EMPLOYMENT TRIBUNALS

Claimant: **Ms B Franicevic**

Respondent: **RSA Insurance Group Plc**

Heard at: **Leeds** **On: 29 and 30 November 2017**

Before: **Employment Judge Maidment (sitting alone)**

Representation
Claimant: **Mr D Robinson-Young, Counsel**
Respondent: **Mr P Gorasia, Counsel**

JUDGMENT

The Claimant's complaint of unfair dismissal fails and is dismissed.

REASONS

The issues

1. The Claimant's sole complaint is of unfair dismissal. The Respondent maintains that the Claimant was dismissed for a reason related to conduct and that it acted fairly and reasonably in all the circumstances. Complaints of race and disability discrimination had been dismissed upon their withdrawal prior to this hearing.

The evidence

2. The Tribunal, before commencing the 'live' hearing, took time to read the various witness statements and the relevant documents referred to. The Tribunal had before it a core agreed bundle numbering some 418 pages and an additional bundle of immigration regulations and guidance.

3. Each witness was able to confirm his/her statement and then, subject to brief supplementary questions, be open to be cross-examined. The Tribunal heard firstly on behalf of the Respondent from Richard Guest, UK

Head of Motor Injury Claims and then from Lee Dainty, Director of Pet Claims. The Claimant then gave her evidence.

4. Having considered all relevant evidence, the tribunal makes the findings of fact as follows.

The facts

5. The Claimant was employed by the Respondent as a claims handler. She commenced working for the Respondent in July 2009 through an agency but from April 2013 was directly employed by the Respondent. The Claimant is of Croatian nationality. She was granted indefinite leave to remain in the UK with no restrictions on her employment on 7 January 2004 as evidenced by a stamp in her passport which expired in November 2009. The Claimant obtained a new passport at that point in time and indeed that passport came to be cancelled and replaced by a further new passport issued in 2015. The second and third passport contain no fresh insertion either confirming or contradicting the Claimant's indefinite leave to remain in the UK.

6. Croatia joined the European Union on 1 July 2013. However, a transition period meant that Croatian nationals did not immediately and automatically acquire a right to live and work in the UK. A form of worker authorisation was required to legally work in the UK. However, this was subject to exceptions including if the Croatian national had been legally working in the UK without interruption in a period preceding Croatia's accession to the EU.

7. The Respondent had been subject to a legal obligation to carry out checks to ensure that the Claimant had the right to work in the UK on its initial employment of her.

8. The Respondent had special status as a licensed sponsor for the employment of non-EU nationals. As part of the renewal process for its licence, the Respondent's specialist immigration solicitors recommended that it conducted a review of the right to work documentation held on all employees. Human resources were tasked with checking the documentation in place to support the Claimant's right to work in the UK on the basis of her employment since December 2010. They were unable to find anything on file to that effect.

9. The Claimant's manager, Sue Jubb, noted in an email of 6 December 2016 that she had spoken to the Claimant to explain the lack of documentation held by the Respondent. However, as luck would have it, the Claimant had had her first and third passport with her at the time which she had allowed Ms Jubb to copy. It was noted that this old passport had the aforementioned visa stamp in it.

10. The documentation was passed to Karen Moore, International Assignment Adviser, who in turn took the advice of the Respondent's immigration lawyers. This resulted in human resources writing to the Claimant asking a number of questions in particular about the circumstances in which indefinite leave to remain was granted in 2004. The letter of 16 December 2016 from Karen Mills expressed the hope that with the Claimant's co-operation they could comply with the necessary regulations, *"however it would be with regret that I must inform you that should RSA not receive satisfactory evidence from you to lawfully work for RSA, we will unfortunately have no choice than to terminate your contract of employment…"*

11. The Claimant responded by email of 19 December reiterating that she had been granted indefinite leave to remain which she said was not open to debate. She questioned the Respondent's right to detailed information and asserted her right to privacy.

12. Following telephone contact from the Respondent, the Respondent's immigration solicitors set out their advice in an email of 20 December. This set out the nature of the offence committed in employing a person subject to immigration control if their leave to remain had ceased to have effect. It reiterated the need to verify and retain certain prescribed documents. The advice proceeded on the basis that the Claimant had been employed since December 2010. It stated that a Croatian national must have an Accession Worker Card or fall within one of the permitted exceptions, one of those being that the individual has worked legally in the UK for at least 12 months before 1 July 2013. It stated: *"RSA should at the very least satisfy itself that Branka worked legally for RSA between 30 June 2012 and 30 June 2013."* The advice went on to note that whilst there was an indefinite leave endorsement dated January 2004, indefinite leave can be cancelled by the Home Office. The Respondent was then advised to request the provision of the subsequent (second) and current original passports and in particular ensure that the pages detailing the date stamps between December 2010 and 30 June 2013 are individually noted as having been verified.

