THE EMPLOYMENT TRIBUNALS

Claimant Ms L Olson

Respondent North of England Refugee Service

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 18th &19th May 2017
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: Mr Richard Norman , friend
For Respondent: Mr Simon Underwood Chair of Board of Trustees

JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed

REASONS

1. Introduction and Issues

1.1.The claimant, born 19th August 1957, was employed an Integration Advice Worker from 1st January 2013 until her dismissal with a payment in lieu of notice effective on 26th May 2016. She claims unfair dismissal only.

1.2. The liability 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 the dismissal of the employee?
1.2.2. Were they, as the respondent alleges, related to the employee's conduct?
1.2.3. Having regard to that reason for dismissal, 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 ?

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. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether the conduct is inside or outwith the course of employment, it impacts in some way on the employer/employee relationship.

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. The employer 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 :

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. As a general rule, a person who has been a witness to acts alleged should not hold an enquiry or decide the outcome. In Moyes v Hylton Castle Working Mens Club, an incident was observed by the Chairman and Assistant Secretary of the Club. Those two people went on to be involved in the investigation and the disciplinary hearing. The EAT held no reasonable observer would conclude that in view of their dual role justice was, or appeared to be, done. The EAT added there will inevitably be cases where a witness to an incident will be the person who has to take the decision but in the present one it was unnecessary because there were many other committee members.

Fair Sanction

2.8. Ladbroke Racing v Arnott held the standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach, including its gravity. Previous good character and employment record is always a relevant mitigating factor.

2.9. 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, so that if she appears not to tell the truth , it can be a factor in deciding to dismiss. In Retarded Children's Aid Society –v-Day it was said where an employee appeared not willing to change his ways ,in Lord Denning's words, " *determined to go his own way* " it would be reasonable for an employer to conclude warning him would be futile. Conversely, if she shows she realises what she has done is wrong and promises not do it again, that would make warning more appropriate.

Appeals

2.10 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

2.11. Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt) , held the Tribunal must not substitute its view for that of the employer unless the view of the employer falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson said:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

3. Findings of Fact

3.1. I heard Wendy Elliott, Operations Manager of the respondent (NERS) and Mr Simon Underwood its Chair. I also read the statement of Katherine, known as Kate, Balmer. I heard the claimant and her representative, a volunteer at NERS, Mr Richard Norman. I read the statement of Mr Peter Widlinski and some documentation from Mr David Edington.

3.2. The respondent is a charity run by a board of trustees. Its paid staff are headed by a director, Dr Mohamed Nasreldin. Recently promoted to the second most senior position was Ms Elliott, who has a human resources background. There are then four Team Leaders of which the claimant was one and the remaining few employees work in their teams. There are several volunteers. Ms Elliott became the claimant's Line

Manager and although that was not formally announced, in the few months before the dismissal the claimant must have known Ms Elliott was managing her now.

3.3. The claimant is the lead employee on a contract with North Tyneside Council of which the Contract Manager is Mr David Edington. North Tyneside Council pay NERS to deliver integration advice for refugees which includes English for Speakers of Other Languages (ESOL) to refugees in the North Tyneside area. In order to teach ESOL classes a teacher must have a qualification called CELTA. The claimant has .

3.4. NERS premises used to be in the Bigg Market in Newcastle but in December 2014 they moved to new premises in Charlotte Square. The ESOL classes for North Tyneside were delivered originally in the libraries at Wallsend and Whitley Bay. The classes were moved at the claimant's initiative to Charlotte Square in order to save money. North Tyneside Council paid NERS for every "guided learning hour" so the fewer students who attended, the less money NERS would be paid.

3.5. Like all teaching ESOL is subject to inspection by OFSTED. NERS work is under constant pressure from financial cuts. The Monday ESOL: class was of 22 students and there are high targets for attendance. Attendance dropped dramatically.

