EMPLOYMENT TRIBUNALS

Claimant: Mrs Collette Luty

Respondent: NFAG Limited

Heard at: Manchester **On:** 5-9 March 2018

Before: Employment Judge Langridge
(sitting alone)

REPRESENTATION:

Claimant: Mr P Johnson, Solicitor
Respondent: Mr S Sweeney, Counsel

JUDGMENT having been sent to the parties on 5 April 2018 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

Introduction

1. This unfair dismissal claim arose from the claimant's summary dismissal on 25 January 2017 on the grounds of gross misconduct. The claimant had been employed by the respondent fostering agency as a supervising social worker. The respondent relied on three allegations relating to breaches of its IT policies and a breach of confidentiality, which it said together or separately amounted to gross misconduct. The claimant admitted the breach of confidentiality but felt that dismissal was too harsh and a warning would have been more appropriate. She raised issues about the inconsistent treatment of other colleagues, and questioned whether the respondent had an ulterior motive for dismissing her.

2. There was a significant overlap in the circumstances of this case and the case of Mrs Patricia Tummon, a colleague whose unfair dismissal claim (case number 2403126/2017) for other alleged breaches of the respondent's IT policy was heard together with this claim.

3. The claimant gave evidence on her own behalf. An agreed bundle was provided to the Tribunal. After hearing evidence relating to both claims, judgment was given orally at the end of the five day hearing.

Issues and relevant law

4. The first question for the Tribunal was to determine the reason for dismissal. The respondent, who carried the burden of proving that the reason was a potentially fair one under section 98 Employment Rights Act 1996 ('the Act'), relied on conduct under section 98(2)(b) and asserted that this was genuinely the reason for dismissal. In assessing the evidence, the Tribunal had to examine whether the facts supported the claimant's argument that there was an ulterior motive for dismissal, possibly linked to matters relating to her former colleague, Jackie McMillan, even though she did not specify what that motive might have been.

5. The next stage was to consider the question of fairness in accordance with section 98(4) of the Act, which requires the Tribunal to take into account equity and the substantial merits of the case, the size and administrative resources of the employer, and the circumstances of the case. Those circumstances may include, for example, issues about the consistency of treatment between individuals and the fairness of procedures.

6. The leading case on fairness in conduct cases is British Home Stores v Burchell [1978] IRLR 379 which set out three elements to consider: firstly, whether the respondent's belief in its reason for dismissal was a genuine one; secondly, whether that belief was held on reasonable grounds; and thirdly, whether the respondent had carried out a reasonable investigation. The Tribunal also took account the principles laid down in Foley v Post Office [2000] IRLR 827, as well as Sainsbury v Hitt [2003] IRLR 23, Iceland Frozen Foods v Jones [1982] IRLR 439 and the other authorities (not recited here) referred to by the parties' representatives in their submissions.

7. The Tribunal had to avoid bringing its own view of the dismissal decision into consideration, but instead had to decide whether this respondent's decision to dismiss fell within the range of reasonable responses which an employer might apply when considering the conduct in question. This range also applied to the procedures followed and the sanction itself.

8. Applying these principles to the arguments in the present case, the Tribunal had to address the following questions of law:

8.1 Was there a reasonable basis on which the respondent could conclude that the claimant was guilty of gross misconduct, as distinct from misconduct warranting a sanction other than dismissal?

8.2 Did the respondent actually believe that the claimant was guilty of gross misconduct, and was it entitled to hold such a belief on the basis of the evidence it had gathered?

8.3 When the respondent decided that dismissal should be the outcome, was it entitled reasonably to take that view, and was that sanction within the range of responses open to a reasonable employer?

Alternatively, was it a decision which no employer, acting reasonably, could have reached on the evidence?

9. The key issues of fact in this case included whether:

9.1 the claimant was (or should have been) aware of the respondent's rules and policies on the use of IT;

9.2 the respondent did enough to ensure the claimant understood those rules and policies;

9.3 there were any mitigating factors or circumstances to be taken into account;

9.4 the respondent's decision was inconsistent with the way it treated other employees in the same or similar circumstances.

