EMPLOYMENT TRIBUNALS

Claimant *Respondent*
Ms D Dawson Daemma Trading Limited t/a Cash Converters

REASONS OF THE EMPLOYMENT TRIBUNAL

Heard at North Shields On 3rd April 2017
Before: Employment Judge Garnon (sitting alone)

Appearances
For the Claimant: Mr S Collins of Counsel
For the Respondent: Ms J Barnett Consultant

REASONS

1. Introduction and Issues

1.1. By a claim presented on 9th December 2016 the claimant, born 29th December 1967, brought complaints of unfair dismissal and breach of contract . She was employed from 5th November 2012 until her employment was terminated without notice on. 11th October 2016 for reasons the respondent says related to her conduct. She admits some misconduct but avers the decision to dismiss fell outside the range of reasonable responses and could not justify summary dismissal.

1.2. The issues are:

1.2.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for dismissal?

1.2.2. Were they, as the respondent alleges, related to the employee's conduct?

1.2.3. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:

(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal ?

1.2.4. If it acted fairly substantively but not procedurally, what are the chances it would still have dismissed the employee if a fair procedure had been followed?

1.2.5. If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct ?

1.2.6. In the wrongful dismissal claim the issue is whether she was in fact guilty of gross misconduct

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:

"(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 dismissal
(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 relates to .. the conduct of the employee."

The Reason

2.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The reason for dismissal must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal. Although it is an error of law to over minutely dissect the reason for dismissal, it is essential to determine the constituent parts of the reason.

2.3. In ASLEF v Brady it was said:

Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that …... .
It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.

Fairness

2.4 Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

Reasonable belief and investigation

2.5. An employer does not have to prove, even on a balance of probabilities, that the misconduct he believes took place actually did take place, it simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable (see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.)

Fair procedure

2.6. In Polkey v AE Dayton Lord Bridge of Harwich said :

.. an employer having prima facia grounds to dismiss .. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

2.7. Khanum v Mid Glamorgan Area Health Authority explained the requirements of natural justice which have to be complied with during a disciplinary enquiry are : firstly, the person should know the nature of the accusation against him; secondly, should be given an opportunity to state her case; and thirdly, the dismissing officer should act in good faith. The employer must decide what the allegation is and the employee must be informed of it. Strouthos v London Underground held the employee should only be found guilty of disciplinary offences with which he has been charged. An employee found guilty of and sentenced for something that had not been charged will not have received fair treatment.

Fair Sanction

2.8. Ladbroke Racing v Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach, including the degree of its gravity. When considering sanction, a previous good employment record is always a relevant mitigating factor.

2.9. Even an admission of misconduct may not make the decision to dismiss within the band of reasonable responses as the Court of Appeal said in Whitbread Plc v Hall [2001] IRLR 275: "*Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer.*

2.10. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process Retarded Childrens Aid Society v Day held that if an employee does not appear to recognise what he did was wrong and is "determined to go his own way" , it

would be reasonable for the employer to conclude a warning would be futile and may fairly dismiss even for a first offence. . Conversely, if the employee admits fault, apologises and promises never to do the same again, no reasonable employer would dismiss on the basis of her apology and promise being "insincere" without some factual basis for concluding it was insincere.

Appeals

2.11 Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

Band of Reasonableness

2.12. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt,) held I must not substitute my own view for that of the employer unless its view falls outside the band of reasonable responses.

Wrongful Dismissal

2.13. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. Dishonesty towards the employer is the paradigm example of gross misconduct. Another is **wilful** failure to obey lawful and reasonable instructions. The requirement for wilful disobedience was affirmed by the Supreme Court in West London Mental Health NHS Trust-v-Chhabra. Such instructions may be in the form standing orders made known clearly as essential for employees to follow. The main differences between unfair and wrongful dismissal are that in the latter I may substitute my view for the employer's and take into account matters the employer did not know about at the time (see Boston Deep Sea Fishing Co –v-Ansell) Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful and damages are the net pay for the notice period less any sums earned in mitigation of loss.. The statutory minimum periods of notice are set out in Section 86 the Act Clarification of this area of law is to be found in the judgment of Elias LJ in a case heard on 13th December 2016 of Adesokan –v- Sainsbury's Supermarkets Ltd

Remedy

2.14. Under the Act I must explain to the claimant the power to order the respondent to re-instate her in her old job or re-engage her in a similar one. These powers are explained in s 113 to 117. She does not request either .

