EMPLOYMENT TRIBUNALS

Claimant: **Miss I. Tomschey**

Respondent: **Coventry City Council**

Heard at: **Birmingham** **On: 04 May 2018**

Before: **Employment Judge Butler**
Members: Mr E. Stanley and Mr J.P. Kelly

Representation
Claimant: In person
Respondent: Ms G Carter, Solicitor

JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of unfair dismissal, direct discrimination because of a disability, discrimination arising from a disability and less favourable treat under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 are not well founded and are dismissed.

REASONS

The Claims

1. By a claim form submitted to the Tribunal on 01 August 2017, the Claimant made claims as specified in the Judgment set out above together with claims of sex and race discrimination. The claims of sex and race discrimination were subsequently withdrawn. The Respondent denied all of the claims.

2. In relation to the claims arising from the Claimant's alleged disabilities, the Respondent conceded she was disabled as a result of suffering from anxiety and depression and lymphoedema.

3. In relation to the unfair dismissal claim, the Claimant alleged her dismissal did not fall within the reasonable range of responses of a reasonable employer and also that the reason for dismissal was related to her disabilities and the fact that she was a part-time employee.

The Issues

4. The issues were comprehensively set out and agreed at the Preliminary Hearing before Employment Judge Broughton on 04 October 2017 and we do no rehearse them again in this Judgment.

The Law

5. In considering these claims, we had regard to the relevant provisions of the Employment Rights Act 1996 (ERA), the Equality Act 2010 (EQA) and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). We also paid particular regard to the decisions in British Home Stores Limited v Burchell (1980) ICR303 and Sainsburys Supermarkets Limited v Hitt (2002) EWCA CIV1588.

The Evidence

6. There was an agreed bundle of documents comprising 779 pages and references to page numbers in this Judgment are to page numbers in that bundle. We also heard evidence for the Respondent from Mr J. Reading, the Dismissing Officer, and Mrs M. Mutton, a Member of the Appeal Panel. For the Claimant, we heard evidence from Mr C. Carter, a Service User of the Respondent and former partner of the Claimant, Mrs S. Feeney, Trade Union Official, and the Claimant.

7. All of the Witnesses produced witness statements which were taken as read. Supplementary questions were allowed at the discretion of the Tribunal. The Witnesses were cross-examined.

8. Mr Reading is the Head of Commissioning and Provision for Adults in the People Directorate of the Respondent. After the investigation into the Claimant's conduct, he chaired the Disciplinary Hearing and made the decision to dismiss the Claimant without notice. He gave his evidence in a straightforward and concise manner which continued throughout his cross-examination and questions asked by the Tribunal. He explained why he found two of the allegations against the Claimant to be proven and one not proven. We detected no inconsistencies in his oral evidence as it related to the documents before us.

9. Mrs Mutton's evidence was also given in a straightforward manner. She explained the procedure followed by the Appeal Panel and that it made its decision to dismiss the Claimant's appeal based on the submissions made during the appeal and the documents produced for consideration. Again, we detected no inconsistencies between her evidence and the documents produced to us.

10. Mr Carter gave evidence which was supportive of the actions taken by the Claimant on behalf of him and his father, Mr Arthur Carter. He confirmed he had signed the consent forms given to him by the Claimant (pages 361 and 362) but had not appreciated she would be accessing data held by the Respondent in respect of himself and his Father. There were no inconsistencies between his evidence and the documents produced to us.

11. Mrs Feeney's evidence was background in nature, concentrating specifically on other employees of the Respondent who had been disciplined by the Respondent for unauthorised access to personal data of service users but not dismissed. We noted that, when specific cases were put to her, she did not attempt to challenge the distinctions between those cases and the Claimant's. We did, however, feel that her reference in her witness statement to a key difference being that the Claimant was a part-time employee, was not adequately explained and an attempt to suggest that the Claimant was dismissed because she was working part-time and those employees who had not been dismissed were all full-time employees. Otherwise, we had no reason to question her evidence.

