EMPLOYMENT TRIBUNALS

Claimant: Mrs P Peall

Respondent: Autoscan Limited

FINAL HEARING

Heard at: Nottingham **On:** 27 September 2018

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr J Howlett, counsel

JUDGMENT

(1) The claimant was unfairly dismissed.

(2) If the claimant's remedy is compensation only:

a. there shall be no reduction to any compensatory award pursuant to the so-called 'Polkey principle';

b. any compensatory award shall be increased by 15 percent pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

(3) Without prejudice to any appeal or application for reconsideration, and the parties having agreed terms of settlement in relation to remedy in light of paragraphs (1) and (2) above, by consent, the claimant is awarded, and the respondent must pay her, compensation for unfair dismissal in the total sum of **£32,800.00**, incorporating a basic award of £11,002.50 and the remainder being a compensatory award.

(4) At the parties' request, it is formally recorded that the terms of settlement require the respondent to pay the claimant the sum of £32,800.00 as follows: £16,400.00 by the end of October 2018; £16,400.00 by the end of November 2018.

(5) This Judgment was made and took effect on 27 September 2018.

REASONS

1. This is the written version of the Reasons given orally on 27 September 2018, written reasons having been requested by respondent's counsel on the day.

2. The claimant was employed by the respondent as an Account and Payroll Manager from 2 January 2002 until her summary dismissal on 1 December 2017. The given reason for dismissal was "*some other substantial reason*", namely a breakdown in the employment relationship.

3. Counsel confirmed on the respondent's behalf in submissions that what is meant by a breakdown in the relationship is, as stated in the dismissal letter, a "*personality clash between employees that makes it impossible for them to work together*".

4. There was no disciplinary process of any kind. The claimant was simply invited into an office by a text message on 30 November 2017 and dismissed, essentially being handed the pre-prepared dismissal letter I have just quoted from. She had no prior warning and dismissal was completely out of the blue from her point of view, after nearly 16 years of employment.

5. Theoretically, the liability issues to be decided at this stage of the hearing are, first, what was the principal reason for dismissal and was it "*some other substantial reason*" as just explained and, secondly, was dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, under section 98(4) of the Employment Rights Act 1996 ("ERA").

6. I have used the word "*theoretically*" because this was plainly an unfair dismissal, for procedural reasons even if for no others; and there are others. There was a wholesale disregard for even the most basic precepts of fairness in relation to an employee of nearly 16 years standing. Even on the respondent's case put at its reasonable highest, the perceived need to dismiss the claimant was not so urgent as to mean that there wasn't time, at the very least, to write to her before a decision had been made definitely to dismiss her, setting out the reasons why it was thought she should be dismissed, inviting her to a meeting where she could set out her side, to hold the meeting, and only then to make the final decision one way or the other.

7. It has been implied in the respondent's evidence (its witness evidence being given solely by its Managing Director, Nicholas Shelvey) that Mr Shelvey was following legal advice when he decided to dismiss the claimant as he did. It's an implication rather than an established fact, because the respondent has not waived privilege in any advice that was given. If the respondent really was advised by a legal professional that it could fairly dismiss the claimant following the procedure that the respondent adopted, I find that astonishing. I think I would quite possibly be making an error of law if I decided this was a fair dismissal.

8. The claimant seeks compensation only. The real issue in this case is the so-called 'Polkey issue'. That issue could be put in various different ways, but I put it as something like this: if the claimant was unfairly dismissed, what reduction, if any, should be made to any compensatory award to reflect the possibility that the claimant might in time have been dismissed in any event.

9. The other issue that the parties agreed we would deal with at this stage of the proceedings is the question of uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("section 207A"). Because there is no dispute that the respondent breached the ACAS code in the present case, the subsidiary issues that arise in relation to the section 207A issue are: were those breaches of the ACAS code unreasonable breaches; and if they were, would it be just and equitable to increase the claimant's compensation; and if it is just and equitable to increase the claimant's compensation, by what percentage, up to a maximum of 25 percent, should it be increased?