2.15. There are two elements to compensation: the basic award which is an arithmetic calculation set out in s 122 , and the compensatory award explained in s 123 which as far as relevant says:

(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the

complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ..

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .

2.16. What is commonly called a Polkey reduction is made where a dismissal is substantively fair, but procedurally not, and if fair procedures had been complied with dismissal would or may have occurred anyway. If updated to take account of a legislative change, paragraph 54 of the EAT judgment in Software 2000 Limited v Andrews 2007 ICR 825, is an good summary of the applicable principles

2.17. Section 123(6) as explained in Nelson-v-BBC empowers me to reduce a compensatory award if the conduct of the claimant caused or contributed to the dismissal. This can be done in addition to a Polkey reduction (see Rao-v-Civil Aviation Authority). Section 122(2) empowers me to reduce the basic award on account of the conduct of the claimant before the dismissal even if it did not cause or contribute to it , if I think it just and equitable to do so.

3. Findings of Fact and Conclusions on Liability

3.1. I heard the evidence of the dismissing officer Mr Galvin McKay, the appeal officer Mr Paul Harrison and the claimant.

3.2. In September 2016 the claimant went for a week's holiday to Portugal. She left on Friday, 23 September. On Sunday, 25 September she received an offer of four extra days free in the villa. She leapt at the chance and changed her flights at modest cost so she would return home on Monday, 3 October, which she had not booked as leave, rather than Friday, 30 September. She was hopeful that the Monday, 3 October would, as is often the case, be one of her off days on rota

3.3. Having done this she had second thoughts and realised she should have telephoned her manager, who she knew well, for authorisation for this change. She tried to change back her flights, but could not. At that point she accepts a degree of panic set in. On Friday, 30 September she telephoned her manager and was told the rotas had been done, she was to be at work and this could not be changed. She was also told there would be consequences for her. She flew back on 3rd and presented herself for work on the 4th October.

3.4 The claimant fully accepted what she had done was wrong. She admitted that straightaway and expressed remorse. She had no previous disciplinary record whatsoever. The regional manager, Mr McKay took a line which was in my view entirely correct. Within the procedures of the company, outside its formal disciplinary procedure , there is a document called a letter of concern, the purpose of which is to metaphorically fire a mild warning shot across the bow of an employee who had done wrong and get her to agree she will not repeat the same type of conduct again. I would have gone as far as to say that even had Mr McKay decided, obviously after a

disciplinary hearing, to give a sanction as strong as a final written warning, that would have been within the band of reasonable responses. The claimant's conduct was something she had done on the spur of the moment and for which she apologised profusely. Not only was it in my view not an act of gross misconduct but dismissal would have been outside the band of reasonableness. Mr McKay must, initially, have thought the same , because had the claimant accepted the letter of concern, he agreed she would not even have been formally warned, let alone instantly dismissed.

3.5 The problem was the text of the letter of concern (page 36) contained a sentence which suggested the claimant had been guilty of this or something similar in the past. It gave no details of what she was alleged to have done. The claimant refused to sign that letter but gave instead, page 37, what I can only describe as a fulsome written apology for what she had done. For some reason this was not acceptable to Mr McKay and on 6 October he decided to call the claimant to a disciplinary hearing.

3.6. The letter calling her to that hearing, page 38 , contains an allegation, again, of previous misconduct. Mr McKay said it was booking holidays first and asking for permission afterwards. Even if the claimant had done this, which she did not recollect, it is her problem not the respondent's in that if leave was refused she would have to change or cancel her arrangements. As Mr McKay accepted in cross-examination today , it is not misconduct at all.

3.7. It would be misconduct to extend her holidays by taking a day of sickness which was not genuine. Not only has the claimant never done that, but Mr McKay accepts that on the one occasion he suspected she may have she had a genuine well documented explanation. This allegation was never put to her. It certainly was not in the letter calling her to the disciplinary hearing. The pre-prepared questions Mr McKay had, at pages 40-41, were fully answered by the claimant and recorded in the notes at pages 42-44. Again, there was an apology and an expression of remorse. I am therefore looking at a claimant who recognised the importance of the policy she had breached , had an exemplary four year record , was apologising profusely and saying it would not happen again. She simply would not sign a letter of concern which contained an untruth.

