EMPLOYMENT TRIBUNALS

Claimant **Mrs V Smith**

Respondent **Talon Engineering Ltd**

Heard at: **Bristol** **On:** **23 May 2017**

Before: **Employment Judge Reed**

Representation
Claimant: **Mrs J Sefton, counsel**
Respondent: **Mr Probert, counsel**

JUDGMENT having been sent to the parties on 1 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the claimant Mrs Smith said she had been unfairly dismissed by her former employer, Talon Engineering Ltd ("the Company"). At the commencement of the hearing she sought leave to amend in order to also pursue a claim of wrongful dismissal. The application was being made at a very late stage and there was no real explanation for that fact. If allowed, if would require the Company to meet a case it would not have anticipated. Furthermore, the claimant was in a position to pursue that claim elsewhere. In the circumstances I refused leave.

2. I heard evidence on behalf of the Company from Mr Sartin, the Company's managing director, who took the decision to dismiss. I also heard from Ms Wynn, an HR consultant, who rejected the appeal against dismissal. Mrs Smith gave evidence herself and I read two witness statements submitted on her behalf. In the light of the evidence I heard and the documents I was shown I reached the following findings.

3. The claimant began working for the Company in 1994. The Company manufactures specialist motorcycling racing parts. There was some debate

over Mrs Smith's precise job title. She described herself as Product/Systems Manager. In the early part of 2016 there was a dispute between the parties as to her right to use the title manager but nothing turned on that for the purposes of my decision, save that it gave rise to a certain amount of bad blood at that time.

4. The events that led to the claimant's dismissal commenced in July 2016. In the middle of that month the Company discovered an email that she had sent to an employee of a business with which the Company traded and in which she was highly critical of her colleagues. She was called to a meeting on 21 July at which the email was discussed. There was a dispute between the parties as to whether at that meeting she had assured the Company there were no other emails of this sort, or whether, as she claimed, she simply said she did not think so. In any event, the Company did find other similar emails, which Mrs Smith had deleted. Certain complaints were also being made about Mrs Smith by her colleagues at that time.

5. Mrs Smith was suspended on 29 July. She came to an investigatory meeting on 9 August. The investigation was undertaken by Ms Musgrave, Mrs Smith's immediate line manager. It is right that at the investigatory meeting Mrs Smith was not shown the evidence against her but there was no reason why she should at that stage. It was clearly intended that she would get that information by the time she went to a disciplinary hearing.

6. On 26 August Ms Musgrave wrote to Mrs Smith calling her to a disciplinary hearing on 5 September and setting out the four allegations she would have to meet. That hearing was postponed because of sickness on the part of Mrs Smith. She was then invited to attend a second disciplinary meeting on 29 September. Throughout, the claimant had intended to be represented by her trade union representative but that person was unable to attend a meeting on that date and suggested several alternative dates, the first of which was less than two weeks later. Mr Sartin was not prepared to delay the disciplinary hearing and it therefore went ahead on 29 September in the absence of Mrs Smith or her representative. He concluded that Mrs Smith had committed gross misconduct and summarily dismissed her. She was notified of that in a letter dated 30 September.

7. Mrs Smith appealed against that dismissal on 7 October and the appeal hearing took place on 8 November before Ms Wynn. Ms Wynn says in her statement that she regarded herself as having carried out a rehearing of the case against the claimant but that clearly was not the case. What in effect she was doing was seeing if there was a good reason to interfere with the original decision taken by Mr Sartin. Put shortly she decided there was not and the appeal was rejected.

8. Under s98 of the Employment Rights Act there are five potentially fair reasons for dismissal. I firstly had to consider whether the Company had successfully established one of them. The first submission on the part of Mrs Smith was that the real reason for her dismissal was not a belief on the part of the Company that she had committed misconduct but rather some ulterior motive related to the disagreements and unhappiness that existed in the early part of 2016. However I heard the evidence from Mr Sartin and was satisfied that he did genuinely believe that the claimant had committed

misconduct warranting dismissal. Conduct was the reason for the dismissal, which was therefore potentially fair. The real issue for me in this case was whether, pursuant to s98(4) of the Act, the respondent acted reasonably in treating conduct as justifying the dismissal of Mrs Smith.

9. The first issue that fell to be considered in that context was the procedure adopted by the Company. For Mrs Smith it was contended that there was something improper in the fact that Ms Musgrave carried out the investigation. I did not agree. Although there were issues between herself and Mrs Smith, it was not the case that she would be deciding what disciplinary action to take. Ms Musgrave was open to criticism in relation to the evidence she obtained to support the allegations (see below) but this was really a substantive rather than a procedural shortcoming. It impacted upon the conclusions that might reasonably have been arrived at.

10. Of more concern was the fact that Mr Sartin proceeded with the disciplinary hearing in Mrs Smith's absence.

11. Under cover of a letter dated 26 August Mrs Smith was called to a disciplinary meeting on 5 September. By letter dated 31 August Mrs Smith indicated she was signed off sick until 10 September, enclosing a letter from her doctor seeking a postponement of the hearing, which was granted in a letter dated 5 September. By letter dated 19 September Ms Musgrave notified Mrs Smith that the hearing would go ahead on 29 September.

