

JJE



EMPLOYMENT TRIBUNALS

Claimant: Mr I Botha

Respondent: Petty, Son and Prestwich Ltd

Heard at: East London Hearing Centre

On: 15 June 2018

Before: Employment Judge C Ferguson, Sitting Alone

Representation

Claimant: In Person
Respondent: Mr M Williams, Counsel

JUDGMENT having been sent to the parties on 5 July 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1. The Claimant worked for the Respondent from September 2014 until his dismissal on 26 October 2017. By an ET1 presented on 19 January 2018, the Claimant brought a complaint of unfair dismissal. The Respondent defended the claim. The issues to be determined are:-

- 1.1 Has the Respondent shown that the reason for the Claimant's dismissal was a potentially fair reason within section 98(2) of the Employment Rights Act 1996 ("ERA")? The Respondent says that the reason related to the Claimant's conduct.
- 1.2 Did the Respondent have a genuine belief on reasonable grounds and following a reasonable investigation in the Claimant's guilt?

- 1.3 Did the Respondent follow a fair procedure?
- 1.4 Was dismissal a reasonable sanction?
- 1.5 If the Claimant's dismissal was procedurally unfair, should any compensatory award be reduced on the basis that he might have been dismissed in any event?
- 1.6 Should any basic and/or compensatory awards be reduced on account of the Claimant's conduct?

2. On behalf of the Respondent, I heard evidence from Jennifer Wagstaff, John Wagstaff, Stella Murray and Jennifer Lawley. I also heard evidence from the Claimant.

FACTS

3. The Respondent is an estate agent employing approximately 14 people in three offices. It is run by Mr John Wagstaff and Mrs Jennifer Wagstaff who are both directors of the company and are a married couple. The Claimant started employment with the Respondent as a lettings negotiator in September 2014.

4. On 24 April 2017, the Claimant was issued with a first written warning for allowing tenants to move into a property before the deposits and rent had been received in full. The warning was said to remain live for 6 months. He did not appeal the decision.

5. On 10 October 2017, the Respondent received a summons for non-payment of council tax in relation to a property at 9 Deynecourt Gardens. The Claimant's line manager, Stella Murray, and the Claimant, looked through the file and found a "red" council tax notice from September 2017. The Claimant said he thought Jennifer Lawley, the accounts manager, was dealing with it. Ms Lawley arranged for the outstanding sums owed plus £126.00 in Council and court costs to be paid on that day. Ms Lawley is Mr Wagstaff's sister.

6. The Claimant went on holiday the following day, 11 October, for approximately ten days. On 13 October Ms Lawley contacted Ms Murray to say that she could not find the gas safety certificate on the file for a property at 70 Empress Avenue, but that the "Tenant Sign-off" form on the file had been signed on 30 September 2017 saying that the tenants had received the certificate. There is a dispute as to who at the Respondent's office was responsible for this property. The landlord of the property was a friend of Ms Murray. The Respondent says that the Claimant was primarily responsible for it, but that Ms Murray assisted at one stage when there was a problem with references. The Claimant insisted that both he and Ms Murray had equal responsibility for the property. To the extent that it is relevant to the issues in this case, I prefer the evidence of the Respondent. The Claimant accepts that he was initially dealing with the tenant's references until the problem arose and he asked for Ms Murray's help. He did not argue during the disciplinary process that Ms Murray had day-to-day responsibility for the file, only that she dealt with the landlord signing the contract and that "as the manager" she should have noticed the lack of the certificate. That is also supported by an email from Ms Murray to Mr Wagstaff dated 25 October.

7. On 14 October, Ms Murray telephoned her friend, the landlord of the property, and asked if she had a gas safety certificate. She confirmed she did but said that no-one from the Respondent had asked her for a copy. She brought the certificate, which was dated 5 August 2017, to the office the next day.

8. It is not in dispute that since October 2015, there has been a statutory obligation on landlords to provide a copy of the gas safety certificate to the tenant and failure to do would afford to the tenant a defence to eviction proceedings.

9. Ms Lawley brought both issues to the attention of Mr Wagstaff. She told him that she had found a council tax notice for 9 Deynecourt Avenue in the Claimant's desk. Ms Lawley's evidence to the Tribunal was that she was concerned that there must have been a council tax notice before the "red" notice in September and she recalled seeing documents of this kind on the Claimant's desk. On or around 12 October while the Claimant was on holiday, she looked in his desk and found a notice from August 2017.

10. Mr Wagstaff informed Mrs Wagstaff of these matters, who then wrote to the Claimant on 19 October 2017 as follows:

"I am writing to inform you that following the Company's investigation into allegations raised against you, namely that you were responsible for letting a property without ensuring a gas safe certificate was in place actions which constitute gross misconduct. Also storing overdue official Council Tax notices in your desk. I am writing to require your attendance at a disciplinary meeting on Monday 23rd October 2017 @ 11.00am at The Corner House, Wanstead. You should be aware that these actions bring the company into disrepute and expose the Directors to charges and potential imprisonment.