Findings of fact

10. The following is not a comprehensive recital of all the evidence heard or taken into account, but rather a summary of the Tribunal's main findings so far as they are relevant to the issues in the case.

11. The respondent is a fostering agency which employs social workers to liaise with children and foster families. The requirements of such work include meeting high personal standards of conduct, safeguarding the interests of service users, and protecting the highly confidential data belonging to them. For this reason, the respondent took various measures to ensure its employees were aware of its policies and rules regarding the handling of such data.

12. The claimant began working for the respondent on 23 July 2006 as a supervisory social worker, a relatively senior position which reflected her professional experience in the field. In that capacity she was required to work to certain professional standards, not just those set by her employer but also the standards issued by the Health & Care Professions Council (HCPC). The HCPC operated a code of conduct regulating conduct, performance and ethics, which the claimant was familiar with and which she was required to abide by.

13. Like other new employees, the claimant was made aware during her induction of the respondent's policies on IT and computer use. The claimant was under a duty to familiarise herself with the policies and any updates to them. The respondent's policies made very clear that email and internet usage may be monitored and was for business use only. Numerous policies were issued or updated in the period between around January 2011 and August 2016, of which the claimant had sufficient knowledge to understand the principles set out. In her evidence to the Tribunal the claimant admitted that she was aware of the respondent's policies on the use of its IT and email facilities. Without reciting the detail of those policies, they included the following rules and requirements:

- use of the IT system is for business use only;
- emails should not be used for personal use, including chit chat;

- company data must not be emailed to home or other private email addresses;
- comments with derogatory or inappropriate content should not be sent.

14. Under a former manager, Gill Guy-Edwards, a more relaxed approach had been taken to some personal use of work email addresses. This position changed in around November 2011, according to the evidence of Mrs Tummon, the claimant's colleague and friend, who purchased her own laptop and created her own personal email address at that time. This change in approach was confirmed by Mrs Tummon's evidence that at some point the respondent instructed staff to stop using the IT systems for personal use, for example for the purposes of shopping. The claimant and some of her peers maintained, however, that personal communications between colleagues fell into a different category and that personal use of the work email address to interact with colleagues was a substitute for the workplace 'water cooler conversation'. This was valued by the claimant and those of her colleagues with whom she was on friendly terms, because they were all home workers.

15. The manager who succeeded Ms Guy-Edwards (Christine Crynch) did not use emails for personal purposes nor did she share the relaxed attitude of her predecessor about the use of IT, though other aspects of her conduct were challenged by the claimant and Mrs Tummon.

16. Although Mrs Tummon changed her practice of using work email for personal purposes in around November 2011, the claimant did not. This was because she did not have access to her own computer or personal email address. Throughout 2016 the claimant was using her work email account on a regular and routine basis to conduct personal business, including online shopping and booking holidays. She accepted in evidence that she had been doing this for around three years, in effect running her personal life through the respondent's IT systems and email account. Much of this activity was carried out during working hours. This was apparent from numerous automated emails sent to the claimant in acknowledgement of shopping orders she had just placed, revealing that she had just placed an order after spending working time browsing for and purchasing goods online.

17. In late 2015 and the early part of 2016 the claimant was participating in what were described as "joke emails" with a foster carer, Mr Bishop. Most of the emails in question, which were not great in volume over that period, were sent by him to the claimant; in some cases she forwarded messages on, for example to her nephew. The claimant did not ask Mr Bishop to stop sending such emails or challenge the content of them.

18. Some elements of those emails were perceived by the respondent to be offensive and at times homophobic, sexist or racist. The claimant admitted she deleted some of the messages because they were not to her taste. Aside from the potentially offensive content, the respondent was concerned about the blurring of professional boundaries, something which had been discussed at a serious case review meeting attended by the claimant in January 2016.

19. A further email which caused the respondent some concern was sent by the claimant to Mr Bishop and related to a diversity event which the respondent was

promoting. When forwarding this information to Mr Bishop the claimant commented that the event would be "crap".

