



# EMPLOYMENT TRIBUNALS

## BETWEEN

Claimant  
MISS N CONWAY

AND

Respondent  
NEATH PORT TALBOT COUNTY  
BOROUGH COUNCIL

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF      ON:    5<sup>TH</sup> / 6<sup>TH</sup> / 7<sup>TH</sup> SEPTEMBER 2018

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:-      MR G POLLITT

FOR THE RESPONDENT:-    MR R JOHNS

## JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim of unfair dismissal is dismissed.
2. The claimant's claim of wrongful dismissal is dismissed.

## Reasons

1. This is the decision of the employment tribunal in the case of Miss N Conway (claimant) v Neath Port Talbot County Borough Council (respondent).
2. By this claim the claimant brings claims of unfair and wrongful dismissal. The claimant was employed as an Enforcement Officer in the respondent's Trading Standards Department between 1 September 1986 and 2 May 2017 when she was summarily dismissed.
3. The claimant was suspended on the 29 November 2016 to allow an investigation into three allegations; firstly undertaking serious unauthorised use of computer hardware/software and/or data including inappropriate use of electronic mail sent; secondly undertaking action or behaviour which could result in defrauding the authority; thirdly undertaking serious misconduct outside the workplace which reflects adversely upon the authority and/or the claimant's suitability for the post as it could result in damage to the authority's reputation.
4. The claimant attended a disciplinary hearing on 2 May 2017 and all three allegations were upheld; they were categorised as gross misconduct and the claimant was summarily dismissed. The claimant appealed and following an appeal hearing on 21 June 2017 the first allegation was upheld but the penalty of a final written warning substituted; the second allegation was not upheld; and the third allegation was upheld as was the penalty of summary dismissal. As that appeal hearing was a complete rehearing before a panel of five councillors, the parties are agreed that for my purposes the question of whether the dismissal was fair or unfair must be judged against the reasoning of the appeal panel and the significance of the earlier disciplinary findings fall away.
5. In respect of wrongful dismissal I have to make my own judgement as to whether the claimant was in fundamental breach of contract entitling the respondent to dismiss without notice.
6. The third allegation for which the claimant was dismissed by the appeal panel was itself split into two factual allegations; firstly allegation 3(a) "Your failure to declare your involvement with Mr Hussey once aware that he had criminal convictions for trading standards offences and was awaiting sentence for offences of selling motor vehicles in a dangerous condition"; and secondly (3 (b) "Your procuring from a colleague and involvement in the creation of an inaccurate character reference for Mr Hussey to be presented to the court which was to sentence Mr Hussey in July 2016."
7. Central to those findings was the nature of the claimant's relationship with a Mr Paul Hussey. It is not in dispute that Mr Hussey, by some point in 2016, had been charged with and was eventually convicted of trading standards offences relating to the sale of motor vehicles. The criminal proceedings were carried on in the Exeter Crown Court by Devon County Council's Trading Standards Department. The question of the claimant's involvement with Mr Hussey arose in the latter part of 2016. In November

