Case Number 2501168/17

THE EMPLOYMENT TRIBUNALS

Claimant C

Respondent R

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 22nd & 23rd January 2018

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances

For Claimant: in person

For Respondent: Mr A Webster of Counsel

REASONS

1. Introduction and Issues

1.1. C, born 12th November 1967, was employed as an Administration Officer (AO) from 17th April 2000 . Her employment was terminated without notice on 6th June 2017. She presented her claim on 29th September 2017. Although the claim form only ticks the box for unfair dismissal , it contained all elements of a claim of wrongful dismissal save for the tick in the box " notice pay". I treated it as both.

1.2. The issues are:

1.2.1. What were the facts known to, or beliefs held by R which constituted the reason, or if more than one the principal reason, for dismissal?

1.2.2. Were they, as R alleges, related to C's conduct?

1.2.3. Did R act reasonably in all the circumstances of the case:

(a) in having reasonable grounds after reasonable investigation for its beliefs

(b) in following a fair procedure

(c) in treating that reason as sufficient to warrant dismissal ?

1.2.4. If R acted fairly substantively but not procedurally, what are the chances it would fairly have dismissed C if a fair procedure had been followed?

1.2.5. If the dismissal was unfair, has C caused or contributed to her dismissal by culpable and blameworthy conduct?

1.2.6. In the wrongful dismissal claim the issue is whether she was in fact guilty of gross misconduct.

2. Findings of Fact

2.1. I heard the evidence for R of the investigating officer (IO), the dismissing officer (DM) and the appeal officer (AM). I heard C' and read the statement of her union representative who was unable to attend in person due to her husband's ill-health.

2.2. Many departments of the Civil Service necessarily hold data in relation to members of the public. R refers to such people as "customers". Two" golden rules"

necessary to prevent customers' right to private life being infringed are (i) no officer of R should access their information unless there is a legitimate business need to do so and (ii) even if there is a legitimate business need, no officer should access information about personal acquaintances. C freely accepted during the whole investigation and disciplinary process, and in this hearing, she knew these rules and appreciated the gravity of breaching them.

2.3. R acknowledged there is an element of judgment in whether there is a legitimate business need to access a customer record and if an AO honestly and reasonably believes there was a business need that would be a good defence to a charge of misconduct. Similarly in the course of accessing records of scores of customers, who at the point of access are faceless names, it is possible an AO will access information about an acquaintance without realising she is doing so. That too would be a good defence, not just mitigation.

2.4. C has been married to Mr C since 1990. They have two grown up children. Mr C's brother , B, aged about 40 had a relationship for about 10 years, as C says "on and off" with X . They had three children, the eldest boy Child 1 who is now 18, Child 2 , a girl born 26 July 2005 (a date of some significance) and Child 3 , a girl, born 10 December 2007. At all material times Mr C and B worked full time.

2.5. X has never been successful in looking after her children. From a very early age Child 1 was brought up by the mother of Mr C and B and her husband (now deceased).. X has a history of abuse of controlled drugs. In the seven months she had Child 2 following her birth she neglected her to such an extent social services had to intervene. X was not allowed to look after her but B was given custody after intervention by the courts. X was allowed to see Child 2 at a contact centre for two hours every two weeks but she rarely turned up so the court stopped her access . For some years both girls lived and slept at C's house They now sleep at B's house but Mr C collects them early every morning,. takes them to school , collects them from school and takes them back to B at night.

2.6. Child 3 was born in prison. After X was released she had custody of Child 3 for about 18 months. X took an overdose and Child 3 was taken from her. She challenged B's paternity so a DNA test was necessary to prove he was the father. He was given custody of Child 3 from about 2009 but in practice she was brought up largely by C and Mr C and is known by their surname .

2.7. At about that time X moved to the North-West of England . C thought she was in the Manchester area. Around Christmas 2011 X married and sent a card to Child 1 with wedding pictures saying "*this is your new dad'* which Child 1 threw away.