20. On 23 March 2016 the claimant forwarded an email to a foster carer, being a message she had received from another social worker. The forwarded message incorporated a highly confidential reference to another foster carer who was said to be the subject of an allegation. The carer who was the recipient of this email was due to meet the other carer the following day, at which time the identity of the latter would have become apparent. Although the claimant forwarded that email in haste, she did have time to type the words, "Please ignore the bit of the email you are not supposed to see". The claimant did this because she knew she was forwarding confidential information. She did not take a moment to delete the confidential part of the email.

21. The manner in which the claimant used its IT systems and email account was not apparent to the respondent at the time. In November 2016 an independent investigator called Andy Whitehouse was asked by the respondent to investigate issues relating to Ms McMillan. In his report dated 11 November 2016, Mr Whitehouse advised that "it may be necessary to investigate the other supervising social workers implicated in the email … for similar breaches of policies and procedures". As a result, the claimant was suspended on 7 December. She was given a script identifying that an initial review of an email account had identified a number of concerns. This was linked to the fact that she had been in regular correspondence with a person described in that document as an ex-employee, meaning Jackie McMillan. The fact of their being in contact was not in itself described as an allegation. The scrutiny of Ms McMillan's email account was the trigger for the claimant being suspended and investigated.

22. On the same day the claimant was given a letter confirming the suspension and the reasons for it. That letter identified four allegations, one of which was not pursued following completion of the investigation. The gist of the three allegations which were taken forward was as follows:

21.1 Allegation 1 – making significant use of the work email address for personal purposes during 2016;

21.2 Allegation 2 – improperly engaging in "joke emails" with Mr Bishop, including making a disparaging comment about the respondent's diversity event;

21.3 Allegation 3 – the disclosure to one foster carer of confidential information about allegations relating to another foster carer.

23. After the initial investigation had revealed some concerns, the respondent appointed a new independent investigator, Ms Beverley Ashby, to conduct an investigation relating to the claimant's conduct. The claimant was able to participate fully in this investigation. She provided a detailed personal statement, supplemented by two further statements which were produced before her disciplinary hearing. Ms Ashby produced an investigation report dated 19 December 2016.

24. On 28 December the claimant was invited to a disciplinary hearing. The allegations were framed in that letter in broadly the same terms as the suspension letter. It was also made clear, in connection with Allegation 1, that the respondent was concerned about how the claimant spent her working hours.

25. The date for the disciplinary hearing was twice re-arranged at the claimant's request. On the third occasion she was contacted about attending, the claimant asked the respondent to go ahead in her absence. This was partly because she did not feel well (although not signed off sick), and also because she felt unable to attend without a legal representative. The respondent did not agree to permit a legal representative to attend although extended the statutory right to a companion so as to allow the claimant to bring a friend. The claimant still did not feel able to attend, and the disciplinary hearing took place in her absence on 18 January 2017. It was chaired by the respondent's manager, Ms Bailey, and the allegations were considered in detail even though the claimant was not present. It is important to note that the claimant did not deny the facts behind the allegations, though she did not feel they warranted dismissal.

26. On 25 January 2017 Ms Bailey sent a letter dismissing the claimant summarily on the grounds of the Allegations 1, 2 and 3 as outlined above. Allegation 1 was felt, in isolation, to be misconduct but not gross misconduct. Allegations 2 and 3 were each felt to be gross misconduct.

27. On 31 January 2017 the claimant appealed her dismissal, arguing that it was harsh and unfair and that there were breaches in procedure. The latter were not so much procedural defects as arguments about what she saw as the respondent's ulterior motives for dismissal. Like Mrs Tummon, the claimant felt the respondent was motivated by her friendship with Ms McMillan in reaching its decision to dismiss.

28. In her detailed grounds of appeal, the claimant questioned why the investigation had been commenced; she questioned the independence of the investigators (a point which was not pursued at the Tribunal hearing); she said her mitigation had not been taken into account; that others were using email for "personal greetings"; that Gill Guy-Edwards, the former manager, had also taken part in joke emails; and that there was no actual detriment arising from her error of judgement, as she put it, regarding professional boundaries.