12. We found the Claimant's evidence to be lacking in credibility and plausibility in a number of instances. We note some of these as follows:

    i. The Claimant accepted that she deliberately failed to admit to the investigating officer Mr C. Carter was the father of her daughter. When pressed, both in cross-examination and in questions asked by the Tribunal, she said she did not make the admission because at the time she was very tired and because of her mental health issues. She also confirmed in her claim form that the fact that Mr Carter was her daughter's father had nothing to do with the issues in this case. We did not find these explanations to be at all credible or that there was any reason why she should have denied their former relationship.

    ii. She said she did not know why she accessed the CareDirector system 61 times looking at the data of Mr C and Mr A. Carter, nor why she accessed the information late at night when she was not at work. Her explanation that she found it difficult to switch off from work and that her head was "all over the place" we found to be lacking in credibility and evasive.

    iii. The Claimant was unable to say in response to a question from the Tribunal precisely what information was available on the CareDirector system. Given that she accessed it 61 times, we simply could not accept that evidence.

    iv. In the light of the emails sent by the Claimant to the Case Worker for the two Mr Carters (pages 368, 371 and 374), her evidence that she was not requesting services for them but merely facilitating contact between them was not reliable.

    v. In relation to her mental health issues, the Claimant relies heavily on them in her claims. However, in a meeting with Mr Reading, which took place under the Respondent's Promoting Health at Work Policy, it was noted (page 259) that "(she) did not feel that stress was a particular issue at present". In her evidence, she explained this inconsistency by saying she wanted to keep her job. We did not find this explanation credible.

vi. Throughout her evidence, the Claimant indicated that her line manager, Mr McConnell, had given the impression to others that he was being supportive, but in reality, was not, often saying things such as "what have you got to be stressed about?". This evidence was not, however, supported by the documentary evidence before us and, in particular, at page 247 where she writes in an email to Mr O'Connell "firstly, thank you for being supportive, I am glad I took your advice in arranging an emergency GP appointment today".

13. We also had a number of general concerns regarding the Claimant's evidence concerning training. Her training record shows that she had received data protection training and she also confirmed some familiarity with the Respondent's code of conduct for employees. However, she persisted in giving evidence that she had authority to openly access the CareDirector system and this was permissible, in the first instance, because she had the written consent of the two Mr Carters. We noted that notwithstanding that the written consent post-dated some of the access she made to their personal data. Further, in cross examination, it was noted that on a number of occasions the Claimant's access to the system took place shortly before she sent emails to the relevant Caseworker or shortly after such emails were sent, or meetings held. We form the view that the Claimant was accessing the system to obtain information in order to send the emails and then to check up to see whether anything had been done after a meeting had taken place.

14. We further doubted the Claimant's credibility in relation to her evidence that she did not think she was doing anything wrong in accessing personal data of a service user and that by implication, it was perhaps up to someone else to tell her she was, doing something wrong. In the light of the training she had received and her position within the Respondent, we found this would be highly unlikely. It would have been a simple matter for the Claimant to ask, for example, her line manager or, indeed, the line manager or the caseworker, whether she could access the personal data of the Carters and act on their behalf.

15. Given the Claimants position within the Respondent, her training, the Respondent's policie's and her relationship with the Carters, we did not accept her evidence that she was unaware that accessing the CareDirector system and viewing personal data was a gross misconduct issue.

<u>The Facts</u>

16. This was a case where many of the facts were not disputed by the parties. Indeed, given the documentary evidence before us, it would have been difficult for either party to maintain that certain events did not happen. What was in dispute, was the reason for certain events happening and the explanations given for those events. For the reasons outlined above, where there were differences in the explanations being given, we preferred those advanced by the Respondent.

