EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss J Dyer	v	**Genhawk Limited**

Heard at: **Hull** **On:** **1 March 2017**

Before: **Employment Judge Maidment**

Appearances:

For the Claimant: **In Person**

For the Respondent: **Mr R Parish, Manager**

JUDGMENT having been sent to the parties on 09 March 2017 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues

1. The claimant brings a complaint of unfair dismissal, firstly on the basis that her dismissal was automatically unfair in circumstances where it she says the reason, or principal reason, for her dismissal was her having made a protected disclosure and secondly that it was ordinarily unfair pursuant to section 98(4) of the Employment Rights Act 1996.

2. The respondent accepts that the claimant made a qualifying protected disclosure in an email of 9 January 2016. It denies however that the claimant was dismissed for having made a protected disclosure. The respondent maintains that the claimant was dismissed for reasons relating to capability, namely, as stated in its response form*, 'unreliability and unauthorised absence. Julie was dismissed for her bad timekeeping record…'* It contends that it acted reasonably in all of the circumstances in treating such reason as a sufficient reason to justify the claimant's dismissal.

The Evidence

3. The Tribunal had before it an agreed bundle of documents, each document placed behind one of 39 tabs in a lever arch file.

4. This contained a form of statement mirroring largely the grounds of resistance already provided, which Mr Parish confirmed was intended to stand as his own witness evidence. It also included the claimant's witness statement and a written statement from Amanda O'Brien who had previously worked with the claimant. Mr Parish confirmed that he had received a signed copy of this latter statement. Ms O'Brien was not present to give live evidence but the Tribunal confirmed that it would accept her statement as evidence but in circumstances where it explained that it would be able to give significantly less weight to such evidence in circumstances where Ms O'Brien was not present to be cross examined on it.

5. Prior to the commencement of the hearing the Tribunal took some time to read the statements and various relevant documentation such that when each witness came to give his/her evidence he/she could do so simply by confirming such statement and, subject to an opportunity being given to provide any supplementary evidence, then be open to be cross examined on it.

6. The Tribunal heard firstly from the claimant and then on behalf of the respondent from Mr Ralph Parish, Manager of the care home at which the claimant worked. Cross examination of the witnesses by each party was brief. The Tribunal took an opportunity to ask a number of open questions in order to be clear as to the factual background to the claimant's dismissal.

7. Having considered the witness evidence and relevant documentation, the Tribunal makes the findings of fact as follows.

The Facts

8. The claimant was employed by the respondent from 2 April 2012 as a Support Worker at the respondent's care home for autistic adults.

9. The claimant's absence record was unremarkable and had not been called into question by the respondent, certainly prior to May, June and July 2014 when the claimant was off work due to sickness following a return to work from maternity leave.

10. The claimant took a further period of maternity leave from October 2014 to July 2015.

11. Following her return to work, the claimant was recorded as being late for work on three occasions in August 2015. At a routine supervision meeting with Julie Pickwell, deputy manager, on 30 September 2015 the claimant's timekeeping was raised as an issue.

12. On 9 January 2016 the claimant sent an email to Mr Parish referring to an incident which she said had occurred on a nightshift where she believed she had been witness of abuse towards a service user. She said that she felt that she needed support in submitting a written complaint and said that she was raising this directly with Mr Parish as she felt that the type of behaviours she had witnessed were also condoned by her line manager, Mrs Pickwell.

13. The evidence is that Mr Parish took such issue seriously. He emailed the claimant later on the same day proposing a meeting on the Monday morning and in the meantime asked the claimant to write down what she had witnessed in as much detail as possible to allow him to *'get a good insight'* into the matter.

14. No evidence has been presented to the Tribunal of any change in attitude towards the claimant from the respondent's managers, including Mr Parish, from that date.

15. The claimant was late for work on three occasions in January 2016 but no action was taken against her.

16. On 9 April 2016 she was late in attending work by around two hours due to her having slept in. The claimant received a first written warning dated 20 April 2016 following a meeting with Mrs Pickwell. It stated that the claimant's *'bad timekeeping and absence from shift is causing problems within the staff team.'* Mrs Pickwell referred to Mr Parish as being very sympathetic towards the claimant's situation at home and that he had told her that he had spoken to the claimant regarding how the respondent might help her situation by her perhaps going part-time or changing her shift start time, both of which she had declined. Mrs Pickwell went on to state that she had spoken to the claimant before about her timekeeping and absence and it had not improved. She therefore went on to say that she had no alternative but to issue this first written warning which would remain on the claimant's record for a period of six months. She was asked to note that if her timekeeping and absence from work did not improve her position with the respondent *'will be in jeopardy'*.

17. The claimant said in evidence to the Tribunal that she deserved this warning as she had let the team down on this occasion.

18. The claimant was absent due to sickness from 8 May to 19 June due to stress and anxiety affected, not least, by the terminal illness of her grandmother.

19. The claimant returned to work, but on 30 July 2016 she phoned into the respondent to say that she might be late due to the illness of another family member and indeed arrived for work 15 minutes after the designated start time. She was offered by Rhonda Sycamore and took the opportunity to leave her shift a little earlier than the normal finish time in recognition of how she was feeling.