3.6. The premises at Charlotte Square were not to everyone's liking although they had their advantages. They were somewhat open plan and noisy on the ground floor where the claimant did most of her work. The result of budgetary constraint has been staff cuts and, as Ms Elliott put it, the few remaining staff really have to get on with each other and with the volunteers. Ms Elliott's knowledge of the claimant was that her work was excellent but she had become somewhat volatile.

3.7. In January 2016 Ms Elliott heard of some complaints about the claimant's volatility, and apparent hostility, to colleagues and volunteers. She was alleged to have raised her voice regularly over trivial matters for example there being no paper in the photocopier.

3.8. On 29th February 2016 at an informal meeting Ms Elliott put these matters to the claimant who apologised. She said her workload had a lot to do with it because it was causing her stress. Some work, for example funding applications, had been given to the claimant when they should not have been. They were taken from her. Ms Elliott went on to query whether the claimant spending 14 of her 35 hours per week in attendance at ESOL classes she was not teaching , was an aspect of her work which could be reduced. At the end of the meeting, Ms Elliott had asked the claimant to come back to her with any suggestions for reducing her workload. The claimant did not. Ms Elliott did make it clear this sort of behaviour would not be tolerated in the future.

3.9. One of the Trustees is Mr Philip Latham. He is also a teacher of ESOL and has the relevant qualifications. He was suffering from cancer and maybe failing to teach all the Monday classes he should have been. Everybody agrees supply teachers do not generate the same atmosphere in class and may lead to poor attendance.

3.10. On 17th March an exchange of texts took place. I was only taken to these at the end of the hearing (pages 104 and 105)and I need not replicate them. They are between Ms Elliott and the claimant when Mr Latham had said he was unable to teach the Monday class for the next 5 weeks because he was undergoing chemotherapy. He

had arranged for Lesley, a teacher who, as far as anybody is aware, is CELTA qualified, to take the class. The claimant was also arranging cover but from a different source. At 17:39 she texted "*If you are saying I have no authority or control over this ESOL class I cannot coordinate them. I'm sorry it has come to this*", The claimant was protesting she was being bypassed in the arrangement of a substitute teacher.

3.11. On 23rd March at a meeting about Syrian refugee resettlement, the claimant was reading to the attendees from a document. Ms Elliott suggested it would have been helpful to provide copies. The claimant now says she had copied extracts but when interviewed as part of the disciplinary process none of the attendees at the meeting had seen such copies. Indeed three of them commented the claimant used the words either "*knowledge"* or *" information" "is power*" and simply carried on reading.

3.12. On 4th April at 11:19 the claimant sent an e-mail to Dr Nasreldin copied not only to Ms Elliott but to Mr Edington at North Tyneside Council. The claimant was never told by Ms Elliott there was any question of control of the North Tyneside contract being taken from her. Ms Elliott says, and I accept, she did not know of falling numbers in the Monday class until this Tribunal hearing took place. Neither did she know that there were any doubts over Mr Latham, or Lesley, holding a CELTA qualification.

3.13. The e-mail starts: "*I have discussed with Dave Edington about the current situation over the Monday ESOL class*". Pausing there, a conversation had already taken place between the claimant and Mr Edington before any conversation with Ms Elliott, or so it would appear from this document, with Dr Nasreldin. The claimant said today she had discussions with Dr Nasreldin during March. She never told Ms Elliott that. The e-mail continues: "*Dave has confirmed that if I do not have total authority over the class then it cannot come under the North Tyneside NERS ESOL provision*". There was no question of the claimant being deprived of authority. The conclusion of that paragraph contains: "*I would be unwilling to just close the class abruptly with no notice*". There had never been any suggestion that should happen. The e-mail concludes: "*The decision about the Monday class will have to be made in the very near future. At the moment I am continuing to support all the classes and tutors with the exception of the Monday morning class and will continue to do so*".