29. Some other colleagues who were using email for what the claimant described as "personal greetings" were a group of five social workers, including the claimant. They had been involved in an email thread on 11 June 2016, initiated by Mrs Tummon and which formed one of the allegations leading to the latter's dismissal. Mrs Tummon had made ill-judged and extremely offensive comments about the manager of this group. Of the five, the claimant and Mrs Tummon were investigated, disciplined and dismissed. Ms McMillan had resigned before any disciplinary process could be completed. The two remaining colleagues were not dealt with formally through a disciplinary process, though they were spoken to informally. The reason for that difference in treatment was that the respondent felt them to be passive participants in the email exchanges, as recipients of the messages in question. They had not committed any acts which were comparable to the claimant's.

30. In her grounds of appeal the claimant also said that she held information about some "very concerning behaviour" by staff and managers, and asked for the whistle-blowing policy with a view to pursuing that. In the event she did not take that any further. In relation to Allegation 3, the claimant acknowledged it was a breach of confidentiality but said it was an isolated event.

31. The claimant attended the appeal hearing which was chaired by a director of the respondent, Liz Cowling, on 9 March 2017. Mrs Cowling's decision letter was sent on 24 March. Detailed reasons for rejecting the appeal were given. The letter confirmed that all the information put forward by the claimant had been considered, including a further statement produced on the day of the hearing. Referring to other colleagues' cases, Mrs Cowling did not halt the claimant's appeal in order to look into the point, but said that appropriate action would be taken with others on a case by case basis. She confirmed that Christine Clynch had not been involved in the disciplinary process, contrary to the claimant's belief. The appeal decision took account of everything the claimant had said but detailed reasons were given for rejecting those explanations. Mrs Cowling also noted that the claimant had admitted that Allegation 3 did amount to gross misconduct.

Conclusions

32. The context in which these allegations arose is an important feature of the case and has been taken into consideration by the Tribunal as part of the circumstances of the case, in accordance with s.98(4) of the Act.

33. The claimant is an experienced social worker with knowledge and awareness of professional standards and also knowledge and awareness of the respondent's policies on confidential information and the use of IT. It was the claimant's responsibility to follow those rules and standards and to update herself from time to time. It was the respondent's responsibility to ensure the standards were implemented in a clear and consistent manner and to provide training and support as needed. As an experienced social worker, the claimant ought also to have understood the importance of protecting highly sensitive confidential information belonging to service users, without the need for ongoing instruction or training. Indeed, the claimant confirmed in her evidence that she did know of and understand these principles.

34. Another relevant part of the context is the poor relationship which existed between the claimant and her colleagues on the one hand (the group of five referred to above) and the respondent and some of its managers on the other. The claimant brought Mrs Crynch's motives into question during the disciplinary proceedings. The senior managers who dealt with the disciplinary and appeal stages, whose evidence to the Tribunal was accepted, said that Mrs Crynch had not played a part in the internal proceedings. The Tribunal also accepted the respondent's explanation that the trigger for the investigation arose as a consequence of information obtained by the initial Whitehouse investigation and not by virtue of any contact the claimant had had with Ms McMillan. The claimant's immediate misconception about that contact nevertheless played a part in how she responded to the allegations. The claimant saw a conspiracy where there was none.

35. One of the grounds of appeal was that others had not been disciplined for their personal use of emails. Those others were the two remaining colleagues in the group of five involved in the email thread on 11 June 2016. They were not disciplined but were spoken to informally. The respondent addressed its mind to the distinctions between the cases and made a decision based on its knowledge that the others had not committed any acts comparable to the claimant's.

36. Having examined the investigation and disciplinary process as a whole, the Tribunal concludes that the respondent adhered to expected standards of fairness. It carried out an initial investigation which provided a reasonable basis on which to suspend the claimant pending further investigation. Reasons for suspension were given in writing; there were no undue delays; there was an opportunity to participate in the investigation including submitting written information. The claimant received details about the allegations and the supporting evidence in advance; she had an opportunity to review them and to prepare herself for a disciplinary hearing. The claimant was given three opportunities to attend the disciplinary hearing in person, but chose not to do so. The respondent was under no obligation to allow a legal representative to attend with her, as this is not a legal right. The respondent did not act unreasonably in refusing this request, and indeed offered to extend the statutory right to bring a companion so as to include a friend. Despite choosing not to attend the disciplinary hearing, the claimant was nevertheless able to participate and respond to the allegations through numerous detailed written statements. Finally, she was provided with a fair and impartial appeal process.

