EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102051/2017

Held in Glasgow on 27 April 2018

Employment Judge: Amanda Jones (sitting alone)

David McQuade	**Claimant** **Represented by:** **Ms Laura Simpson - Solicitor**
Aspen Solutions Limited	**Respondent** **Represented by:** **Ms Julie Barnett - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent, having conceded that the claimant was unfairly dismissed, is ordered to pay to the claimant the sum of Five Thousand, Eight Hundred and Thirteen Pounds and Twenty Five Pence (£5,813.25) as compensation for unfair dismissal, being a basic award of Two Thousand, Three Hundred and Ninety Five Pounds (£2,395) and a compensatory award of Three Thousand, Four Hundred and Eighteen Pounds and Twenty Five Pence (£3,418.25 net.

REASONS

Introduction

1. The claimant initially lodged a claim of unlawful deduction from wages. He subsequently sought to amend that claim to include a claim of unfair dismissal. That application was granted following a Hearing before Employment Judge Wiseman on 13 September 2017.

2. At the commencement of the Hearing, the claimant's representative indicated that the unlawful deduction of wages claim had been resolved.

Issues to be determined

3. The respondent conceded in its notice of appearance that the claimant had been unfairly dismissed on 21 March 2017. However, the respondent's position was that the claimant had contributed to his dismissal and that had a fair procedure been followed, the claimant would have been dismissed in any event. The respondent's position was that the claimant should not be awarded any compensation.

4. The claimant had already given notice at the time of his dismissal and was due to end his employment with the respondent on 17 April 2017. The claimant was seeking a basic award and a compensatory award in respect of the balance of his notice pay and pay in lieu of holiday entitlement which would have accrued had he been allowed to work for the entirety of his notice period.

5. The issue to be determined was therefore what, if any compensation, should be awarded to the claimant in respect of his unfair dismissal. In addition, it was necessary to consider whether any such compensation should be adjusted either by way of uplift or reduction for either party's failure to follow

the ACAS code of practice on disciplinary and grievance procedures 2015 ('the ACAS Code').

Witnesses

6. The Tribunal heard evidence from the claimant and his former line manager, Brian Smillie. The Tribunal also heard from Paul Harkins, the respondent's Finance Director who is the son of the Managing Director.

Findings in Fact

7. The Tribunal made the following relevant findings in fact:-

8. The claimant was employed by the respondent as a Business Development Manager. The claimant signed a new contract on 28 July 2016, which set out his terms and conditions of employment.

9. The claimant was paid an average weekly wage of £749.62 net.

10. Although the contract referred to a company handbook, this was not produced to the Tribunal.

11. No reference during the proceedings was made by either party to any policy dealing with IT use.

12. The claimant's contract indicated that company property or equipment should not be taken from Company premises at any time and that he was not permitted to take work home with him for any reason. Notwithstanding this provision, the Tribunal heard that the claimant regularly worked at home and took his laptop with him, all with the respondent's consent.

13. The claimant was issued with a new laptop in July 2014. The claimant paid a contribution towards this laptop as he wished to have the most up to date model which cost more than the laptops being issued to other staff.

14. The claimant used the laptop for personal purposes and the respondent was aware of this.

15. The claimant submitted a letter of resignation dated 17 March 2017, giving a month's notice. The claimant expected to work his notice and to end his employment on 17 April. The claimant gave this letter to his line manager and indicated that he intended to join a competitor. He was asked to go home.

16. Thereafter the claimant was advised to work from the Cumbernauld office, which was further away from his home than his normal place of work and was required to carry out more menial tasks. The claimant was no longer able to access the respondent's systems.

17. The day before the claimant submitted his notice, he removed documents from his laptop. He did not inform the respondent that he had done so. The claimant's laptop was taken from him when he handed in his notice.

18. On 20 March, the claimant had a conversation with the respondent's IT manager, when he asked if he was looking at his laptop. The claimant said to the IT manager something along the lines of 'good luck with that if you are looking for something'.

19. On 21 March, when the claimant attended work he was asked to a meeting with Colleen Rae, the respondent's then Sales Director and John Clark, the Office Manager who is still employed by the respondent.

20. The claimant was handed a letter (pp34-35) dismissing him with immediate effect. The letter stated that the claimant was being dismissed for gross misconduct. The letter said this conduct was 'Specifically, you have copied on 16 March 2017 at 17.23 various company files containing financial and other customer information onto a Philips USB flash drive whilst deleting other files and folders from your hard drive.'

21. The claimant asked for further details of the information he was alleged to have taken, but was told by Colleen Rae, she didn't have to go into that. The claimant indicated that it was his wedding photos he had copied, but was told that it was not up for discussion.

22. The decision to dismiss the claimant was taken by the Managing Director Vincent Harkins and Colleen Rae.

23. The claimant was offered the right to appeal although the letter dismissing him did not specify who would deal with any appeal. The claimant was aware that the Managing Director had been involved in the decision to dismiss him.