3.14. The texts made the claimant's case worse, in my view. The e-mail shows the claimant airing a potential disagreement about who should arrange replacement teaching for the class with the "client" , North Tyneside Council. The issue was a matter entirely for NERS but with the overriding condition it must satisfy the " Memorandum of Understanding" with North Tyneside Council and any OFSTED inspection. By her discussing it with a client before she had discussed it internally, I can see why the dismissing officer, Ms Elliott, and the appeal officer, Mr Underwood, thought she was trying to strengthen her own hand in any future internal discussions. Most importantly, she had a route to follow if she had concerns about the way in which her managers were impeding her authority over the North Tyneside contract. She could have gone formally to Dr Nasreldin and,. if that had failed, to the board of trustees. Instead she sent this e-mail copied to Mr Edington.

3.15. The next allegation stems from a staff meeting on 13th April. The topic under discussion was again the Syrian refugee contract. At the meeting, in front of other members of staff, Ms Elliott asked the claimant for a copy of the document she had read

from on 23rd March. The claimant replied with one word, "No". It may well be the contract was one which Ms Elliott could have sourced online and that there was a copy in Dr Nasreldin's office. However, when a Line Manager makes a polite request at a meeting in front of other Team Leaders, simply saying "No!" truly is an act of insubordination .In any employment situation there is an order of management and for a person who is lower down the order , a " subordinate" to tell someone higher up the order she will not comply with a request is insubordination made worse by the fact Ms Elliott was recently appointed and the defiance of her authority was in front of others..

3.16. On 14th April Katherine, known as Kate, Balmer sent an e-mail to Ms Elliott reporting she had heard the claimant shout at a volunteer called Mariam. The issue is not one of decibels, ie whether the claimant was shouting or not, but the content which was "For God's sake Mariam I do not have time to keep telling you …". Mariam has a longstanding association with NERS and is a softly spoken person. On the following day, according to Ms Balmer, another employee called Agnes needed some information from the claimant who was in a one to one session with a NERS client. Ms Blamer said Agnes looked "terrified" at the prospect of interrupting the claimant. Ms Balmer did so on Agnes behalf and then reported the matter to Ms Elliott.

3.17. The accumulation of these three matters within the space of a few days caused Ms Elliott to decide to start the disciplinary process. A letter of 29th April sets out all of the allegations in detail. I accept Ms Elliott was not the ideal person to have conducted what was in effect a rolled up investigatory and disciplinary stage but due to the size and administrative resources of NERS there was nobody else apart perhaps for Dr Nasreldin who would have been in exactly the same position. Despite the claimant's assertion, Ms Elliott was biased against and hostile to her, in my judgment she was not. Indeed even up to the disciplinary hearing she did not think this was going to lead to dismissal.

3.18. The claimant had a period of sickness so the disciplinary hearing was not convened until 16th May. The claimant attended with Mr Norman. The charge relating to the sending of the e-mail was undoubtedly the most serious. Throughout the hearing the claimant gave the impression she could not see she had done anything wrong. She could not see the potential for harm. This surprised and shocked Ms Elliott.

3.19. On the charge of shouting at Mariam, the claimant mentioned that sometimes she does talk sharply to people but afterwards would have made Mariam a cup of tea. Ms Elliott was not impressed with this. What she wanted to hear was that the claimant would try to address her own shortage of temper, not carry on and say sorry afterwards .

3.20. As for her refusal to provide copies of the contract on Syrian refugee business the position taken by not only the claimant but Mr Norman on her behalf at the hearing did not come across as in anyway apologetic. In her witness statement the claimant says:-
"*At no time was I e-mailed a reminder to photocopy the document by the Operations Manager and it ceased to be a priority for me with all the other demands on my time*".
This might explain why she had not yet provided it by the meeting on 13th April but goes nowhere towards explaining why she said simply "No" when asked by Ms Elliott to do so. In notes prepared by Mr Norman and the claimant for the disciplinary hearing, they say what she meant when she said "No" was simply that she did not have a copy with her at the time. I cannot accept that. If that were the situation the reply would have been, "I can't do it now, but I will later".