12. It was Mrs Smith's intention to be represented by her trade union representative, Mr Richards but he was not available on the new date. He wrote to Mr Sartin seeking a further postponement and providing 3 dates in October when he would be available. That request was turned down in an email dated 26 September. Mrs Smith then wrote to indicate that she was not prepared to attend a hearing without her representative. It therefore went ahead in her absence.

13. It goes without saying that it is far preferable if an employee such as Mrs Smith attends her disciplinary hearing. It is her opportunity to put her case to the decision maker. All reasonable steps should be taken in order to ensure she can do so.

14. There will be cases where it is reasonable to proceed in the absence of the employee, for example where she is being difficult or trying to inconvenience her employer. There will also, no doubt, be situations where, even without bad faith on the part of the employee, proceedings have gone on for long enough and a decision must be taken. Put shortly, none of those situations applied here. There had been no sort of misbehaviour on the part of Mrs Smith, proceedings had not been on foot for a particularly lengthy period and the further delay that would have ensured her attendance was a short one.

15. I took the view that no reasonable employer would have refused a further short postponement and gone ahead in the absence of Mrs Smith.

16. There was, however, an appeal against dismissal. It was contended that, viewed in the round, the procedure was not unreasonable – that the handling of her appeal had the effect of "rectifying" the shortcoming attendant upon the

original decision. In my view it did not. Ms Wynn says in her witness statement that she conducted a rehearing but clearly she did not. Indeed, elsewhere in that statement she indicates that the test she applied was whether the decision to dismiss was within the band of reasonable responses. Before Mr Sartin, Mrs Smith had improperly been denied the chance to have her side of the case heard and a decision taken as to her actual "guilt". That shortcoming was not cured by the way Ms Wynn took the appeal. She clearly was not hearing the matter "do novo". I was therefore bound to conclude that the dismissal was unfair.

17. There were two further issues that fell to be addressed as a consequence of that declaration. They were firstly, the extent, if any, to which the claimant contributed to her dismissal and secondly the prospect that she might have been dismissed had a proper procedure been adopted. In order for me to consider those questions it was necessary to go through the allegations made against Mrs Smith and consider what merit they had. There were four allegations found against her in the letter of 30 September.

18. The first related to emails that she sent to a contact within a company with which the respondent traded. She made a number of highly critical remarks about a number of her colleagues. That clearly was misconduct. It was clearly inappropriate for her to be speaking about her colleagues in the way that she did.

19. The second allegation was that the criticisms themselves in those emails amounted to breaches of the Company's bullying and harassment policy. It was not clear how that might be the case, since the recipient of the emails was not the person being criticised and those being criticised would not, on the face of it, ever hear about the criticism. Essentially, this did not add to the first allegation.

20. The third allegation was that Mrs Smith had deleted the critical emails. Mr Sartin concluded this was a deliberate attempt by Mrs Smith to conceal their contents. She certainly had deleted emails of this sort. Her explanation - and he was aware of this explanation when he took the decision to dismiss - was that that was her general practice and indeed others did the same.

21. There were clearly steps Mr Sartin or Ms Musgrave could have taken to investigate that assertion, the most obvious being to look at her other emails and see whether this was indeed a habitual practice. They simply failed to do that. Nor did either of them discuss it with any of Mrs Smith's colleagues to see whether there was any substance in her assertion that others did likewise. In those circumstances he could not reasonably conclude, as he did, that the deletions amounted to a deliberate attempt by her to "cover her tracks".

22. The final allegation was that Mrs Smith's general attitude to the Company and her colleagues demonstrated a breakdown in trust and confidence. The evidence against Mrs Smith was several statement from colleagues that were somewhat critical of her. On analysis, however, these amounted to little more than a broad criticism of her somewhat negative attitude. Mr Sartin himself clearly did not regard this matter as especially important and indeed no reasonable employer would have.

23. The totality of what Mr Sartin might reasonably have concluded amounted to misconduct on the part of Mrs Smith was that she had sent improper emails to a third party. Any reasonable employer would have been bound to reach that view. There was nothing within the disciplinary code that would have alerted an employee in Mrs Smith's position to the prospect that the commission of this act might be regarded as gross misconduct.

24. The Company pointed out that the recipient of the emails in question was a representative of a key business contact and furthermore Mrs Smith could not have known who would become aware of the contents of the emails at the other end. It seemed to me that, even in the absence of a "surrogate warning" in the disciplinary code, there was a prospect that a reasonable employer might consider that this amounted to gross misconduct. However, that would be most unlikely. It would be a relatively small proportion of such employers that would take the view what that Mrs Smith had done would warrant dismissal, particularly in the light of her long service.

25. The same issues fell to be considered in the context of contribution. The only contribution that the claimant had made to her dismissal was the sending of those emails. That was misconduct for which she was bound to have been disciplined.

26. The issues of contribution on the one hand and the prospect of dismissal are two separate matters but they clearly relate to each other. I had to consider the interaction of the two and make a sensible declaration under each head, taking into account the "aggregate" effect. I concluded that Mrs Smith had contributed to her dismissal such that it would be just and equitable for any award of compensation to be reduced by 15%. In addition, the compensatory award will be reduced by a further 15% to reflect the likelihood that she would have been fairly dismissed if a fair procedure had been adopted.

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Employment Judge Reed
1 June 2017

REASONS SENT TO THE PARTIES ON

14th June 2017
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FOR THE TRIBUNAL OFFICE