37. No serious challenge was made during the internal proceedings or here at the Tribunal as to the unfairness of the procedure. While the claimant did use that label to raise some of her grounds of appeal, the grounds were not really of that nature or quality.

38. At the appeal the respondent listened to what the claimant said about the conduct of others, which amounted to three things: others using emails for "personal greetings"; Ms Guy-Edwards participating in joke emails; and the other information about "concerning behaviour" which the claimant did not go on to disclose.

39. The respondent was under an obligation to act reasonably on receipt of this information. It cannot reasonably be said that this disciplinary hearing should have been paused while such other broad enquiries took place, with no way of knowing where they might lead. If the respondent discovered other behaviour which breached its IT and email policies, it would have to make decisions on the facts of those other cases. The Tribunal does not consider that the respondent could reasonably have been expected to carry out a company-wide or even region-wide search of all IT usage by all employees before coming to its decision in the claimant's case. It was reasonable for the respondent to expect to be provided with specific information on which to justify embarking on such a broad exercise, and to proceed to make a decision about the claimant's case in the absence of that.

40. The use by others of email for "personal greetings" was not only non-specific but in any event did not bear comparison with the allegations the respondent was dealing with. Its witnesses accepted that normal pleasantries formed part of day-to-day communication between colleagues and foster families. Such pleasantries, being an adjunct to work-related email contact, are quite different from the routine

use of messages for entirely private conversations. It cannot be said that the respondent acted unreasonably in failing to examine all emails across the organisation in order to ascertain whether any others might have been using work emails for inappropriate purposes. Even if other were including "personal greetings" in their emails, the respondent would have been entitled to make a distinction between this and the way the claimant used emails for personal purposes.

41. As for Ms Guy-Edwards, she had left the organisation by 2014 and there had been a change in management attitude towards the personal use of emails well before then, by around late 2011. In any event, it was the claimant's personal responsibility to abide by the respondent's policies, and indeed to promote and respect diversity whether or not her former manager was doing the same.

42. The Tribunal concludes that the scope and quality of the investigation was carried out to a reasonable standard, and that the respondent obtained sufficient material to support a reasonable belief in the misconduct. In reaching that view it is important not to overlook the fact that the claimant made admissions as to the central facts. She did not dispute that she used the respondent's IT and email facilities for personal purposes, or that some of this was done during working hours. She did not dispute receiving and sending the "joke emails", and admitted to committing gross misconduct by breaching the confidentiality of a foster carer. Such admissions are likely to have a bearing on how far an investigation needs to explore the detailed facts.

43. Having admitted the conduct, the claimant argued that she should not have lost her job over the allegations. It is not for the Tribunal to substitute its own decision as to what sanction should have been applied, but rather to consider whether the respondent's decision fell outside the range of potential responses so as to be unreasonable.

44. It is also not for the Tribunal to decide whether the claimant is actually guilty of the gross misconduct in question; only whether the respondent believed that to be the case, and whether it was reasonably entitled to hold that belief on the strength of the evidence it gathered. Mitigation was put forward, and the claimant was entitled to argue that she felt dismissal was too harsh. Whether or not the Tribunal agrees that it was harsh is immaterial, and the Tribunal must not substitute its view of what it would have done in the respondent's position.

45. The facts of Allegation 1 were admitted. There was no dispute that the claimant was effectively running her personal life from her work email address because she did not have her own email account at that time. She said she had been doing this for about three years, though the respondent took into account only the activity carried out during the course of 2016. While Mrs Tummon acted on the instruction to stop using email for private purposes, the claimant did not.