20. On 3 August 2016 the claimant phoned in to say that she was unable to attend work that day due to sickness giving *'personal reasons'* as the reason for her absence. On the evidence before the Tribunal it is likely that the call she made was at around 7:45am, before the scheduled commencement of the claimant's shift at 8:00am.

21. The claimant then phoned the respondent's office administrator at around 1:50pm to say that she would return to work the next day.

22. However, the claimant's partner rang into the respondent at 8:35am on 4 August to say that the claimant would not be in that day as she had been called to the hospital that night in respect of an ill relative.

23. The claimant then phoned Mrs Pickwell at around 2:00pm on 4 August. The Tribunal has not heard evidence from Mrs Pickwell. The claimant's evidence was that this was a *'good'* conversation. The claimant said that she apologised to Mrs Pickwell for not calling in personally earlier that day and that her apology was accepted. The claimant in discussion with Mrs Pickwell then confirmed that she would not be in work on 5 August due to the continuing situation. The claimant's evidence of this conversation is accepted as accurate and corroborated by her subsequent correspondence with the respondent.

24. The claimant was already recorded by the respondent as going to be absent on her ordinarily next rostered shift on 10 August (the day of a family member's funeral) such that it had been agreed that the claimant would next be at work on 13 August.

25. Following this telephone conversation, Mrs Pickwell spoke to Mr Parish. She told him that the claimant had said she would be in on 4 August but had not come in and had now said she would not be in for the whole run of the claimant's rostered shifts. She said that she could not carry on like this and that the claimant had had sufficient warning. She said to Mr Parish that she wanted to terminate the claimant's employment. Mr Parish said, if that was her decision, she should go ahead. Their conversation was about the current missing of shifts and the claimant's perceived unreliability, not about her more general record of sickness absence.

26. Mrs Pickwell then wrote to the claimant that day terminating her employment and referring to her telephone conversation with the claimant saying that she would not be back in work until 13 August. In this letter of 4 August Mrs Pickwell referred to the claimant having a current warning on file because of her timekeeping and that since then she had had two days unauthorised absence on 23 and 24 April, 6 weeks sickness from 8 May to 19 June, the aforementioned late start and early finish on 30 July and two unauthorised absences on 3 and 4 August. She explained the respondent's difficulty in covering the claimant's shifts and referred to the claimant's warning and that she was not happy with the claimant's absence since that had been given. She therefore confirmed that she was terminating the claimant's employment with immediate effect, that the claimant would receive one week's pay in lieu of notice and that the claimant had seven days from the date of the letter to appeal against her dismissal to Mr Parish.

27. The claimant lodged her appeal on 5 August and subsequently provided more detailed grounds of appeal and a statement of events prior to an appeal meeting which was held by Mr Parish with her on 16 August.

28. At such meeting the claimant's absence and timekeeping was discussed. Mr Parish did not speak to Mrs Pickwell regarding the claimant's account of her phone call with Mrs Pickwell on 4 August as described above. He did not consider there to be any need to speak to her.

29. He adjourned the appeal hearing and then wrote to the claimant by letter of 18 August rejecting her appeal.

Applicable Law

30. In a claim of unfair dismissal it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability under Section 98(2)(a) of the Employment Rights Act 1996 ("ERA") and another conduct pursuant to Section 98(2)(b). This is the reason relied upon by the respondent. A dismissal is automatically unfair if the reason for it is the claimant's making of a protected qualifying disclosure (Section 103A). Here the employee has to show something which is capable of establishing the automatically unfair reason for dismissal. The burden then shifts to the employer to prove the reason for dismissal.

31. If the respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [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 upon 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".*

32. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

33. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

34. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

35. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to her dismissal – ERA Section 123(6).

36. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

Conclusions

37. The respondent has shown that the claimant was dismissed by reason of her absence and timekeeping. She was not dismissed by reason of any act of whistleblowing.

38. Mr Parish has accepted that the claimant's email of 9 January 2016 amounted to a protected disclosure. The Tribunal concludes that she was not dismissed by reason of that communication or any other act of whistleblowing.

39. There is no basis for concluding that the respondent reacted adversely to the claimant's raising of concern regarding the abuse of residents. Mr Parish's

response suggested a desire to get to the bottom of the concern raised by the claimant. The subsequent disciplinary warning the claimant received in April 2016 was, on the claimant's own account, justified and the evidence shows that the respondent's genuine issue with the claimant in August 2016 revolved around her attendance at work and that alone.

40. The respondent therefore had a potentially fair reason for dismissal relating to the claimant's capability and/or conduct in her perceived poor timekeeping, absence from work and failure to comply with notification requirements.

41. Did it then act reasonably therefore in terminating her employment for that reason?

42. Here the claimant's dismissal was without any hearing of a disciplinary nature or any investigation of the claimant's circumstances and without any attempt to understand the reasons for her absence. Given a total lack of any fair procedure up to the point of the claimant's dismissal, her dismissal must be declared to have been unfair.

43. An appeal hearing where the claimant's account was not considered in detail or put to/investigated with Mrs Pickwell cannot cure such procedural defects.

