo to attend her office; when he arrived, he found the tenant already there; the tenant played the recording of his meeting with Mr Sagoo. (It transpires that, in fact, Mr Sagoo's recollection of the conversation was more accurate than that of the tenant he had never *promised* a new fire; although, as he had readily agreed earlier, he had expressed his own expectation that one would be provided.) Mr Sagoo was concerned that it was not necessary that he should be confronted by the tenant in this way; he would happily have discussed the recording of the meeting with the claimant face-to-face in a supervision meeting.

- (b) The claimant had some concerns about Mr Sagoo's conduct of exit meetings; and it had apparently been suggested that he had exposed the respondent to expense in rectifying dilapidations at a property. (The "dilapidations" concerned involved laminate flooring; and Mr Sagoo explained that his understanding was that laminate flooring would not necessarily be removed once a tenant vacated; and, accordingly, would not be regarded as a dilapidation.) The claimant's response was to accompany Mr Sagoo at an exit meeting which occurred later in the day on 19 February 2016. Mr Sagoo inspected the property with the tenant; and completed the necessary paperwork. He was about to hand the summary sheet to the tenant when the claimant stopped him from doing so; she then conducted the entire inspection again herself before handing her summary sheet to the tenant. Mr Sagoo's complaint was that he had understand that the claimant was attending to observe him carry out inspection; and she would later give him feedback. He had not expected her so totally undermine his abilities in front of the tenant.

20 Mr Wall also dealt with more minor complaints relating to the claimant's method of approving annual leave; her general demeanour towards Mr Sagoo following the extension of his fixed term contract; and an occasion where the claimant had insisted that Mr Sagoo maintain eye contact with him whilst she was speaking to him.

21 Mr Wall's report is dated 18 April 2016 and is addressed to Mr Brooks. He concludes that bullying had taken place; and that the claimant had behaved in a way that constituted gross misconduct. He recommended a disciplinary hearing as soon as possible as the investigation evidenced bullying. The claimant makes a fair point in this case, that, in reaching the conclusion he did, Mr Wall rather overstepped his brief. The decision as to whether bullying had taken place was not his decision to make. However, my judgement is that the report adequately establishes the facts; and Mr Wall expressing his own conclusions could only imperil the fairness of the claimant's dismissal if they were evidence to show that

Mr Brookes was influenced by Mr Wall's opinion. Having heard Mr Brookes' evidence, I am quite satisfied that he was not; he made his own decision on the facts presented to him.

22 On 18 April 2016, Ms Roden wrote to the claimant inviting her to a disciplinary hearing which had been arranged for 28 April 2016. The claimant was told that Mr Brookes would chair the meeting; that he would be advised by Mike Sutton of HR; and that Mr Wall would present the management case. There was effectively a single charge of misconduct - that of bullying Mr Amarjit Sagoo. The letter made clear that, if the allegation of bullying was substantiated, it could constitute gross misconduct and could result in dismissal.

23 The disciplinary hearing went ahead on 28 April 2016; the claimant attended; accompanied by Mrs Brewer. Mr Wall presented his report; the claimant presented a bundle of documents which predominantly dealt with the following matters: -

- (a) Examples of mistakes made by Mr Sagoo, demonstrating that there were genuine management concerns about his performance.
- (b) Information showing how the claimant generally dealt with annual leave requests.
- (c) Examples of positive interactions between the claimant and Mr Sagoo.
- (d) Examples of positive interactions between the claimant and other colleagues; and a challenge to criticisms of her made by other colleagues in Mrs Parks' pre-investigation.

24 The disciplinary hearing did not conclude on 28 April 2016; it was adjourned; and reconvened on 10 May 2016. By this time, Mr Brookes had concluded that adverse comments made about the claimant by colleagues, but unrelated to Mr Sagoo, would be disregarded; this of course meant that much of the material presented by the claimant was no longer relevant. Mr Brookes concluded however, that opinions expressed by other managers including Sarah Johnson were relevant; he informed the claimant and Mrs Brewer of these conclusions at the outset of the resumed hearing on 10 May 2016.