- 2016 Devon Trading Standards contacted the respondent who in turn instructed Ms Joy Smith (who has not been well enough to give evidence before the tribunal) and Ms Anne Marie O'Donnell (who has given evidence), to look at the council's computer systems to see if there was anything recorded in the records created or held by the claimant which might assist Devon Trading Standards in their investigations into potential money laundering and the proceeds of crime. Ms O'Donnell examined the claimant's email account and discovered a large number of personal emails, some with attachments including items such as a bank statements in euros which seemingly related to the sale of property in France by Mr Hussey; and documents relating to property transactions in the UK and Ireland and other documents which together appeared to demonstrate some form of relationship between Mr Hussey and the claimant. As a consequence Nicola Pearce the Head of Planning and Public Protection concluded that a full investigation was warranted.
8. Ms Smith assisted by Ms O'Donnell reported and her conclusion was that the claimant should face disciplinary action. The conclusions of the investigation report into allegation three were that *"NC chose not to declare her relationship with PH despite being aware of his conviction for trading standards offences i.e. selling unsafe vehicles. This is despite her being aware of the existence of the register being available for that purpose which she has used in the past when someone known to her was suspected of breaching trading standards legislation. She does however admit to having given advice when he was trading in vehicles in this within the Swansea area. In addition NC's manager reminded the team of their responsibility in terms of declarations of interest in 4 November 2016. This admission by NC is significant given the nature of her post, the intelligence she was party to and the seriousness of the offences PH was convicted for. NC has participated in the production of a character reference at to be produced at a Crown Court which she knew to be false, indeed there is some doubt in my mind as to who is actually author of the document. It can clearly be seen from the responses given by RW at the meetings and subsequent amendments made to the combined notes of the panel that she was being obstructive and the answers she gave were not wholly truthful. In view of the position which NC holds, which necessitates representing NPT CBC at court in relation to trading standard prosecutions and the need for integrity of the highest order to be maintained by an officer in her position NCs conduct falls far short of that which would reasonably be expected of the post-holder. NCs failure to declare her relationship with PH and her involvement in the production of a character reference which she knew to be false for a Crown Court trial calls into question her suitability for the post she holds. Her actions have irrevocably broken the trust that is essential between employer and employee."*
  9. The conclusion that she should face disciplinary action was accepted and the hearing was conducted by Ms Pearce. Her conclusions are set out at length in her submission to the appeal panel, but are summarised in the termination letter. In respect of the third allegation she stated *"You participated in the provision of inaccurate character reference in respect of Mr Hussey to Exeter Crown Court which called into question your integrity as a trading standards officer. Additionally you failed to disclose the relevant details in relation to an investigation and the subsequent conviction of Mr Hussey to your manager for recording within the record"*

- of interest book. This calls into question your judgement and your ability to operate as an enforcer of trading standards legislation.” She concluded that that amounted to gross misconduct justifying dismissal.*
10. As indicated earlier, the real question for the tribunal, given that the appeal took the form of a complete rehearing and the appeal panel reached different conclusions from Ms Pearce, is whether the conclusions of the appeal panel can be justified.
11. I have heard from Dr Reynolds on behalf of the appeal panel, which made the following findings in relation to allegation three, which was the only one both upheld and found to amount to gross misconduct sufficient to warrant dismissal; *“The committee noted that you are an experienced trading standards officer with some 31 years of service and that you are aware of your duty to report to your manager any link with any person or body subject to a trading standards investigation. Although it accepted that the primary purpose of the register maintained within the trading standards team was to ensure that an officer did not become involved in a matter concerning a person with whom they were connected, it also considered that it was at least a gross error of judgement on your part not declare your association with Mr Hussey potentially when you were aware that his business in Swansea concerned second-hand car sales, a significant area of trading standards complaints, and certainly in 2015 when you admit you were aware of his convictions and ongoing criminal proceedings. The committee found that you had approached your colleague RW to give a character reference for Mr Hussey and that you were well aware that although not formal evidence for the court’s purposes it would be handed into a court in the hope that it would mitigate sentence. The committee also found that as RW herself admitted that character reference was inaccurate and that RW’s relationship with Mr Hussey was exaggerated. It reflected more the closeness of your involvement with Mr Hussey rather than that of RW. You accepted that you had typed the document for RW to sign. The committee as mentioned above in respect of allegation two was not satisfied that you were being truthful concerning the extent of your association with Mr Hussey. The personal emails and documents found on your work computer, evidence of ongoing involvement during 2016 and property related matters, including potential dealings until shortly before your suspension from work. Whether or not you had been taken in by Mr Hussey the committee was very concerned by what it regarded as a lack of candour in your submissions to it in this respect given your close involvement in legal process on behalf of the Council. The honesty and integrity of trading standards officers whether or not likely to be required to give evidence in court is fundamental to the council’s enforcement work. The committee found that this allegation was made out and constituted gross misconduct. It considered that your actions, the judgement displayed and your unwillingness or inability to discern anything inappropriate in your behaviour, and the lack of candour concerning these matters so undermined its trust and confidence that it was not tenable for you to continue in your employment, and that you should be summarily dismissed.”*
12. The parties agree I have to determine the fairness of a misconduct by reference to the Burchell test. The first question is whether the respondent has established that a