2.8. I asked C whether she ever feared X might attempt to regain contact with Child 2 and Child 3. She said X had put the girls in danger once and C was not prepared to let her do so again. She added she feared X could " snatch" the girls. Just before C's appeal against dismissal, she discovered X had been trying to make contact with Child 2 via her school by pretending to be C .

2.9. Until mid 2016 C worked 17 weeks of the year so she could care for Children 2 and 3. What she and Mr C have done for them is more than praiseworthy. C

increased her hours to 4 weekdays and did overtime frequently on Saturdays and Sundays. She worked in an office with about 80 to 90 employees which deals with work from a large area not confined to North East England. C dealt with various types of work but latterly her main involvement was with a type which involves communications being received from third parties, such as local authorities, to whom payments of benefits awarded to customers to cover such things as rent are made direct . This generates from them post, emails and telephone queries often received without the National Insurance (NI) number of the customer or sometimes not even their full name. This is called "unindexed post" An AO must then search records to try and marry it with a particular customer .

2.10. There are over 80 million persons with NI numbers recorded on R's database. Of those only one other shares the name of X. Even her surname only belongs to one in every 150,000 people. The claimant's case is that she accessed X's records only to deal either with unindexed post or telephone queries. All R's witnesses said if that were the case one would expect to see, following the accessing of X's information, a record of some step taken in relation to a benefit X was receiving . C says that would be expected 7 out of 10 times but AM said in 99% of cases. Some of the evidence was confusing in that it was couched in terms and abbreviations known to the witnesses but not me or most other people. For example, " WAR" is a "Work Available Report" and SAR is a record kept by individual employees of what they do. One would normally expect to find somewhere some notes of actions taken even if there was no change in benefit or third party deductions . None were found following the accessing of X's records. On one print out concerning X, entries by other AO's are there chronologically but there are gaps where one would expect to see something from C if her explanation for accessing X's record was correct. As for the first " golden rule", if there was a legitimate reason for accessing X's records , the IO , DM , AM and I have been unable to find evidence of such reason. The second "golden rule" is even more important in this case.

2.11. The first access on 28 July 2015 was made by C searching for X **by name**. Page 232 shows the times of four accesses in rapid succession on that day The database can only be accessed from a building used by R and automatically shows the operator number . There is no doubt all the accesses were by C . Having found 2 people with X's name, C would have guessed which was likely to be the children's mother probably from the date of birth alone . She then went into three other screens but the sum total of information she would have obtained about X was where she was living at the time, the type and amount of benefit she was receiving and her date of birth. On the first access an entry refers to Preston office. At that time it is believed X was living in Blackpool which may come under the remit of that office.

2.12. The IO, DM , AM and I found C's explanation for this unbelievable . It was that because she knew X had married , she assumed she had a different surname and did not realise that when she searched against her maiden name it could relate to the mother of Children 2 and 3 . C never knew X's married name but even if she did she would not forget her unusual maiden name as she had been the cause of such trouble for the claimant's family.

2.13. C next accessed X's record on 25 January 2016 . She did not have to search for the NI number because she had it. Again, if there were any legitimate reason to

access the record, there is no note of any follow-up action. By this time X was living in Middlesbrough. The third access on 24 July 2016 was broadly similar The statistical chances of 3 enquiries in 12 months all about X coming to C when she is one of about 80 people at that office are very remote.

2.14. A complaint was received from X at page 220 on 28 November 2016. She named C as the person against whom it was made but gave the wrong office address. She accused C of looking up her records and telling people in her family personal information . When IO spoke with X by telephone she refused to name these family members and this accusation against C was rightly not progressed by IO. X says in her email ' *I know this lady as she used to be a family member around 10 years ago*". In her telephone conversation with IO she said C was spreading information about her claiming a benefit only paid to disabled people and doing so in the Grangetown area where X used to live and B and his mother still do . X at that time was living about 10 miles away in Thornaby. Something had reached her ears to make X complain. Although R did not include an allegation against C of spreading information about X , C must have told someone in the wider family and that information " got back to " X. C's case is that X had resented C **for years** due to her involvement in preventing X , as X saw it, having custody of the children . However, C could not give any explanation for X only to complain when she did in late 2016 .