25 Having heard further from the claimant and Mrs Brewer, Mr Brookes took time to reach a decision. The meeting was further adjourned until 16 May 2016. Mr Brookes reached a very specific conclusion regarding the claimant's conduct: he concluded that, after 20 January 2016, the claimant had specifically targeted Mr Sagoo when the opportunity arose; and had bullied and humiliated him purely out of spite because of her feeling that she had been side-lined by Mrs Parks when Mrs Parks made the decision to extend Mr Sagoo's fixed-term contract. Mr Brookes accepted that, prior to 20 January 2016, the claimant and Mr Sagoo have a positive professional relationship; he accepted that the claimant was generally a well-respected; efficient; and effective manager.

26 Mr Brookes took full account of the claimant's unblemished disciplinary record; he also considered suggestions made by the claimant that the matters complained of could and should have been dealt with informally; and could and should have resulted in additional training. He rejected these suggestions: this was not a case of "management style"; he concluded this was a case of deliberate and spiteful bullying. This being his conclusion, he also concluded that this constituted gross misconduct; that the implied term of trust and confidence had been broken by the claimant; and that the appropriate sanction was that of summary dismissal.

27 At the end of the meeting on 16 May 2016, Mr Brookes explained his decision to the claimant and Mrs Brewer; and this was confirmed in writing the same day. In the letter, Mr Brookes makes clear that he had taken account of a previous incident when the claimant was line managed by Sarah Johnson. Sarah Johnson had recruited Natasha Jones without the claimant's involvement; sometime later, Natasha Jones was dismissed. At the time of the dismissal, the claimant observed "*I told you so... I wouldn't have appointed her*". The claimant admitted this incident; Mr Brookes concluded that this demonstrated a propensity on the claimant's part to feel slighted when managers made decisions without involving her.

28 The claimant was advised, both verbally and in writing, of her right to appeal; the claimant did not pursue an appeal.

## **The Law**

### **29 Employment Rights Act 1996 (ERA)**

#### **Section 94: The right not to be unfairly dismissed**

(1) An employee has the right not to be unfairly dismissed by his employer.

#### **Section 98: General Fairness**

(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.

### 30 Cases on Unfair dismissal

#### **British Homes Stores v Burchell [1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal must decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

#### **Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)**

#### **Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

**Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

**31 The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

**The Claimant's Case**

32 Mrs Southan's submissions concentrated on the following matters which the claimant says constituted unfairness: -

- (a) Mr Wall provided a biased investigation report which focused on proving guilt rather than fact-finding. He did not consider whether the claimant's conduct may have been misinterpreted; and did not look at the relationships between the claimant; Mr Sagoo; and Mrs Parks before the February 2016 incidents.
- (b) The complaint from Mr Sagoo on 26 February 2016 should have been regarded as a learning opportunity; to demonstrate and explore with the claimant how her style can be interpreted; and to improve her employee relations.
- (c) There was too much focus onto specific incidents of 19 February 2016.
- (d) Mr Sagoo's complaints of feeling demotivated; humiliated; and demoralised; by the claimant's conduct were unreasonable.
- (e) Mr Brookes was not the appropriate manager to conduct the disciplinary hearing; he had previously been the claimant's line manager.

**The Respondent's Case**

33 The respondent's case was that Mr Brookes had quite correctly focused on the February 2016 incidents; this was not a case where the claimant had been dismissed for general poor management, but for two specific incidents of bullying. The respondent maintains that it had followed a fair procedure; conducting a thorough investigation; and reaching permissible conclusions. There was nothing inherently unfair in Mr Brookes conducting the disciplinary hearing having once lined manage the claimant; the claimant had been advised in advance of the hearing that it would be conducted by Mr Brookes and had raised no objection. At all stages, the respondent's actions and responses were within the range of what was reasonable. Accordingly, the respondent's case is that this was a fair dismissal.

## Discussion & Conclusions

### *The Reason for the Dismissal*

34 I am quite satisfied that the respondent has established that the sole reason for the claimant's dismissal was a reason relating to her conduct. This is a potentially fair reason under the provisions of Section 98(1) and (2) ERA.