46. The activity was also evidenced by records of numerous emails sent and received during normal working hours. While Mr Johnson sought to persuade the Tribunal that there was no clear evidence of significant time being spent, or when that time was spent, the respondent was entitled to treat this as a clear breach of its rule that no personal use should be made of its IT and email systems. Furthermore, it was clear from the evidence that when automated acknowledgements were

received by the claimant, this was been triggered by her spending time on online activities such as shopping. Whether the emails were sent or received, and whether they individually took up much time or not, the respondent was entitled to have the claimant give her full time and attention to the job during normal working hours.

47. This was a clear breach of the respondent's policies and it was entitled to conclude that this allegation amounted to misconduct. Had it been the only allegation, the claimant might have received a warning, but her dismissal resulted from the respondent's decision to treat Allegations 2 and 3 as gross misconduct.

48. Allegation 2 was on its face a breach of the same policies about the use of email for work purposes, but it carried more serious implications as well. Firstly, the content of the jokes was liable to cause offence, just as the claimant acknowledged by deleting those messages which were not to her taste. Once received into its email server, there was no way for the respondent to control the recipients of such emails. The fact that they were sent mainly between the claimant and Mr Bishop, who she felt would not take offence, did not ease the respondent's concerns.

49. The emails were also in some important respects contrary to the respondent's equal opportunities policy, and contrary to the claimant's obligations to challenge discrimination and promote diversity in accordance with the HCPC code of conduct.

50. The other element of this allegation was the claimant's description of a planned diversity event as "crap". This was a breach of the same standards and was liable to damage the respondent's reputation and undermine the event. All these messages were sent on the respondent's email account with its logo visible. It was apparent from the content of the email that the claimant knew her use of the word "crap" was wrong even as she sent it.

51. Furthermore, the respondent was entitled to view this conduct as a blurring of professional boundaries with foster carers, something which the claimant was well aware from a recent serious case review she attended only two months earlier.

52. Allegation 3 was a serious breach of confidentiality. The claimant knew this at the time and knew when she sent it that she should not be forwarding on any information about another foster carer, especially one who was the subject of an allegation. This was apparent from her comment asking the recipient to ignore the part he should not see. It would have taken no longer to delete that paragraph before forwarding the message than it took to type that comment.

53. Given that the facts available to the respondent were not essentially in dispute, given the seriousness of the conduct in each case and especially when the allegations are viewed together, the Tribunal has considered whether the respondent was entitled to treat the allegations, taken as a whole, as amounting to gross misconduct. The conclusion is that it was.

54. It is one thing for an employee to be considered guilty of gross misconduct, but that does not mean that the sanction of dismissal is automatically a fair one. The sanction of summary dismissal could only be unfair under section 98(4) of the Act and the relevant case law, if no reasonable employer acting reasonably could have come to that conclusion, applying the range of reasonable responses test. In the

Tribunal's judgement it cannot be said that no reasonable employer faced with the evidence in front of the respondent, including the mitigation, would have dismissed summarily. It is possible that another employer might have issued a final written warning, but this employer's decision to dismiss did fall within the band of reasonable responses. In reaching this view the Tribunal has taken into account the good faith of the respondent's decision-makers, the importance of its values and professional standards, and the requirement that the respondent be able to place trust in its key employees. That trust includes a legitimate expectation that supervising social workers will follow its policies and procedures, adhere to professional standards, behave in a respectful way towards colleagues, exercise good judgement, and protect highly confidential information belonging to service users.

55. In conclusion, the Tribunal finds that the reason for dismissal is made out as conduct under section 98(2)(b) of the Act. While the claimant put forward her theories and suspicions about ulterior motives there was no evidence to support that. Having considered all of the circumstances of the case under section 98(4) of the Act and applying the Burchell guidelines, the Tribunal concludes that the claimant's dismissal was for gross misconduct, that the respondent acted in good faith and with a genuine belief in that misconduct, that the respondent had evidence including the claimant's own admissions to support that belief, and that the investigation carried out was reasonable.

56. For these reasons the claimant's unfair dismissal claim fails and is dismissed.

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Employment Judge Langridge

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Date 27 July 2018

REASONS SENT TO THE PARTIES ON
30 July 2018

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FOR THE TRIBUNAL OFFICE