13. By that point there had been further correspondence between Ms Mills and the Claimant in which the Claimant had suggested obtaining a letter from the Home Office through her MP confirming that she had enjoyed uninterrupted leave to remain since 2004. Ms Mills had agreed to refer any such letter to the Respondent's lawyers. An email was received from the office of the Claimant's MP which confirmed that the Claimant was legally resident in the UK enjoying indefinite leave to remain with full employment rights.

14. In circumstances where the documentation which the Respondent had been advised by their immigration lawyers to obtain sight of had not been

provided, Ms Jubb wrote to the Claimant on 6 January 2017 confirming, following a meeting earlier that day, that she was suspended from work relating to her *"unwillingness"* to provide evidence of continued eligibility to work in the UK, which put the Respondent at risk. Sight of the second passport was requested by 9 January it being stated that failure to comply with this request would leave no alternative but to take formal disciplinary action which could result in the Claimant's dismissal. That deadline passed such that the Claimant's suspension was extended and she was told by email of 10 January that she would be invited to a disciplinary hearing. This hearing was arranged for 16 January. An invitation letter of 12 January noted that the hearing was to consider an allegation of gross misconduct, the legality of the Claimant's employment relationship and her continued employment. The allegation was stated to be that she had not complied with a reasonable request to provide evidence of her right to work in the UK. The letter explained the context of the request in terms of the audit being undertaken within the Respondent. The Claimant was warned of the possibility of her dismissal and given the right to be accompanied at the meeting together with a pack of relevant documentation.

15. The documents were reviewed in advance by Mr Richard Guest, UK Head of Motor Injury Claims who had been designated to conduct the disciplinary hearing. He had no personal knowledge of the Claimant and had had no prior involvement in the matter. The Claimant attended the meeting accompanied by her union representative. However, the Claimant objected to the presence at the meeting of Ms Jubb. By the time this issue had been resolved the Claimant had left the building and therefore the hearing was rearranged for the following day, 17 January. The meeting on 17 January lasted approximately 45 minutes. Mr Guest had expected the Claimant to resist the disclosure of her second passport but in fact the Claimant agreed to Mr Guest seeing and copying her passports. The Claimant was upset at the meeting, denied that she had ever refused to cooperate and expressed a lack of understanding as to why she was in this position. In response, it was reiterated that the Respondent was conducting an audit relating to the renewal of the sponsor licence and that this had brought to their attention a gap in the documentation held for the Claimant. Mr Guest said that whilst he believed this was a case where the Claimant had been potentially obstructive he noted that she was now willing to provide the information previously requested. The Claimant did not have with her the second passport covering the period from 2009 and indeed her current passport was not in her possession such that the meeting was adjourned and, after Mr Guest had taken a better photocopy of the first passport, the Claimant departed on the basis that she would revert to the Respondent once she had found the second passport.

16. Mr Guest sent an internal email to update others as to the outcome of the meeting confirming the Claimant's agreement to bring in the two other passports and commenting that he had not seen anything untoward in the passport which he had been able to copy.

17. The Claimant was about to depart on a three week holiday that weekend and on Thursday 19 January Mr Guest emailed her asking her to let him know if there would be any issues or potential delays beyond that week. The Claimant responded that morning. She said that she could not find the second passport commenting that she had ransacked her flat but had still not been able to find it.

18. The Claimant attended the Respondent's offices on 20 January with again her first passport and now the current one which were again copied. Mr Guest's understanding based on the legal advice received was that the gap in information provided was still problematical. Advice was sought from the lawyers as to any alternative solution and Mr Guest emailed the Claimant on 20 January reiterating that it was essential to have sight of all passports. He said that as that was not possible he would be grateful if the Claimant could provide authority for the Respondent's lawyers to speak to the Home Office on her behalf in an attempt to resolve the matter quickly. She was asked to sign and return an attached letter of authority drafted by the lawyers or to draft a letter herself containing the wording within the lawyers' draft. He said that all costs would be borne by the Respondent. The draft letter of authority covered the release of all information or documentation requested by the lawyers in relation to the Claimant's immigration status/history including any application submitted to the Home Office, details of her current status and all correspondence.

19. The Claimant had little opportunity to consider this prior to her departure on holiday. She did not respond. Shortly prior to her return from leave, Mr Guest emailed her further on 9 February enclosing again the letter of authority for her to return it to her team leader, Mr Nick Raleigh.

20. The Claimant was due to return to work on 13 February but was unable to do so due to sickness. Mr Guest was told by Ms Nesbitt of human resources that she had spoken to Ms Lavery, the Claimants union representative, who had told her that the Claimant was unwilling to sign the letter of authority. Mr Guest also learned from Mr Raleigh that the Claimant had told him that she would not complete the letter of authority until she had taken legal advice through her trade union.