35 The specific misconduct found against the claimant was that, because she felt slighted at not having been consulted about the extension of Mr Sagoo's contract, she deliberately targeted Mr Sagoo; bullied; and humiliated him on two occasions in the presence of tenants.

### *Applying Burchell*

36 I am satisfied that Mr Brookes genuinely believed that the claimant had targeted and bullied Mr Sagoo. His analysis is carefully set out in the dismissal letter dated 16 May 2016. The claimant fails to appreciate that her earlier good relationship with Mr Sagoo operated against her in Mr Brookes' analysis. He saw a clear change in her approach after the fixed-term contract was extended. Mr Brookes concluded that the email exchange of the 20 January 2016 (Paragraph 14 above) was highly significant.

37 As to whether Mr Brookes had reasonable grounds for coming to this belief, it is clear, in my judgement, that he did: -

- (a) He had Mr Sagoo's complaint which related specifically to the two incidents in February 2016.
- (b) Despite being given every opportunity, claimant had provided no explanation for dealing with matters as she had; rather than in other very obviously less confrontational ways such as for example: -
  - (i) Obtaining the electronic file of the recorded meeting and giving Mr Sagoo the opportunity to listen to it at a supervision meeting (or indeed alone) rather than in the presence of the tenant.
  - (ii) Simply shadowing Mr Sagoo's exit inspection and later providing feedback or,
  - (iii) Providing Mr Sagoo with the opportunity to shadow the claimant as a learning experience.
- (c) The email exchange of 20 January 2016 is highly significant as to the claimant's reaction to the fixed-term contract extension.

(d) The claimant's previous behaviour towards Sarah Johnson (Paragraph 27 above) was also significant as to the claimant's general approach in situations where she felt slighted by senior managers' decisions.

38 In my judgement, the investigation in this case was comprehensive; and the claimant's criticisms of it are not justified. Mr Wall quite correctly focused on the February 2016 incidents; and was not concerned with other matters which pre-dated these incidents. More general material had been obtained by Mrs Parks; and, in my judgement, Mr Wall was quite correct to allow this material to go to Mr Brookes - it was not his place to eliminate it. I have no doubt that Mr Brookes properly disregarded the irrelevant material; and he too concentrated on the February 2016 incidents. The claimant attended two investigatory meetings; she was accompanied by her Trade Union Representative on both occasions; and was given every opportunity to suggest lines of enquiry which could have been pursued. The claimant did not focus on the February incidents which were under investigation.

#### *Procedural Fairness*

39 In my judgement, the respondent followed a conspicuously fair procedure; which fully complied with the ACAS Code.

40 The pre-investigation conducted by Mrs Parks and Ms Roden may have been ill-advised; but that is immaterial in this case as Mr Brookes correctly disregarded the information derived from it.

41 In my judgement, there can be no legitimate complaint arising from the fact that Mr Brookes conducted the disciplinary hearing having previously line managed the claimant. Firstly, the claimant made no complaint at the time; but, in any event, she advanced no evidence, or even a suggestion, that, because of having previously line managed her, Mr Brookes would somehow be biased against her.

#### *The Sanction*

45 The claimant's assertion that the complaint, and the findings of misconduct against her, could and should have been taken as a learning opportunity entirely misses the point. Mr Brookes was very clear in his findings; this was not a performance issue; this was the claimant deliberately targeting a more junior employee; and bullying him; and humiliating him; because of her feelings of exclusion or humiliation by Mrs Parks not having consulted her about the contract extension.

46 Some employers may have dealt with this matter differently; some may have seen it as a case for conciliation between the claimant and Mr Sagoo; some

may have concluded that a change in Mr Sagoo's line management would suffice; some may have issued the claimant with a formal, or final, written warning. But, the fact that other sanctions may have been available is not the test which the tribunal must apply. I must consider whether Mr Brookes' decision to dismiss the claimant was outside the range of reasonable responses. Put another way, was it a decision that no reasonable employer could have come to? When the correct test is applied, in my judgement, Mr Brookes' decision cannot be impugned. This was found to be serious misconduct; and an abuse of power.

47 Accordingly, I find that the claimant was fairly dismissed by the respondent; her claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Gaskell  
5 April 2017  
Judgment sent to Parties on  
7 April 2017