- belief in the misconduct was the genuine reason for the dismissal. That is not in dispute in this case, and even if it had been I would have accepted the respondent's evidence as to it.
13. The remaining Burchell questions are whether there was a reasonable investigation, whether reasonable conclusions were drawn from that investigation; and whether dismissal was a reasonable sanction. The range of reasonable responses test applies to each of those questions, and thus the questions become whether a reasonable respondent could have investigated as the respondent did, could have reached the conclusions the respondent did and could have considered that the dismissal was the appropriate sanction.
  14. In summary the claimant's case is that the investigation was flawed in at least one respect; that the conclusions set out above were not reasonably open factually to the appeal panel, that even if they amounted to misconduct (which is not accepted) that they on any analysis could not reasonably be considered gross misconduct; and that the sanction was in any event disproportionate and outside the range reasonably open to the respondent.
  15. In respect of the investigation the allegation that it was insufficient effectively relates to the conclusion as to the provision of the reference. As is set out above the committee held that as RW herself admitted the character reference was inaccurate and that RW's relationship with Mr Hussey was exaggerated. That conclusion was based on the notes of interview of the original investigation with RW. The background is that it is not in dispute that a reference for Mr Hussey's appearance in the Crown Court was typed by the claimant in the name of RW. The reference provides in part "*I have known for Mr Hussey for the past three years, we first met by a mutual friend and I would regard Mr Hussey is a good friend. He regularly visits our family home and has built a relationship with myself, my husband and our two sons.*" She goes on to express opinions as to Mr Hussey and his remorse and the likelihood of him reoffending.
  16. In the initial investigatory interview she said in response to the question "*Do you know Paul Hussey? How do you know him? How long have you known him for?*" "*Yes I don't know him well known him more lately as I have problems with my house no gas or electric no roof my builder run off with my money I've been in touch with trading standards to sort this out I've been badly let down by my builder and Paul has been given me advice he offered to help. I've met him a few times we've been out socially once mostly when I've been at Nikki's he hasn't been there. Only when he is visiting I bump into him.*" And then in response to the question "*What you have just told us about your relationship with Paul Hussey it is very different to what is in the letter which is true to you know him well enough to give a character reference to Crown Court in the reference you say he's a good friend and it and he regularly visits your home which is in direct contrast to what you said today.*" she answered "" RW clarified that she was not influenced in providing the reference."
  17. There was a second interview in which she was asked "*Do you stand by the contents of the letter*" and replied "*Yes I think so I was asked to do it is just a*

*character reference. I had so much going on at the time it wasn't relevant to my life I did to help Nicky I don't know if it's gone to the Crown Court* and went onto confirm that she had done it to help Nicky. She said, *"The character reference does not reflect the true relationship between Paul Hussey and me"* and she went on to say that *"I haven't met him that often I met Paul Hussey when Nicky had a bad foot he helped me with paperwork invoices my house I've only recently known him"*. To the question *"Are you saying that the character reference in your name does not reflect the true relationship between you and Mr Hussey?"* she replied *"Yes about how well I knew Paul at the time."* She went on say *"Yes the statement is the truth not the character reference"*; and in answer to the question, *"So you lied in the character reference"* *"Yes about how well I knew Paul at the time"*. Those notes were signed by RW on 28 March 2017.

18. The conclusions that were drawn were self-evidently based upon those answers in the interview. However the claimant contends that in fact the appeal panel was not entitled to rely on what was said by RW in those two interviews. It is not in dispute that the RW subsequently claimed in the disciplinary hearing that she had been bullied in the second interview, and moreover that a threat was made to her, in that she had been told to think carefully about her family and children when she answered a particular question. She alleged this at the disciplinary hearing but she was not called to give evidence at the appeal. If the appeal panel were to rely on what was said in interview it was incumbent upon them to investigate whether what the claimant and RW had said was true, and therefore what weight they could place on RWs responses I interview. .
19. The submission that it was not open factually to make findings that the panel did relate to both of the allegations. The evidence before the panel in respect of the first allegation, that of the failure to declare the involvement with Mr Hussey, relies on the proposition that the claimant knew of, or should have known, of the requirement to disclose this in the register of interests contained within the trading standards department. The claimant contends that the allegation is very specific, that this is the document in which she and should have made any such disclosure and that therefore this is not simply a general allegation that she should in some way have made some form of disclosure or at least raised the question of whether she should have disclosed the relationship with Mr Hussey. The claimant's evidence was that she understood the register to relate solely to conflicts with ongoing investigations being carried out by Neath Port Talbot CBC and not a more general requirement in respect of other investigations in other parts of the country. She had received no specific training in what matters needed to be declared. She was supported by a written statement submitted by Mr Daryl Price which it is not necessary to set out.
20. Accordingly the claimant submits that her evidence which was supported in the appeal was that she was not aware of any requirement to disclose the relationship, and specifically there was no evidence that she knew or should have known of the requirement to register it in the Register of Interests. There was therefore no basis for any conclusion that she was or could have been aware of any obligation to report as was found by the committee.