3.21. Two paragraphs in the claimant's witness statement are very significant At paragraph 8 the claimant says she did not raise her voice to Mariam but she may have been "a little impatient". She points out she finds the working environment at Charlotte Square very stressful and the strain of holding advice sessions there emotionally draining. She then says at paragraph 9:-
"*In hindsight I now believe I was burnt out as a result of working over three projects at one time and for three years running two full time projects. This should have been addressed much earlier and I must take responsibility for not recognising the signs in myself. I have included some statements from volunteers which may indicate my working relationship with others*".
I accept the claimant's evidence that she did not realise until after her dismissal when she was participating in what are called Talking Therapies that she had reached "burn out point". Had she said anything like this at her disciplinary or appeal hearings , Ms Elliott's decision, at least on that charge, may have been different.

3.22. I refer back to the cases of British Leyland –v- Swift and Retarded Children's Aid Society –v- Day, Ms Elliott unexpectedly had an employee who was, on the point of having copies at the meeting on 23rd March, not telling the truth and on the other points was showing no recognition she had done anything wrong, let alone any contrition. Her decision was to dismiss. Mr Norman's statement and that of the claimant is that Ms Elliott appeared to have her mind made up before hearing. I do not accept she did. She may have been taking a robust line but only in response to the line was being taken by the claimant which did not appear to acknowledge any blame at all. Mr Norman said during the hearing the claimant would appeal if she was dismissed . She did.

3.23. The appeal was heard by Mr Underwood on 28th June. The claimant and Mr Norman acknowledge he conducted it in a very fair way. He had engaged in further investigation by speaking to Ms Elliott and Dr Nasreldin. He too found no sign of recognition by the claimant the e-mail was inappropriate. He came to the view she was going her own way in defiance of her newly appointed Line Manager. He could see no genuine contrition about the way in which she had spoken to Mariam or about her refusal to provide the copies. He formed the view she was, in contacting Mr Edington, trying to strengthen her hand internally regardless of the damage it may cause the respondent . Therefore he upheld the dismissal.

4 Conclusions

4.1. I have no doubt the claimant, who has been involved with NERS in various capacities from 2008 and was taken on as an employee in 2013, is a diligent, dedicated and skilled employee who has done a great deal of good work of which she is rightly proud. However, even such persons can act in a way which no reasonable employer could be expected to tolerate. The claimant is very concerned it has been suggested that she would deliberately harm NERS. That is not the suggestion. By contacting North Tyneside before she discussed matters fully internally she would unintentionally cause potential harm to NERS. If NERS lost any North Tyneside contract it would cause them considerable loss of income not only from that contract but because it would also impede their efforts to obtain contracts from other local authorities.

4.2. The key is the absence of any apparent recognition of failure or remorse .Even today in relation to the refusal to provide a copy document when requested by Ms Elliott, Mr Norman's statement reads:-"*In my own managerial experience I would never have taken this issue as an allegation of refusal to comply with reasonable management instructions. In fact I think the whole issue was something of a farce*". It is far from being a farce for somebody to openly say "No" to a reasonable request from a manager in front of other Team Leaders. Similarly Mr Norman says at paragraph 19 of his statement:- "*I think in relation to the sending of the e-mail Linda has asked several times for proof to be shown that the actions had any negative impact on NERS*".The respondent does not have to prove it did have such an impact, it simply has to show it genuinely believed it had that potential. It has comfortably discharged that burden of proof.

4.3. The view taken by the respondents at both the initial disciplinary hearing and the appeal hearing were well within the band of reasonable responses. Had the claimant presented her case differently then the outcome may have been different Therefore whilst I acknowledge, as do the respondent's witnesses, the contribution the claimant has made to NERS over many years, the decision to dismiss her on these three counts was well within the band of reasonable responses. The claim for unfair dismissal is therefore dismissed.

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T M GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON 6th June 2017

SENT TO THE PARTIES ON
7 June 2017

G Palmer
FOR THE TRIBUNAL OFFICE