17. In relation to the issues, we find the following facts:

i. The Claimant commenced employment with the Respondent City Council on 03 October 2005. On returning from maternity leave in 2007, she reduced her full-time hours to 18.5 hours per week and at the time of her dismissal, was a Contracts Officer in the Strategic Commissioning Team of the Respondents People Directorate. She worked during school term time only.

ii. The father of her daughter is Mr Christopher Carter who, along with his father, is a service user of the Respondent.

iii. Towards the end of 2015, Mr C Carter approached the Claimant to ask for her assistance in obtaining additional services for his father who was very ill. In particular, he wanted more suitable accommodation for him as he was struggling, as his father's carer, to cope. Before assisting the Carters, the Claimant made enquiries within the Respondent's Departments to ascertain what should be done to obtain further services for someone in Mr Carter's position. She then in December 2015 accessed the Respondent's CareDirector system and viewed personal data in relation to the Carters. Although the written consents of the Carters to the Claimant accessing their personal data was not submitted to the Respondent until the disciplinary procedure had begun, the Claimant states that she obtained their written consents on 02 January 2016, although she accessed their personal data before that time.

iv. The Claimants then assisted Mr Carter in submitting a formal request to theRespondent's Social Care Team for additional services to assist the Carters (page 421 and 422). Thereafter, as mentioned above, the Claimant sent numerous emails to the Carter's Caseworker both requesting specific services and facilitating contact between the Caseworker and Mr C. Carter. Throughout 2016, the Claimant continued to access the CareDirector system in the interests of the Carters and on a number of occasions did this either before she sent a request for the services to the Caseworker or after meetings to see whether the request had been followed up.

v. For the avoidance of doubt, we find that at all times the Claimant was aware that her access to the CareDirector system was unauthorised in so far as it related to the Carters.

vi. Later in 2016, the Caseworker of the Carters was noted by her line manager, Ms. Healy, to have been in correspondence with the Claimant and was concerned that the Claimant may have put her under pressure. Ms. Healy checked the CareDirector system which logged every access to it and noted that the Claimant had accessed the Carter's

data on numerous occasions. After taking advice from the Respondent's Human Resources team, Ms. Healy notified a senior officer of the Respondent and an investigation into the Claimant's conduct was initiated. The investigating officer interviewed the relevant people involved and viewed the documentary evidence. He concluded that there was a case to answer and Mr Reading was appointed as the Chair of a disciplinary hearing to which the Claimant was invited by letter of 16 February 2017 (page 301) wherein the detailed allegations against her were set out. The Claimant had previously been suspended and had attended a disciplinary investigation meeting on 23 January 2017.

vii. The allegations against the Claimant were that she had unlawfully accessed personal data and had misused the CareDirector system in accessing files she was not authorised to view and had used information gained from the CareDirector system and her own position within the Respondent to assist individuals to secure services provided by the Respondent and she had used the Respondent's email system in relation to personal matters.

viii. During the investigation, the Claimant misled the investigating officer by stating that her Daughter's double-barrelled name which included her surname and that of Mr Carter was a mere coincidence and by describing herself as a family friend of the Carters.

ix. After considering all the evidence and hearing what the Claimant had to say about the allegations against her, Mr Reading found that all but the reference to using the Respondent's system for personal issues were proven and that the appropriate sanction was summary dismissal. Mr Reading did ask his HR support officer whether there were any comparable cases of employees accessing information they were not authorised to view and was told there were none with similar facts.

x. The Claimant appealed against her dismissal and her appeal hearing was before a panel of which Mrs Mutton was a member on 14 March 2017. The grounds of her appeal were that she did not breach the Data Protection Act in relation to the Carter's data because she had their written consent, she had only corresponded with their caseworker to facilitate contact, she had had no CareDirector training and had been "open and honest from the outset" even though she had been untruthful about the identity of her Daughter's Father and that there had been no breach of the Respondent's IT policy.

xi. These grounds of appeal were put forward at the appeal hearing along with evidence from Mrs Feeney that other employees who had accessed data they were not authorised

to access had either not been dismissed or been dismissed and reinstated.

xii. The panel came to the conclusion on the evidence before it that the sanction of summary dismissal had been appropriate and there had been no flaws in the disciplinary procedure followed by the Respondent. The appeal was therefore dismissed and the Claimant was notified of this outcome by letter dated 06 July 2017 (page 664).

Submissions

18. We summarise the submissions of the parties in the following paragraphs:

19. The Appellant submitted that her dismissal had been unfair as the Respondent did not hold a genuine belief that she had committed an act of gross misconduct because it had carried out an unfair investigation. Accordingly, the outcome was disproportionate. She further submitted that her mental health issues were not being investigated notwithstanding the fact that Mr Reading would have been aware of them. There had been a presumption of her guilt and the investigating officer had asked leading questions. Regarding her mental health issues, her line manager had failed to retain her supervision notes which referred to these issues.