2.15. When IO commenced his investigation on 22 December 2016 a fourth access had not yet happened . C yet again accessed X's information on 19 January 2017 before she knew she was under investigation. The claimant says she did not know X was back in the Teesside area until IO told her when she was interviewed on 30 January 2017.I cannot accept that. At the interview C recalled accessing X's records, she says on 25 January 2017. C refers to a WAR are at page 279. X's benefits were automatically uprated on 24 January 2017 . The WAR would then tell the deductions team to uprate any deductions . C says she did on 25 January 2017 as shown by a **manuscript line** drawn by C through X's entry on page 279 .That proves nothing. R cannot find X's deductions were ever uprated on 25 January by C or anyone else. Even if C did, she cannot explain why she accessed X's records on 19 January. When she did C would have seen an entry on another screen that a person with her own surname, who R says is Child 1, was getting a carer allowance for X .

2.16. From the date of the complaint to the date investigation started on 22 December, there was some delay first due to R not taking all complaints forward if they are obviously spurious, which this was not. It is then passed to IO's department where it needs thorough investigation on a massive computer database to see whether there is anything in the complaint, before the person accused is seen . IO saw C on 30 January. His investigation had found C had on four occasions 28 July 2015, 25 January 2016, 24 July 2016 and 19th January 2017 accessed X's records. None of C's explanations for doing so unintentionally were remotely believable. The report recommended disciplinary action.

2.17. The first decision-maker appointed was a lady "acting up" to that position. IO's report was first sent to C on 16 March 2017 under cover of a letter inviting her to a disciplinary hearing .Partly due to annual leave, delays occurred. Then problems arose with regard to the lady not being able to continue as the decision-maker when her acting up period ended. It is plain from the documents a blunder on the part of

R caused this whole matter to, metaphorically, sit on someone's desk for several weeks When it was resurrected, a virtually identical letter to that sent to C on 16 March was sent on 17 May this time with DM as the decision-maker . The claimant was given ample warning of the meeting which was to take place on 25 May. She was as before provided with all the necessary information fully to answer the charges clearly set out . She asked for and was given a postponement.

2.18. The disciplinary meeting took place on 30 May 2017. The claimant was accompanied by a trade union representative. Her defence was that there was a business need to access X's records and she did not realise at the time she knew that individual. DM could no more believe this than IO had. Because the claimant denied any intentional wrongdoing, she offered no "mitigation". On 6 June DM informed C she was dismissed for gross misconduct effective immediately. C appealed on 14 June. The appeal meeting was on 6 July and AM upheld the decision for exactly the same reasons.

2.19. The claim form alleges procedural unfairness. I was unable to see any basis for that . When I asked C to explain to me how she thought any of the procedure was unfair she said in between March and May she had thought the allegations against her had died a death. There was no basis for that. As Mr Webster said in closing, there was delay but it caused no prejudice to C. She was not suspended at any time but I do not see why she should have been. Her performance in the job had been impeccable for 17 years. She was alleged to have done something she was highly unlikely to repeat in respect of any other customer's records as she had no motive to pry into the information of any other customer. In short, I find no fault in the thoroughness of the investigation and no procedural fault at any other step of the process. The claimant says she had too little time to prepare for the disciplinary hearing. Even if that were so , which I do not accept, it was cured by the appeal.

3. The Relevant Law

3.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."

The Reason
3.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause it to dismiss the employee. The reason must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal.

Fairness
3.3. Section 98(4) of the Act says:

"Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

Reasonable belief and investigation
3.4. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did take place. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.