24. The claimant did not appeal against his dismissal.

25. The claimant commenced work with the competitor the day after his dismissal and was paid more in that role than he had been paid while with the respondent.

26. Following the claimant's dismissal, his new employer wrote to the respondent indicating that he had seen the USB which had been used by the claimant to transfer data. He stated (p47), 'Whilst there were a couple [of files] that had what might be deemed company information, it was superfluous, old or of no value, ie no data dump you would expect from an employee looking to capture customer lists, or data of value from a company.'

27. Subsequent to his dismissal, the claimant contacted clients of the respondent.

Observations on the evidence

28. No explanation was given as to why Vincent Harkins did not give evidence about the decision to dismiss the claimant. The Tribunal did hear that Colleen Rae no longer worked for the respondent, but the Tribunal was surprised that neither Vincent Harkins nor John Clark gave evidence about the circumstances surrounding the claimant's dismissal. In addition, no direct

evidence was heard regarding the steps taken by the respondent to investigate the claimant's computer use.

29. Paul Harkins gave evidence that he was on honeymoon at the time of the claimant's resignation and subsequent dismissal. The Tribunal felt that his evidence was of limited value. While he indicated that he spoke to his father by phone on a number of occasions during his honeymoon, he was unable to give evidence about the circumstances or decision making leading up to the claimant's dismissal. He could not say whether any consideration had been given to suspending the claimant, or placing him on garden leave as an alternative to immediate dismissal.

30. The Tribunal found that the witnesses who did give evidence were on the whole credible and reliable.

Submissions

31. During submissions, the parties referred the Tribunal to various authorities - *Software 2000 v Andrews and others 2007* IRLR 568; *Montracon Ltd v Hardcastle EAT/307/12/JOJ; Optikinetics Ltd v Whooley EAT/1257/97; Parker Foundry Ltd v Slack 1991 WL 837959 and Lemonious v Church Commissioners UK EAT/253/12/KN*.

32. The respondent's position was that there was a 100% chance that the claimant would have been dismissed had a fair procedure been followed. In addition, the respondent's position was that the claimant was 100% to blame for his dismissal. The respondent reminded the Tribunal not take into account the respondent's actions in unfairly dismissing the claimant when considering whether the claimant had contributed to his dismissal.

33. It was submitted on behalf of the respondent that the employer had a reasonable belief that the claimant had committed gross misconduct and that there had been evidence available to suggest that the claimant had been collating evidence with a view to misusing it. The respondent also argued that

the claimant changed his position in relation to what information he had downloaded. The respondent argued that neither party had complied with the ACAS Code and therefore there should be no uplift in compensation.

34. The claimant's position was that there should be no reduction in compensation. The claimant's position was that the respondent had acted unreasonably and without any proper investigation in dismissing the claimant. In addition, the claimant's position was that there should be no reduction in compensation as a result of the claimant's failure to pursue an appeal against his dismissal. It was argued that it was clear that such an appeal would have been futile. The claimant's position was essentially that the respondent sought to justify its decision to dismiss him by relying on events subsequent to his dismissal and that these should not be taken into account when considering the dismissal itself. The claimant argued that there were no reasonable grounds on which to conclude that the claimant was guilty of misconduct and had he been given the opportunity, he would have been able to explain what he had done with the laptop and that it was no unusual to have a USB plugged into and that he had never been questioned before in that regard. Finally the claimant sought an uplift of the compensatory award for the respondent's failure to follow the ACAS code.

Relevant law

35. Sections 119 and 123 of the Employment Rights Act 1996 (ERA 1996) set out the bases on which a basic and compensatory award should be calculated. Both awards may be reduced in circumstances where a Tribunal finds that the claimant contributed to his dismissal. In the case of the basic award that is provided for in section 122(2) and in the case of the compensatory award in section 123(6) of ERA 1996.

36. In addition, a Tribunal may reduce compensation awarded to a claimant where it finds that the claimant would have been dismissed had a fair procedure been followed, on the basis of *Polkey v AE Dayton Services Limited [1988] ICR 142* (otherwise known as the *Polkey* principle)

37. Further, the ACAS code provides that where an employer or employee fails to follow the ACAS code and the Tribunal considers that the failure was unreasonable, it may increase or reduce the amount of compensation by no more than 25% if it considers it just and equitable to do so (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992).

Discussion and decision

38. The Tribunal considered the evidence, the parties' submissions, the documents and the authorities to which it was referred carefully.

39. The respondent conceded that the claimant was unfairly dismissed. Leaving aside for the moment the issue of whether the basic award should be reduced under section 122(2), the claimant would be entitled to a basic award of £2,395. This is calculated on the basis of the claimant having 5 years' service and earning over the statutory cap. Therefore 5 x £479 = £2,395.