20. The Claimant further submitted that, under the Respondent's policies, the question of access to data was a grey area and had not adequately been explained by the Respondent. By way of example, the Carters' caseworker had contacted her on several occasions by email.

21. She further submitted that comparable cases had been ignored at her appeal hearing and the Respondent had failed to investigate them, despite having support from Human Resources. It was not reasonable to penalise one employee more heavily than another for the same act of misconduct.

22. She also submitted that dismissal was because she was a part-time employee with disabilities which meant she would spend less time at work than full-time employees at a time when the Respondent was looking to reduce its salary bill. She further submitted that there was a significant difference between a deliberate act of misconduct and one committed as a result of lack of training.

23. For the Respondent, Miss Carter referred to her written submissions. She said the principles in British Home Stores were satisfied in this case and that the Claimant accepted the allegations against her and merely tried to justify them. Although there was no record of the training, the Claimant's line manager had said the whole team had been trained in the use of the CareDirector system. She noted that the Claimant had not been truthful in relation to her own relationship with the Carters and a number of the emails she said to the caseworker fell more within the definition of advocacy on their behalf than acting as a go-between.

24. Miss Carter submitted that the procedure followed had been fair and the decision to dismiss was within the range of reasonable responses. In

relation to the Claimant's disabilities, there was no evidence that the disabilities had been considered at all in relation to the dismissal or the procedure followed. The same applied to the Part-time Workers Regulations.

Conclusions

25. Section 98 ERA provides that conduct is a potentially fair reason for dismissal but that fairness (a) depends on whether in the circumstances (including the size and administrative resources of the employers 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. The decision in British Home Stores provides that for a dismissal to be fair, the employer must have a genuine belief in the conduct alleged, carry out reasonable investigation including giving the employee an opportunity to state his or her case, and the decision to dismiss must fall within the range of responses of a reasonable employer.

26. In relation to investigating alleged misconduct, the Sainsbury's case provides that, not only must the decision to dismiss must be reasonable, but the investigation itself must be reasonable.

27. In this case, we do not agree with the Claimant's assertion that the initial investigation was flawed, either because there was a presumption of guilt on her part, or for any other reason. The investigation was comprehensive and a detailed report with its findings was provided to the Claimant prior to the disciplinary hearing.

28. The Claimant alleges that she was not appropriately trained. We do not accept that assertion. It is clear from her training record that she had data protection training. Whilst she denied receiving training on the CareDirector system, we have reservations about that but, even giving her the benefit of the doubt, her data protection training and the fact that she was aware that she could access the system in relation to matters she was dealing with, should have highlighted that she could not access the system for purposes not associated with her work duties. We do not accept that she was not aware she was doing anything wrong, or that what she was doing was not potentially gross misconduct. The documentary evidence before the Claimant and the dismissing officer, Mr Reading, suggests to the Tribunal that there was sufficient evidence on which to find the Respondent's belief that there had been gross misconduct on the part of the Claimant.

29. As stated above, the investigation itself must also be reasonable. It could be argued that the Appeal Panel, having been advised that there were comparable cases where employees had accessed data, but not been dismissed, should have investigated the further with Human Resources support. The question is, whether reasonableness of the investigation as a whole was flawed because no such enquiries were made. We have considered this matter in detail and conclude that the failure to investigate these comparable cases does not taint the appeal process with unreasonableness. Mrs Mutton's evidence was that the panel thought the

decision to dismiss was an appropriate sanction given the facts before Mr Reading as dismissing officer. In the absence of further specific details of these comparable cases, she said the panel saw no reason to upset Mr Readings decision.

30. In any event, from the documents produced to the Tribunal but not to the Appeal Panel and from the evidence given by Mrs Feeney, especially that given under cross examination, it is clear to us that none of the cases referred to can be said to be comparable with the Claimants. There are a number of reasons for this which include known mental health issues affecting an employee's unauthorised accessing of data, the nature and severity of the breaches, expressions of remorse for those breaches and a lack of intended influence on others within the Respondent as a result of accessing data. We would also point to the fact that there was no evidence of dishonesty with these comparable cases by way of, for example, attempting to hide the true nature of an employee's relationship with a service user as with the question concerning the Claimant's daughter and Mr C. Carter being her father.