10. In terms of the relevant law, this is reflected in the wording of the issues and my starting point is the relevant sections of the ERA and section 207.

11. In relation to the Polkey issue, I refer in particular to paragraph 54 of the Employment Appeal Tribunal's decision in Software 2000 Limited v Andrews [2007] ICR 825.

12. In terms of issues of liability – that is, whether or not the claimant was unfairly dismissed – the burden of proving a potentially fair reason under subsection (1) [of ERA section 98] is, I note, on the employer, but the burden is neutral under subsection (4); that is to say, there is no burden of proof either way.

13. I also remind myself that the question I am asking under subsection (1) of ERA section 98 is what was in the employer's mind at the point of dismissal. In other words: why did the respondent think it was dismissing the claimant?

14. In relation to ERA section 98(4), I considered the whole of the well-known passage from the judgment of the Employment Appeal Tribunal in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I may also call the band of reasonableness test, applies in all circumstances, to both procedural and substantive questions.

15. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have had to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the band of reasonable responses test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

16. Also in relation to the issue of fairness under section 98(4), I have in addition taken into account the ACAS Code of Practice on Disciplinary and Grievance Procedures, although, of course, I have borne in mind that whether somebody complies or doesn't comply with that Code isn't determinative of fairness. You can have somebody who complies with the Code but still dismisses unfairly and somebody who doesn't comply with the Code but still dismisses fairly.

17. Most of the relevant facts are not in dispute. I emphasise the word "*relevant*". There has been a great deal of evidence on both sides that in my view is completely irrelevant to my decision. The respondent, through counsel, has been

at pains to emphasise that this is not a misconduct case and that that is not how the respondent puts its case. And yet most of Mr Shelvey's witness statement was taken up describing the claimant's supposed misdemeanours going back to 2013 to 2014, only for Mr Shelvey to confrim, in his oral evidence, that these were not actually the reasons for his decision to dismiss the claimant. The claimant has to an extent in her witness statement retaliated in kind.

18. The respondent's case is that the decision to dismiss the claimant was made in late October/November 2017 after a key member of staff called Mr Elliott resigned.

19. The named respondent, the claimant's employer, was one of a pair of very closely entwined companies and in practice many employees – including, as I understand it, the claimant herself – did work for both of those companies. The other company is called East Midlands Fabrications, and I will abbreviate that to EMF as the parties have done.

20. Mr Elliott was a key member of staff for EMF. There is no dispute that that company could not operate without someone doing his job, although to the extent the respondent is suggesting that without Mr Elliott himself the company would necessarily go under, I don't accept that.

21. I do accept, though, that if Mr Elliott left it might be difficult to find an adequate replacement for him and that Mr Shelvey genuinely thought that without Mr Elliott, the future of EMF was threatened. I note that earlier in the year, Mr Shelvey had explored the possibility of closing down EMF and although he decided not to do so, this does show that EMF was not in the best of health in 2017.

22. Earlier in 2017, in June, Mr Elliott's deputy, a man called Mr Fletcher, had left / resigned. On the basis of the whole of the evidence that's before me, but in particular a signed note from Mr Fletcher, which has been referred to as a statement and is in the hearing bundle at page 151, it appears that he left primarily because he was offered what he saw as a better job elsewhere, but that a contributing factor, perhaps a reason why he felt that the job elsewhere was better, was his perception that the claimant had had a bad attitude towards him and Mr Elliott and had made their lives difficult.

23. Mr Fletcher was not replaced. Given it's not the respondent's case that the claimant was dismissed for misconduct, e.g. for actually having a bad attitude and/or making the lives of colleagues difficult, and that the decision to dismiss was not taken because Mr Fletcher resigned and wasn't taken until Mr Elliott resigned 4 months or so later, the potentially important thing about Mr Fletcher's departure from my point of view is the fact that he was not replaced. This meant there was no one on hand to take over from Mr Elliott if and when he did leave.