44. However, without the procedural failings, the claimant's dismissal would not have been a sanction within a band of reasonable responses open to a reasonable employer in these circumstances.

45. The claimant's timekeeping had been a past issue but since a warning in April there had been only one further instance of lateness in circumstances the claimant could/did explain to the Respondent and where there is no evidence of any further action of a disciplinary nature or otherwise being contemplated by the respondent.

46. The claimant did seek to update and notify the respondent regarding her absence on 3, 4 and 5 August.

47. A significant criticism of the claimant by the respondent was that she had notified them of her inability to attend work on 3 August later than she ought to have done, but she had in fact done so before her shift was due to commence.

48. A further significant criticism of her, which the respondent took into account in terminating her employment, was that she had said she would be back at work on 4 August whereas she had not managed to attend work then. However, the claimant's partner had called the respondent to notify them of her inability to attend work and that the claimant was said to have been at hospital with a relative and continued to be so.

49. Clearly, in terms of the claimant's intentions and information given to the respondent regarding her intention to return to work on 4 August, circumstances did change and whilst real disruption was caused within the respondent this cannot in all the circumstances have justified, in terms of it falling within the band of reasonable responses, the claimant's dismissal.

50. The claimant spoke to Mrs Pickwell on 4 August and was given no indication that her future employment was in doubt – quite the opposite.

51. The claimant was dismissed due to her absence on 3/4/5 August and not on the facts due a more general overview of her attendance record.

52. Had the respondent followed a reasonable procedure the Tribunal cannot conclude that the claimant would have been fairly dismissed in any event. Indeed she would not have been fairly dismissed.

53. Further, the Tribunal, given the genuine attendance issues the claimant faced and her attempts to keep in touch with the respondent, cannot conclude that she was guilty of blameworthy conduct which contributed to her dismissal such that there ought to be a reduction made to her compensation.

54. Indeed, any compensatory award should be uplifted by a factor of 20% to reflect the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary Hearings - its failure to invite the claimant to a disciplinary meeting and hold a meeting with her where she was able to answer the charges against her before her employment was terminated.

Remedy

55. The claimant was paid at the rate of £259.20 gross per week on the basis of her working three 12 hour shifts each week. She had four years service and was below the age of 41 at the date of the termination of her employment.

56. Her loss of earnings ran from 1 September 2016 given payments made to her by the respondent.

57. The claimant's net earnings have been assessed at £1061 per month or £244.90 per week.

58. The claimant said that she had struggled to find any work since her dismissal and had been forced into being a full-time mother of two toddlers on basic state benefits. Her inability to obtain alternative employment was in part due to her need to care for her children and also stress which she had felt flowing from her dismissal.

59. From 5 December 2016 she had been in receipt of Employment Support Allowance. She was unfit for work but she said this was mainly due to her having been dismissed by the respondent. Employment Support Allowance had continued for a period 11 weeks but had ceased in February 2017.

60. The claimant believed she was otherwise employable and could apply for appropriate roles with the benefit of being able to show academic attainment through her GCSEs and A Levels. Whilst she had not completed an NVQ in care she had certificates of training from the respondent.

61. Indeed, from next Wednesday she has an opportunity to commence employment at an organisation called Castaway by whom she is known and which provides accessible musical theatre for adults with autism and learning difficulties. She had approached a former colleague who said that he would keep his ear to the ground regarding opportunities and had since heard from him that an imminent opportunity for paid employment has arisen as a Support Worker, albeit the claimant is not entirely certain what weekly hours that might cover. A presumption is that she will be paid at National Minimum Wage rate.

62. The Tribunal calculates the claimant's basic award in the sum of £1036.80.

63. It considers that the claimant has made reasonable attempts to mitigate her loss since her dismissal and there is no evidence that had she taken any further steps she would have been likely to have gained alternative employment elsewhere. In terms of loss to hearing the Tribunal looks at a period of 25.5

weeks and assesses compensation based on 13 weeks at the claimant's net rate of pay received from the respondent of £244.90, followed by 11 weeks loss of £171.90 when Employment Support Allowance of £73 is deducted followed by a further 1.5 weeks at the rate of £244.90. This gives a total loss to date of £5441.95.

64. The Tribunal, however, on the evidence considers it appropriate to make a reduction to that level of compensation to reflect the fact that the claimant is likely to have been absent from the respondent in any event due to sickness and for periods to have been in receipt of Statutory Sick Pay only. Looking at the claimant's circumstances since dismissal and her prior record of attendance with the respondent the Tribunal considers it just and equitable to make a reduction of 30% to the claimant's compensation for immediate loss which gives a figure then of £3809.37.

65. To this the Tribunal adds a figure of £489.80 representing future loss for two weeks on the basis that the claimant is likely to commence employment with Castaway which will extinguish her loss of earnings and/or to be able to gain then other additional employment elsewhere. To this must also be added a sum of £259.20 representing loss of statutory rights (one week's gross pay).

66. This gives a total loss figure of £4,558.37 to which to apply an uplift of 20% to reflect the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. This gives a total compensatory award for unfair dismissal of £5,470.04.

Employment Judge Maidment

Date: 18 April 2017