3.8. Ms Barnett said Mr McKay's reason for escalating from the most mild sanction to the most severe, was that he did not accept the claimant's apology was sincere. There is absolutely no evidential basis for that. The apologies are in writing and could not be more fulsome. At the disciplinary hearing itself she explained exactly what was objectionable about the letter of concern, repeated her unreserved apology and the promise it would not happen again. Nevertheless she was dismissed without notice. The only reason consistent with the respondent's own evidence is that the real reason for her dismissal was merely that she had the temerity to argue about the text of the letter and refused to sign something which contained an untruth.

3.9. Moving to the appeal, at page 51 the claimant appealed on four grounds. First the inconsistency of the two decisions to give her the letter of concern and then to go to gross misconduct. Second, there were points in the dismissal letter which were false and had not been notified to her as charges she had to face. Third, she had a previous good record and fourth gave an unreserved apology. At the appeal meeting she apologised again. Nevertheless although all the grounds of appeal are accepted

as valid by Mr Harrison he refused the appeal. His decision was because he would not have given a letter of concern in the first place. He says, despite the facts and the claimant's clean record, he had dismissed other people for the mere fact of unauthorised absence and would have dismissed her. In that sense he is increasing the penalty chosen by Mr McKay at the first instance and wholly ignoring the law as explained in Ladbroke Racing v Arnott . Such an appeal could not possibly cure the unfairness of the disciplinary hearing.

3.10. I find both the claims of unfair dismissal and wrongful dismissal are well-founded but I will not be making an award of damages for wrongful dismissal because all of the claimant's losses will be covered by the unfair dismissal award.

4. Remedy

4.1. The first remedy issue is mitigation of loss. The claimant was stunned by the dismissal and by the label "gross misconduct". On 14 October she went to her GP and the GP record shows the reason was her shock at having been dismissed. She found she could not get benefits, because the label of gross misconduct had been attached to her dismissal. For that same reason she thought she had no chance of getting a job with that hanging over her and could not face looking straightaway. By about Christmas she started to try. Ms Barnett was right to show there were jobs in the retail sector for extra staff for Christmas, but I can well understand why the claimant would not take a short term engagement if it would possibly impede her search for more permanent employment. By the early part of the New Year she had two offers and took the one which offered the most hours, 20 hours at £7.50 compared to her previous 42.5 hours at £7.20. In evidence today she frankly accepted her hours are likely to increase as new work is being obtained by her new employer but she cannot predict exactly when. I find she has taken reasonable steps to mitigate her loss.

4.2. Turning then to the calculations. The basic award is an agreed figure of £1,380.28 but because I do find the claimant was wrong, as indeed she admits. to have taken unauthorised leave and , though it was only put by Ms Barnett, rather than by Mr McKay of Mr Harrison as an allegation , not to have telephoned her manager earlier than she did, I have decided to reduce by 50% to £690.14.

4.3. As for the compensatory award, the net weekly rate of loss is £269.51 . I will not be making any reduction for contributory fault because nothing the claimant did caused or contributed to the decision to dismiss her for which the reason was her refusal to sign the letter of concern. The compensatory award for the first three weeks, ie the notice period, is not subject to the duty to mitigate anyway (see Norton Tool Company v Tewson). The figure for that period is £808.53. For the next 9.5 weeks she lost £3,368.87 to the obtaining of her new employment on 13 January. There were 11 weeks from that to the date of this hearing. She is £120.00 per week net worse off. Therefore that element of compensation is £1,320.

4.4 Predicting the future is not a precise science. I believe is the claimant's losses are likely to taper from their present £120.00 to zero over the next 20 weeks. If therefore I give her an award of 10 weeks at £120.00 that will sufficiently estimate her future loss for the purpose of a compensatory award.

4.5. The totals which comprise the global award which is £7,687.54 are:

Basic award	£ 690.14
Loss of statutory rights	£ 300.00
Loss to the date of the new employment	£4,177.40
Loss from the date of new employment to the hearing	£1,320.00
Future loss	£1,200.00

4.6. There was a claim in the schedule of loss for an uplift for not following the ACAS Code of Practice on Disciplinary Procedures . I heard Mr Collins' argument that the claimant not being given adequate notice of the allegations against her could be in breach of that Code. However the Code is in my view meant to be applied where an aspect of procedure is omitted rather than implemented badly so I am not minded to make an ACAS uplift. He did apply for a fee costs order in the sum of £1,200 which I agreed to grant.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21st APRIL 2017

JUDGMENT SENT TO THE PARTIES ON

21 April 2017

G Palmer

FOR THE TRIBUNAL