24. The respondent's case, as advanced in submissions by counsel on its behalf, is that Mr Elliott's resignation meant the whole future of EMF was threatened and, because of the close relationship between EMF and the respondent, that this, in turn, threatened the whole future of the respondent. According to the respondent, even though Mr Elliott was persuaded to stay with the respondent indefinitely until a replacement for him could be recruited and he was persuaded to stay at a time when he didn't know the claimant was going to be dismissed,

his employment was – using Mr Shelvey's phrase – on borrowed time. The respondent's case building on from that is to the effect that: Mr Shelvey reasonably believed the only way to prevent Mr Elliott from leaving was to dismiss the claimant; and that that was, basically, why she was dismissed; in other words, that it was a case, he thought, of him having to choose between two employees and that it was within the band of reasonable responses for the respondent to choose to dismiss the claimant instead of letting Mr Elliott go.

25. I am prepared to accept that if the respondent's choice really had been to dismiss the claimant or to have Mr Elliott leave the company (and/or if the respondent had reasonably believed this was so) it would have been reasonable – if appropriate investigatory and procedural steps had been taken, which I shall come on to in a moment – to dismiss the claimant. Apart from anything else, and whoever's fault it was, Mr Shelvey was finding the claimant difficult to work with in 2017 and more to the point, I am not about to second-guess the respondent's business decision that Mr Elliott was more valuable to EMF than the claimant was to the respondent.

26. I have very considerable doubts as to whether Mr Shelvey really did decide to dismiss because he thought it was a question of getting rid of the claimant or losing Mr Elliott, but for present purposes I shall assume that that was the reason. If I make that assumption I accept that this constitutes some other substantial reason under ERA section 98 and therefore that there was a potentially fair reason for dismissal.

27. I have already decided that the dismissal was unfair under section 98(4) in any event, because of procedural failings, so the issue I am mainly looking at now is the Polkey issue. I could also characterise what I am looking at as whether this was a substantively unfair, as well as a procedurally unfair, dismissal. But I don't think the always slightly murky distinction between substantive and procedural fairness is a necessary or even helpful one for me to seek to draw in the present case.

28. What I ask myself is: what did Mr Shelvey know of Mr Elliott's state of mind at the relevant time?

    28.1 First, he knew Mr Elliott had resigned before, albeit a few years previously, citing the claimant as part of his reasoning for resigning, but that, notwithstanding this, he had been persuaded to stay on and had stayed on.

    28.2 He also knew that Mr Elliott had worked with the claimant from September 2011, so however bad his relationship with her supposedly was from his point of view, it was not so bad as to prevent them from tolerating each other for more than 6 years at the point of resignation.

    28.3 Thirdly, Mr Shelvey knew that Mr Elliott did not have another job to go to and was prepared to stay with the company seemingly indefinitely, unless and until a replacement for him was recruited, and that he was willing to stay notwithstanding the fact that, so far as he was concerned, the claimant was also staying on.

    28.4 Fourthly, I also accept Mr Elliott had told Mr Shelvey that the claimant was the main factor in his decision to leave.

29. As already mentioned, the respondent's case is to the effect that the claimant was dismissed to secure the continued employment of Mr Elliott. In my view any reasonable employer who thinks they may be in the inherently difficult situation where they have to choose between two employees of long standing, where one has resigned citing the other as the reason for the resignation, will take at the very least the following steps: first, investigating whether the choice really has to be made. Does the employee who has resigned really mean it? Is there any way in which the relationship between the two could be repaired, perhaps by mediation or something like that? Would the employee who has resigned actually be satisfied with something less than the drastic option of dismissing the other employee, for example for some kind of disciplinary action short of dismissal to be taken against that other employee?

30. Another step that needs to be taken [i.e. that any reasonable employer would take] is investigating whether dismissing the other employee is actually what the employee who has resigned wants and whether it would be effective. For example, they could be asked, "If we were to dismiss the other employee would that make you change your mind about resigning?" – something as basic as that.