The purpose of the disciplinary meeting is to allow you to respond to the allegations which have been made. You are advised that should the allegations be upheld then you will be liable to disciplinary action which may include dismissal under the terms of the Company Disciplinary Policy and Procedures of which you have been supplied a copy."

11. The meeting was put back to 25 October and was attended by Mrs Wagstaff, the Claimant and a colleague of the Claimant's who attended as his companion.

12. During the meeting, the Claimant said that the council tax notice could not have been found in his desk and that there was a witch-hunt against him. The file was obtained during the meeting and shown to the Claimant. It contained a council tax notice for the property, dated 17 August 2017, which was alleged to have been found in the Claimant's desk.

13. As to the gas safety certificate, again the Claimant asked to see a copy of it. The file was obtained and shown to the Claimant. This included the "Tenant Sign-off" sheet. This is a document headed "Tenant Sign Off" and says underneath, "Tenant(s) confirm they have received the following". There is then the heading "Mandatory" and a number of bullet points with tick boxes next to them. The first bullet point is "Valid Gas Safety Certificate" and on the document in question that box has been ticked. The document has

been signed by the Claimant, pp'ing the landlord, and it is also signed by three tenants and in each case, it is dated 30 September 2017. The file also included a copy of the gas safety certificate for the property dated 5 August 2017.

14. The Claimant made a number of arguments in response. He said that the gas safety certificate existed; it was just not in the right place. He also said that as Ms Murray was the last person to deal with the file – and it is agreed that the landlord came into the office to sign the contract on 2 October and Ms Murray dealt with that – he queried why she did not notice the certificate was not on the file. He said that the tick list on the Tenant Sign-off document had been completed by Ms Murray. He also raised an issue about the signing of the contract, saying that it had not been fully signed on each page and he had asked Ms Murray to complete this but she had still not done so.

15. By letter dated 26 October 2017, Mrs Wagstaff wrote to the Claimant to inform him that he was dismissed. She said:

“Following the disciplinary meeting on Wednesday 25th October 2017 and the written warning issued to you earlier this year and first and final formal warning it has been decided that both your conduct and performance is still unsatisfactory and that you be dismissed”.

16. The Claimant appealed against his dismissal on 31 October. On the subject of the gas safety certificate, he said that this issue was:

“not properly investigated as there was a certificate issued on 3 August 2017, even though I didn't ensure a copy was on the file when dealing with the file of 70 Empress Avenue, the property in question, when the tenants came in to sign, two Saturdays before the landlord signed. My manager, Stella Murray handled this file on Wednesday 4 October or Thursday, 5 October when the landlord and her friend, Alison, came in to sign, 4 days before the move in. Not only did Stella not notice there was no GSI on the file, but she also failed to get the landlord to completely sign the contract, as I pointed out during the hearing...”

17. As to the council tax notice, the Claimant said:

“I have also been accused of ‘storing overdue official Council Tax notices in your desk’, a claim yet again, I was able to rubbish at the Disciplinary meeting, as I proved these ‘so called notices’ was paid one or two days before I left on holiday...”

18. The Claimant also complained that the evidence on both charges was not provided to him before the meeting. He also repeated the allegation that there was a witch-hunt against him and said he believed it was instigated by Ms Murray.

19. On 8 November, Mr Wagstaff wrote to the Claimant inviting him to an appeal meeting. The letter then set out reasons for the decision to dismiss and raised a number of new allegations relating to documents and keys that had been found in the Claimant's desk after his dismissal.

20. An appeal hearing took place on 14 November 2017 conducted by Mr Wagstaff. The Claimant was accompanied by the same colleague. Another employee attended as note-taker for Mr Wagstaff. During the meeting, Mr Wagstaff apologised for the fact that the Claimant was not given a copy of the gas safety certificate or the council tax summons. Copies were provided to the Claimant at the meeting. In relation to the gas safety certificate, Mr Wagstaff said at one stage:

“ ..I would expect as your role within the company, not to have ticked that there was a GSI, as that for me is very damning”

The Claimant responded:

“True, but as the ‘lettings manager’ Stella should have checked it”.

21. The Claimant maintained that the council tax notice could not have been in his desk unless someone had planted it there. The Claimant’s appeal was dismissed by letter dated 15 November.

THE LAW

22. Pursuant to section 98 of the ERA it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair:

- (a) depends on 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.

23. In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

23.1 It had a genuine belief in the employee’s guilt;

23.2 based on reasonable grounds

23.3 and following a reasonable investigation.