21. Mr Guest emailed the Claimant on 13 February referring to what he had been told was her position and stating that he would proceed to make a decision on the disciplinary case in the absence of the return of the letter of authority by noon on 14 February. The Claimant responded a few minutes before that deadline asking for written evidence from the Home Office entitling the Respondent as her employer to go through her immigration records to prove eligibility to work in the UK.

22. Mr Guest then considered all the evidence before him and determined that the Claimant's employment ought to be terminated. He felt that she had been provided with numerous opportunities to provide either the missing

passport or sign the letter of authority. He felt her conduct, in what he saw as a deliberate refusal to comply with a reasonable request, amounted to gross misconduct. He considered that no lesser sanction would be appropriate given that the issue of the provision of documents evidencing her right to work remained unresolved. Mr Guest wrote to the Claimant by letter of 14 February confirming this decision together with an explanation which referred also to the necessity for the Respondent to satisfy its statutory obligations in relation to the Claimant's right to work and explaining the background to the eligibility checks it had felt necessary to carry out. The Claimant was given the right to appeal.

23. The Claimant sent grounds of appeal to the Respondent on 21 February. She maintained that the outcome was unfair as she had not committed any act which could constitute gross misconduct and the Respondent had expected her *"to give it liberty to ransack through my personal information…".* She also suggested that the disciplinary action was discriminatory and that procedure had not been used correctly.

24. Mr Lee Dainty, Director of Pet Claims, was designated to hear the Claimant's appeal and a hearing took place on 15 March at which the Claimant was again accompanied by her union representative. During the hearing Mr Dainty suggested to the Claimant that she had refused to sign the letter of authority. She maintained that she didn't refuse but queried the request. He further asked what her concerns were about signing the letter of authority to which she replied: *"I could ask the same of RSA".* When again asked why she was unwilling to sign the letter of authorisation, the Claimant raised the possibility of a Home Office issued biometric card having everything she needed to provide. The Claimant confirmed that she did not have such a card which cost £308 and which she could not afford. The meeting was adjourned after 1 ¼ hours.

25. Mr Dainty then considered his decision. He felt that the Claimant had been clearly told what issue the Respondent was seeking to resolve. He felt she had consistently and repeatedly failed to comply with a reasonable request over a prolonged period of time. This amounted to gross misconduct in his view, including in circumstances where there were potentially serious consequences for the Respondent in them not possessing evidence of the Claimant's continued eligibility to work. He felt that the request for information was restricted to information relevant to protect the Respondent in relation to its statutory obligations. Mr Dainty wrote to the Claimant by letter of 31 March setting out his reasoning in detail and confirming his decision to uphold her dismissal.

26. Since the Claimant's dismissal (and appeal) she has in fact been successful in finding her second passport which contains no endorsements impacting on her status as having indefinite leave to remain in the UK.

Applicable Law

27. 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 conduct pursuant to Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the Respondent.

28. 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".*

29. Classically when conduct is relied upon as the principal reason for dismissal the Tribunal will be concerned to determine whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds and after reasonable investigation. The burden of proof is neutral in this regard. 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.

30. 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. It has been confirmed by Mr Robinson-Young that no point is taken on behalf of the Claimant with regard to the procedures adopted.

31. 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.

32. 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).

33. 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.

34. Applying the legal principles to the Tribunal's findings of fact, the Tribunal reaches the following conclusions.

Conclusions

35. The Respondent has shown that the genuine reason for the Claimant's dismissal was its conclusion that she was guilty of misconduct in having repeatedly failed to comply with a reasonable instruction. This was in circumstances where the Respondent did not then possess the evidence to avail itself of the statutory excuse available if there was ever a challenge to the legality of the Claimant's employment as a non-UK national.

36. The Tribunal is satisfied from the evidence of Mr Guest and Mr Dainty that their focus was on an assessment of the level of the Claimant's cooperation when requests were made of her with a view to evidencing her right to work legally in the UK. The Tribunal is clear that Mr Guest in particular was not looking to terminate the Claimant's employment, but indeed was hoping (and certainly from the reconvened disciplinary hearing at which the Claimant attended) expecting that evidence would be provided satisfactory to the Respondent and which would have resulted in her continued employment. He was willing to adjourn his considerations to give the Claimant an opportunity to provide the evidence she indeed at that stage volunteered that she would seek to provide and then he sought to put forward what he considered to be an alternative solution by way of the letter of authority.

37. The Tribunal has seen notes of internal discussions within human resources prior to the Claimant's dismissal where the termination of employment was mooted in the context of the Respondent's exposure should it be found not to have complied with immigration requirements. The risk of Employment Tribunal proceedings was weighed up against the risk of a Home Office investigation.