31. The third step which, in my view, any reasonable employer is going to take is to go through the procedural steps which I have already outlined. If, after reasonably investigating the matter, the employer thinks, provisionally, that it really is a stark choice between losing one or other of the two employees, the reasonable employer then has, as a minimum, to take these steps before making a final decision: writing to the employee they have provisionally decided to dismiss to explain the situation; having a meeting with them to discuss the situation; giving them an opportunity to put their point of view forward.

32. Even though the respondent is a small company, so far as I am concerned doing all of that is the minimum requirement of the band of reasonable responses. If the respondent were larger, they would have to take a great deal more steps. They would have to, to start with, comply with the ACAS code (what I have just outlined doesn't actually comply with the ACAS code, for example there is no appeal). That's really a bare minimum. But the respondent did none of it.

33. Further, on the evidence before me I am not satisfied that the respondent was actually choosing between dismissing the claimant or losing Mr Elliott. There is no evidence before me of any investigations of the kind I have described and there is no evidence at all from Mr Elliott, let alone the live witness evidence which could be challenged in cross-examination that I would expect the respondent to have advanced in support of its argument to the effect that he would have been satisfied with nothing other than the dismissal of the claimant. The burden of proof in relation to the Polkey issue is on the respondent. It has not discharged that burden. I am not satisfied on the evidence that is before me that there is any significant chance that if the claimant was not dismissed at the time and in the manner she was dismissed she would, in time, have been fairly dismissed in any event. Accordingly, this was an unfair dismissal and there is no Polkey reduction.

34. I turn to the other issue: the ACAS uplift. There was a failure to comply with the ACAS code. I have already said it was a wholesale failure. I see no point in going through the ACAS code point by point and saying this wasn't done and that wasn't done, because pretty much none of the ACAS code was followed.

35. Was it an unreasonable failure to comply with the ACAS code? I am afraid I think it was. It may not have been a wilful breach of the ACAS code. But I am quite surprised that in this day of age any employer thinks it's okay simply, without warning, to get an employee of nearly 16 years' standing into a room and say to her, "Terribly sorry; you're dismissed; that's all". It can't be a reasonable breach of the Code. Even if the employer had taken advice – and, as I say, all that I know is that the respondent got advice and after getting advice did what it did – I don't know whether the advice was qualified in any way. For example, the advice might have been, "You can do this, but you risk an unfair dismissal claim if you do." I know none of that. Privilege is not waived. I am not prepared to assume that the respondent was advised, "If you do this you will be absolutely fine". And even if that had been the advice of a firm of solicitors, that advice would in my view be negligent advice and if the respondent is punished for following such advice, it has its remedy against the negligent advisers.

36. There was an unreasonable failure to follow the ACAS code. If there is an unreasonable failure to follow the ACAS code, it would take something quite unusual for me not to be satisfied that it would be just and equitable to uplift compensation to some extent under section 207A. The real question, then, is: what uplift? I agree with counsel that this is not a 25 percent case for broadly the reasons that he gave in submissions. It's not a 25 percent case because that has to be reserved for the worst examples of failure to comply with the ACAS code. Here you have got a very bad example of failure to comply with the ACAS code in terms of the extent of non-compliance, but you have a small company and one that has taken advice, albeit with all of the caveats and reservations I have raised in relation to that advice. I am, though, satisfied that this was not a wilful breach of the Code, of the kind where an employer says to itself, "I know what we should do in relation to this employee but I just can't be bothered". That would be a 25 percent case and it's not that.

37. But, as I have already said, there is a rather extraordinary total failure to comply with the most basic precepts of fairness and to comply with the ACAS code in any way. So it is not a 5 percent case either. There is no science to this, really. To an extent it may sound like I am plucking a figure out of the air and to an extent it is a sort of educated guess process, but the figure I have plumped for is 15 percent. This reflects the severity of the breaches of the ACAS code, but also the fact that this was not a wilful, defiant breach by a large company that knew very well what it should do and just decided for no good reason not to do it.

EMPLOYMMENT JUDGE CAMP

14 November 2018

Sent to the parties on:

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For the Tribunal:

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