40. Turning to the compensatory award, the claimant's losses in terms of the remainder of his notice period were calculated as £2,848.54 net. This was on the basis of the claimant having 3 weeks and 4 days remaining of his notice period.

    a. 3 weeks x weekly wage of £749.62 net =£2,248.86

    b. 4 days x daily rate of £149.92 net = £599.68 net

41. The Tribunal did not think it appropriate to make an award in respect of holiday entitlement accrued during the remaining notice period. In the present circumstances, given that the respondent did not wish the claimant to perform his normal duties during his notice, the Tribunal was of the view that the claimant would be likely to have taken or been required to take any holidays remaining prior to the termination of his employment.

42. The Tribunal concluded that in downloading information the day before submitting his resignation, the claimant did not behave in a blameworthy manner. In particular, the Tribunal bore in mind that the claimant had made a contribution towards the purchase of his laptop, that the respondent was aware that he used it for personal purposes and took it home and that the claimant correctly expected it to be taken from him as soon as he advised the respondent that he was resigning and going to work for a competitor. In addition, the claimant had volunteered the information that he was going to a competitor and there was no policy or practice operated by the respondent which set out how the claimant should use his laptop.

43. On that basis, the Tribunal concluded that the claimant did not contribute to his dismissal.

44. The Tribunal also considered whether the claimant would have been dismissed had a fair procedure been followed. In this regard, the Tribunal was mindful that the respondent did not at any stage set out what information it alleged the claimant had downloaded or deleted. Indeed, even by the time of the Tribunal, it was clear that the respondent still did not know what, if any, confidential company information had been downloaded or deleted by the claimant. The claimant had admitted to inadvertently copying some company information but stated that it was not confidential information.

45. While the respondent referred to an investigation which was carried out, the only evidence the Tribunal heard was that an IT manager produced a report that there had been a USB stick in the claimant's laptop, that information had been transferred to it and that other information had been deleted. The claimant sought to advise the respondent what information had been transferred to the USB, but was told this 'wasn't open for discussion'. No effort was made by the respondent to listen to the claimant's version of events or give him an opportunity to respond to the letter of dismissal.

46. While it was noted that the dismissal letter gave the claimant the right to an appeal, the letter did not state who would deal with the appeal. In addition,

the claimant was aware that the Managing Director had been involved in the decision to dismiss him. The letter of dismissal did not set out any details of who took the decision, but stated '..the *Company* (italics added) has taken the decision to terminate your employment for an act of gross misconduct without notice and without any warnings.' The letter then went on to state that the decision was because the claimant had copied files containing financial and other customer information, when the reality was that the respondent only had a suspicion that this was what the claimant had done.

47. The Tribunal concluded that had the respondent given the claimant an opportunity to provide his USB stick and explain what he had done, or taken other reasonable steps to investigate the matter, the claimant would not have been fairly dismissed. Therefore the Tribunal did not find it appropriate to make any reductions to compensation on the basis of *Polkey*.

48. The Tribunal then went on to consider whether the compensation should be reduced as a result of the claimant having failed to follow the appeal process. The Tribunal concluded that it was not unreasonable for the claimant to have failed to appeal the decision. So far as the claimant was aware, the Managing Director had been involved in the decision to dismiss him. The evidence before the Tribunal was that either the Managing Director, or his son, the Finance Director, would have dealt with an appeal. It seems to the Tribunal that the claimant was entitled to take the view that any appeal would have been futile. It was clear that the decision to dismiss was taken by the most senior person in the organisation, he was not willing to discuss the matter with the claimant and therefore it seems unlikely he would be willing to change his mind. Further, it seems very unlikely that his son, who was in a subordinate role in the organisation, would have been willing to overturn the decision to dismiss. Rather, it seemed to the Tribunal that the respondent simply wanted to dismiss the claimant and was not willing to listen to anything the claimant had to say.

49. Finally, the Tribunal was required to consider whether the compensatory award should be increased by reason of the failure of the respondent to follow

the ACAS Code. There was a total failure by the respondent to follow any procedure. The respondent failed to set out with any specification the exact allegations against the claimant (indeed the respondent stated that the claimant had copied certain information, when it could not have known that to be the case); the respondent failed to carry out a reasonable investigation; failed to convene a disciplinary hearing and failed to listen to the claimant when he sought to put forward his position.

50. However, the Tribunal is mindful that the respondent is a small employer with no in house HR function, and on that basis the Tribunal concludes that a 20% uplift in the compensatory award would be appropriate. That would increase the compensatory award to £3,418.25.

51. Therefore the respondent is ordered to pay to the claimant a basic award of £2,395 and a compensatory award of £3,418.25.

Employment Judge: A Jones
Date of Judgment: 05 June 2018
Entered in register: 12 June 2018
and copied to parties