21. Moreover the claimant submits that the specific allegation was of undertaking serious misconduct “outside the workplace which reflects adversely upon the authority and/or your suitability to continue in your post as it could result in damage to the authority’s reputation”. The claimant submits that the obligation to complete a register of interests within work is self-evidently not serious misconduct “outside the workplace” and so it was simply not open on either basis for the respondent to draw that conclusion. Therefore both it was not open to the appeal panel to conclude that in respect of the first matter that she was guilty of the misconduct alleged.
22. In respect of the reference claimant submits that the evidence before the panel as to the claimant’s part in the preparation of it, even if RW’s relationship with Paul Hussey’s exaggerated, is that at the request of RW she typed it up. Whilst the panel found that she procured the reference in the sense that she asked RW or at least repeated a request from Paul Hussey to RW to provide one, that there was no evidence from anyone that she influenced the contents of the reference; it was not in her name and not signed by her. It was simply therefore not open to the respondent to conclude simply by assisting other person who had signed and provided the reference to type it up that that was any form of misconduct let alone gross misconduct.
23. In terms of sanction, the claimant accepts that RW is not a comparator in that they did different jobs with different levels of responsibility it is not in dispute, that whether she has faced some form of disciplinary sanction that she has not been dismissed; and that as it was RW herself who supplied the reference in her own name it appears on the face of it bizarre and incongruous that the person who typed it should be dismissed whereas the person who signed and provided it was not. Accordingly the sanction fell outside that reasonably open to the respondent.
24. The respondent submits that these arguments are misguided. Firstly in respect of the investigation that this is a paradigm case for the application of the range of reasonable responses test. Whilst in other circumstances another panel may have thought it appropriate to make further enquiries of RW, the fact is that whatever the circumstances of the interview that RW had made handwritten amendments to the notes of the interview after the interview itself and had then signed them, and there was, therefore, no reason to suppose that it did not accurately reflect the evidence RW had given. It was therefore open to the panel to conclude that they could place reliance on it.
25. In respect of the conclusions as to the failure to disclose the relationship, the respondent submits that whatever the precise wording of the first disciplinary charge the claimant knew precisely the allegation she was facing which was that she should have disclosed her relationship with Paul Hussey and that she had failed to do so. The reason that she should have disclosed that the relationship is that he was on any analysis in a close relationship with her whatever the precise nature of that relationship. The investigation had revealed that he had used, with her permission, her home address as at least a postal address for him and that therefore credit checks which she knew would be carried out as an enforcement officer, would reveal him apparently living at her home address, and that therefore that there would be a