31. We dismiss the Claimant's reference to her mental health issues being a factor in her dismissal. Her evidence was that Mr Reading would have been aware of her mental health issues and indeed, as referred to above, he was and raised the issue with her in his promoting health at work meeting. In that meeting, the Claimant denied suffering from stress at that time and we do not accept her explanation for why she now claims she lied about this.

32. Based on her misconduct, therefore, we consider that the requirements of Section 98 and British Home Stores being met and the dismissal was fair.

33. We have already touched upon the Claimant's disabilities. As far as we can see, Lymphoedema has never been mentioned by her expressly, impliedly or obliquely throughout the disciplinary process. Accordingly, this could not have been a factor in her dismissal. Section 13 EQA provides (1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. On the evidence, and having considered the documents before us, we cannot find that the Claimant was treated less favourably by being dismissed because of her disabilities. We find that the Claimant has made assumptions and engaged in speculation as to the extent of Mr Reading's knowledge of her anxiety and depression, stating repeatedly that he would have known and had access to what was confidential information about her medical condition. Indeed, her sickness absence record shows absence some two years before her dismissal for a "confidential reason" which she states was anxiety and depression. There was no evidence before us that Mr Reading would have had access to that information. Indeed, we do not see how he could have done more than to raise the issue of stress with the Claimant at her promoting health at work meeting and then being told that reference was inaccurate. With respect to the Claimant, it is not credible for her to rely on documents not before us in the form of supervisions with her line manager which she said contained references to her mental health. If she has told Mr Reading, those issues at the time did not exist.

34. Accordingly, we cannot find that there are primary facts from which we could properly and fairly conclude that there was either a difference in treatment or that any such difference in treatment was because of her disability.

35. Section 15 EQA provides (1) a person (A) discriminates against a disabled person (B) if – (a). A treats B unfavorably because of something arising in consequence of B's disability and (b). A cannot show that the treatment is a proportionate means of achieving a legitimate aim. For the reasons already stated above, we cannot find in this case that there is any evidence to suggest that the Claimant was treated less favourably because of her disability.

36. We have also considered the PTWR. The Claimant alleges that she was dismissed because the Respondent was in the throes of rationalising its workforce and, as a term time only, part-time worker, she was the most convenient employee to dismiss. We do not find that this assertion is supported by the evidence. The Claimant began work for the Respondent on a full-time basis and has worked on a part-time basis since 2007. Prior to the disciplinary investigation, there had apparently been no issues with the Claimant's work or the fact that she worked on a part-time basis. The point was made by Miss Carter for the Respondent that if there was an agenda to target part-time workers in any workforce rationalisation, the Respondent had had ample opportunity in relation to the Claimant but had not given any indication for over ten years that there was any issue with her part-time status.

37. In relation to any less favourable treatment, whether on the basis of her disabilities or her part-time status, we have noted that throughout the disciplinary process, the Claimant has steadfastly maintained that she had permission to access the data of the Carters, that she had no training in the CareDirectors system and with that she had done nothing wrong and her dismissal was for other reasons. The reality is that, in relation to her comparators, we have found that her unauthorised access to the data was very significant in volume terms and was undertaken with a view to obtaining services for Mr A. Carter. Accordingly, given her relationship with the Carters, there was a clear conflict of interest which she should have been aware of. Indeed, we would go so far as to say she was aware of it, but chose to ignore it. We further take on board that the comparable matters referred to in the evidence before were cases in which remorse was expressed by each employee. At no time did the Claimant express such remorse but merely attempted to justify her actions.

38. In reaching our conclusions, we have borne in mind our obligations to ensure we do not substitute our own views for those of the employer. The standard is that of the reasonable employer. We find nothing in the evidence to support the view that dismissal in this case was anything other than within the range of responses available to a reasonable employer.

39. For the above reasons, we dismiss the claims.

Employment Judge Butler

Date 10 May 2018