24. The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer’s conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer’s actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

CONCLUSIONS

25. Has the Respondent shown that the reason for the Claimant's dismissal was a potentially fair reason? I am satisfied that the Claimant's conduct was the real reason for his dismissal. The Claimant has claimed that the charges against him were a sham and that there was a witch-hunt against him. There is no evidence to support that assertion. On the contrary, the Claimant committed an act of misconduct in April 2017, which he admits was serious, allowing tenants to take possession of a property before the deposit had been received. He says that the Respondent adopted a lenient approach because they accepted he had done it for compassionate reasons. That is entirely inconsistent with the Claimant's case that the Respondent wanted to get rid of him.

26. Did the Respondent have a genuine belief on reasonable grounds and following a reasonable investigation in the Claimant's guilt? I accept that Mrs Wagstaff had a genuine belief in the Claimant's guilt on reasonable grounds. As for the gas safety certificate, I agree with Mr Williams' submission on behalf of the Respondent that, to a large extent, the Tenant Sign-off document speaks for itself. Although the Claimant denied during the disciplinary hearing that he had ticked the box for the gas safety certificate, by the time of the appeal hearing, he had accepted that it was his handwriting and he had ticked the box. His signature appeared on the document and it was certainly reasonable for the Respondent to conclude that the Claimant had signed a document that wrongly declared the tenants had received a gas safety certificate. Although the Claimant eventually acknowledged during these proceedings that this was blameworthy, he did not accept any responsibility during the disciplinary proceedings. His only arguments were that the certificate did exist, which is no mitigation because the legal obligation is to provide a copy to the tenant. Further, at the time the document was signed, the Claimant did not know that the certificate existed. He also argued that Ms Murray should have noticed the absence of the certificate when she dealt with the file on 2 October. Even if there is some fault on her part, that does not detract from the misconduct on the Claimant's part. He says he assumed that Ms Murray would arrange for the certificate to be provided. He therefore knew that one had not been provided when he signed the documents and he did not take any steps to check the position with Ms Murray. That was, on any view, serious misconduct.

27. As to the council tax bill, Mrs Wagstaff essentially had to resolve a factual dispute about whether the notice was in the Claimant's desk. I consider it was reasonable for her to conclude that it was. I accept that this information had come from Mrs Lawley who is Mr Wagstaff's sister, but the Claimant has put forward no reason why she would plant the letter in his desk. I have already rejected the contention that there was a conspiracy to remove the Claimant. Further, the only point made by the Claimant in the disciplinary hearing was that the document could not have been in his desk and that the bill had been paid. This missed the point that the summons had only arisen because of a failure to deal with the original notice. The Claimant now says that it was not his responsibility to deal with such notices and he had never done so before. Even if that is correct, it was clearly not the right approach to keep the document in his desk unaddressed.

28. Did the Respondent follow a fair procedure? I accept that the Respondent should have provided the Claimant with copies of all the evidence against him before the disciplinary hearing. I find however, that the failure to do so did not give rise to unfairness in this case. The allegations against the Claimant had been clearly set out in the invitation

to the disciplinary hearing. The actual gas safety certificate was not relevant to the case against the Claimant and he had already seen the Tenant Sign-off document. The only new document was the original council tax notice from August 2017, but the Claimant has not suggested that he would have put his case any differently if he had seen it in advance.

29. Mrs Wagstaff's evidence was that she consulted Mr Wagstaff before making the decision to dismiss the Claimant. That is certainly how it also appears from the documents. I should say it is clearly not good practice for someone involved in a dismissal decision to hear the appeal, nor is it good practice to give no reasons in the dismissal letter and then for the appeal manager to set out the reasons justifying the dismissal in the invitation to the appeal meeting. Having said that, in the circumstances of the present case, I do not consider that this led to any unfairness to the Claimant. I accept that Mr Wagstaff was not an impartial person to hear the appeal, both because of his relationship to Mrs Wagstaff and his involvement in the decision, but this is a very small employer and I consider that he gave the Claimant a reasonable opportunity to make the points he wished to make and to consider the matter as fairly as he could. In any event, the focus of my task is whether the original decision to dismiss was unfair. Looking at the process as a whole, I consider that it was.

30. Was dismissal a reasonable sanction? The misconduct in question took place during the period of a live written warning. It was also similar in nature, in that each instance involved the Claimant not following proper procedure, exposing the Respondent and/or landlord to potential losses. The conduct in respect of the gas safety certificate was particularly serious in light of the new legal obligations. The Claimant has accepted that he was aware of the legal obligations. If Ms Lawley had not discovered the omission, the consequences could have been extremely serious. It is also relevant that the Claimant did not accept any responsibility for his conduct and falsely suggested that Ms Murray had ticked the box on the sheet. In those circumstances, there can be no doubt that dismissal was a reasonable sanction.

Employment Judge Ferguson

30 August 2018