- question as to whether he had any property interests together with her, or at least an interest in that address. She therefore knew as an enforcement officer that at very least she would become embroiled as an interested party in the criminal proceedings, being carried out by another trading standards department, and as she could not have known the extent to which she may become involved and the consequences of doing so that she must have known that she should have notified the respondent. This would firstly allow them to draw the link to the attention of Devon trading standards, and secondly to assure themselves that she had done nothing inappropriate. Moreover, given that she was aware that the criminal charges related to the sale of motor vehicles, and was aware that whilst in Swansea Mr Hussey had had businesses of the sale of motor vehicles, that there was at least a possibility that the enquiry would come closer to home. In those circumstances it is inconceivable that she did not understand that there was an obligation to disclose the relationship whether specifically in the register of interests book or more generally. The only rational conclusion is that she deliberately chose not to when on any basis she must have known she had a duty to.
26. That conclusion is borne out by the claimant's own evidence to this tribunal in which she accepted that she understood that she could not be involved herself in the provision of a reference to the Exeter Crown Court on Mr Hussey's behalf precisely because of her position as an enforcement officer within the trading standards department. The respondent therefore submits that if she knew that, she must have known that the link was sufficient that she should have notified the respondent.
27. In relation to the reference the panel was entitled to conclude on the basis of the evidence of RW that she had involved herself in obtaining that reference and had herself typed it up. If its terms were exaggerated and if the claimant had involved herself in the provision of a false reference it was entitled to conclude that this was a very significant failure and that it placed in question the claimant's integrity and was therefore not merely misconduct but gross misconduct; and gross misconduct outside the office and on any analysis did fall within the terms of the disciplinary charge.
28. In terms of sanction the respondent submits that RW was not an appropriate comparator, and given the seriousness of the claimant's failings as set out in the panel's conclusions, it was open to them to conclude that the mutual bond of trust and confidence had been breached; and that in those circumstances that dismissal was the appropriate sanction.
29. My conclusions are that there is some merit in both parties' contentions.
30. Dealing first with the investigation in my judgement the respondent is right. Given that RW had signed and provided handwritten amendments to the notes of interview that appeal panel was entitled to conclude that they genuinely represented the evidence she had given. Whilst another panel may or may not have sought to clarify her allegations, not doing so was a course reasonably open to them.
31. In terms of the conclusions, it appears to me in respect of the first allegation that Mr Pollitt on behalf of the claimant makes a good point in that the allegation was framed



- narrowly, and also that it could not be categorised as serious misconduct “outside the workplace”. On that narrow basis there is merit in the contention that it was not reasonably open to the respondent to conclude that that allegation was proven. However in the broader sense the respondent’s submissions are correct. Given the claimant’s close association with Mr Hussy, and given that it potentially impacted directly on her role it is inconceivable that she would not have understood the obligation to disclose it.
32. In relation to the provision of the reference that was necessarily outside the workplace and the question is whether it was serious misconduct. As set earlier the panel found that the claimant was aware that the character reference was inaccurate in that it exaggerated RWs relationship with Mr Hussey and it reflected the closeness not of RWs relationship but that of the claimant. Was that that a conclusion it was reasonably open to the panel to draw on the evidence? It appears to me that in the context of that allegation the panel were also entitled to take into account, in circumstances where it did not believe that the claimant did not realise the obligation to disclose the relationship, but had not done so. In my judgement in relation to this allegation it was open to the panel to draw the conclusions that it had and also that the claimant had been less than frank in the disciplinary process itself. In respect of the second allegation the panel were entitled to draw the conclusions they did.
33. In respect of the sanction, in the light of the claimant’s role it was entitled to conclude trust and confidence had been fundamentally undermined, and that it was not tenable for the claimant to remain in its employment. Accordingly it does appear to me that the decision to dismiss fell within the range reasonably open to the respondent and that the claim for unfair dismissal must be dismissed.
34. In respect of wrongful dismissal the test is different. I am not determining whether the decision of the respondent was within the range reasonably open to it, but whether in fact the claimant was in fundamental breach of contract entitling them to dismiss her without notice .It is in my judgment as set out above the respondent is correct in its analysis that the claimant must have known of the obligation to inform the respondent of a close personal relationship with someone who had been charged with and was subsequently convicted of trading standards offences. As is set out at paragraph seven above the claimant was at least involved in financial and property transactions of Mr Hussey to the extent of receiving information about them in e-mails and had allowed Mr Hussey to use her home address as his own, at least for correspondence purposes; and that in those circumstances it is in my view unarguable that the failure to disclose was a fundamental breach of contract and the claim for wrongful dismissal must also be dismissed.

**Judgment entered into Register  
And copies sent to the parties on**

**12 October 2018**

.....  
**for Secretary of the Tribunals**

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**EMPLOYMENT JUDGE CADNEY**

**Dated: 10 October 18**