38. In context, such discussions are unsurprising but fundamentally had no influence on Mr Guest's decision making which again in fact sought to allow further time for the Claimant to provide documentation satisfactory to the Respondent.

39. The Respondent at no stage concluded and does not suggest that the Claimant did not have the legal right to work within the UK.

40. Mr Guest had by the time of his dismissal decision reasonable grounds after reasonable investigation for concluding that the Claimant was guilty of misconduct. His decision indeed followed by a lengthy period over which attempts were made to ascertain the Claimant's ability to evidence her status. The matter had been raised with the Claimant in early December 2016, the Claimant was aware at all stages of the reason why this was suddenly an issue for the Respondent and was aware of what the Respondent was seeking from her. The documentation sought was on the advice of specialist immigration lawyers upon which the Respondent was reasonably entitled to rely without seeking to interpret the relevant legislation and guidance for itself. The lawyers had all relevant information and whilst the circumstances did not suggest a reason why indefinite leave to remain might have been removed or lost, its continuance, on advice, could not be assumed but had to be checked and verified. The Claimant ultimately reached the position where she agreed to provide her second passport but unfortunately this could not be located at the time.

41. Only then was the alternative solution proposed of the signing of the letter of authority so that the Respondent's lawyers might seek the necessary information/documentation directly from the Home Office on the Claimant's behalf and without the need for her to expend her own time and money on the process.

42. The Claimant has maintained in evidence that she told her line manager Mrs Jubb that she was not happy with the scope of the authorisation requested. There is no evidence to contradict her making such an assertion, but significantly she made no such assertion to either Mr Guest or Mr Dainty. When Mr Guest expressed his understanding of the Claimant being unwilling to complete the authority she reverted to him asking for the rationale behind the Respondent's request rather than with a suggested solution of narrowing the scope of the authority to be given to the Respondent's solicitors. In fact, at all stages the Claimant had been made aware and reminded of the reason for the Respondent treating such matter seriously. At her appeal hearing Mr Dainty sought to gain an understanding of any issues the Claimant had with the letter of authority, but the Claimant did not refer to the breadth of the authority or provide any other explanation.

43. Was then the Claimant's dismissal within the band of reasonable responses? This is an unusual case and somewhat tragic in that the Claimant has worked legally with the Respondent for a number of years and without any issues raised regarding her work or conduct. The Claimant has now located her passport which covers the period where the Respondent considered it had a gap in its information which needed to be plugged. If this had been provided earlier the Claimant's employment would not have been terminated. The Claimant maintains that if the

Respondent had carried out the requisite checks in 2009/2010 and retained copy documents, as it ought to have done, then there would have been no need to request documentation from the Claimant in 2016. That is possible, but the failure does not render it unreasonable for the Respondent to make its requests in 2016 to remedy the default nor to criticise the Claimant for failing to provide what was now needed in all the circumstances.

44. The Claimant was subject to the Respondent's disciplinary rules which unsurprisingly regard a refusal to comply with a reasonable instruction as a matter of misconduct and where serious insubordination is given as an example of potential gross misconduct. A failure to comply with an instruction might reasonably regarded as insubordination.

45. The Respondents request of the Claimant to provide documentation covering the period of her second passport was a reasonable one as the information was reasonably considered by the Respondent to be necessary to satisfy its statutory obligations in terms of checking the status of its employees and their ability to work legally in the UK. When it was clear that the second passport could not be provided by the Claimant, the request that she complete a letter of authority was again not unreasonable given that it provided a potentially quick solution to the Respondent's dilemma the resolution of which was of course equally in the Claimant's own interests and did so in a way which would not involve the Claimant in any time, effort or expense. There was nothing in the breadth of the authority which made it inherently unreasonable for the Claimant to be asked to sign it – letters of authority are often drafted in wide terms so that they can cover up all eventualities and the Claimant again did not suggest alternative wording nor raise this as a fundamental concern with either Mr Guest or Mr Dainty. They were reasonably entitled to come to the view that the Claimant actions amounted to a repeated refusal over a period of time with no legitimate justification. Although it could be concluded that there was a serious refusal to comply a reasonable request in this case, dismissal is not necessarily a reasonable sanction. That depends on all of the circumstances. However, the unusual circumstances in this case resulted in a situation of stalemate where the effect of the refusal was of a continuing nature in that the Respondent could not show that the checks it was required to undertake had been completed. This left the Respondent in an untenable position in terms of its own legal duties. The situation was not one where any form of disciplinary warning or removal of duties might have been the only reasonable alternative option for the employer. The Claimant's period of service or clean disciplinary record did not render a decision to dismiss unreasonable in these circumstances. The decision to dismiss did fall within the band of reasonable responses.

46. On this basis, the Claimant was not unfairly dismissed and her claim of unfair dismissal must fail.

Case No: 1800760/2017

Employment Judge Maidment

Dated: 30 November 2017