3.5. In A v B [2003] IRLR 405 Elias J (as he then was) in the EAT said:
"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

Whether an employer has carried out such investigation as is reasonable in all the circumstances also involves a consideration of any delays. In certain circumstances, a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. ***Where the consequence of the delay is that the employee is or might be prejudiced****, for example because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of the delay on fading memories, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process.*

Fair procedure
3.6. In Polkey v AE Dayton Lord Bridge of Harwich said :

"*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:*
(b) that he had been guilty of misconduct….
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient

reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

3.7. As explained in Khanum v Mid Glamorgan Area Health Authority, there are three basic requirements of natural justice which have to be complied with during a disciplinary process firstly, the person should know the nature of the accusation against her; secondly, she should be given an opportunity to state her case; and thirdly, the decision maker should act in good faith. The employer must specify the allegation and the employee must be informed of it. Strouthos v London Underground held the employee should only be found guilty of disciplinary offences with which she has been charged. An employee found guilty of and sentenced for something that had not been charged will not have received fair treatment.

Fair Sanction

3.8. Ladbroke Racing v Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach, including the degree of its gravity. However, employers are entitled to place weight on matters important to them and have a "rule" certain acts will usually lead to dismissal , see Meyer Dunmore International v Rodgers but even an admission of some misconduct will not automatically make dismissal fair as explained in Whitbread Plc v Hall [2001] IRLR 275. .

3.9. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process, so that if she persistently lies, that can be a factor in deciding to dismiss her. Most if not all reasonable employers would accept it is never too late to tell the truth but sometimes harm done by an employee being " economical with the truth" cannot be undone. When considering the sanction, previous good character and employment record is always a relevant mitigating factor.

Appeals

3.10 Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

Band of Reasonableness

3.11. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt) held I must not substitute my

own view for that of the employer unless its view falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson put it thus:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, "Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing", because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

Wrongful Dismissal
3.12. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. A paradigm example of gross misconduct is **wilful** failure to obey lawful and reasonable instructions. Such instructions may be in the form standing orders made known clearly as essential for employees to follow. The main differences between unfair and wrongful dismissal are that in the latter I may substitute my view for the employer's and take into account matters the employer did not know about at the time (see Boston Deep Sea Fishing Co –v-Ansell) Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful .

4. Conclusions

4.1. The answers to the unfair dismissal issues are clear . The facts known to, and beliefs held by. R which constituted the reason for dismissal are that the claimant on four occasions accessed X's records for no legitimate business reason and knowing X was the same person as the mother of the three children she had helped bring up. That reason related to C's conduct. R acted reasonably in all the circumstances of the case in having reasonable grounds after a reasonable investigation for its genuine beliefs, in following a fair procedure and in treating that reason as sufficient to warrant dismissal.

4.2. On the wrongful dismissal claim, I find on a balance of probability that C, for no legitimate business reason and knowing who X was, on four occasions accessed her records wilfully breaching two rules she knew applied to her thus deliberately failing to obey lawful and reasonable instructions. This was gross misconduct.

4.3 On that basis both claims fail and I agree with Mr Webster I **need** not speculate on where the real truth lies. However, I will because it explains and fortifies the conclusions I have drawn. There are two questions I feel deserve answers. First, why would a lady of long and impeccable service who has shown her good character by her selfless dedication to caring for three children not her own, behave in this way? Second, why would she not admit guilt either in the internal process or here?

4.4. On the first question, C did not, and never intended to , cause X any harm, for example by interfering with her benefits. The fear X may “snatch” Child 2 and/or Child 3 has been with her for years but lessened when she knew X was out of the area. She first checked up on X’s whereabouts within 2 days of Child 2’s birthday in 2015, a time when her fears would peak, and found she was still in the Northwest. I believe C heard on the grapevine, through family or friends, X had returned to Teesside possibly as early as the very end of 2015. In early 2016 she checked again and found X had come back to Middlesbrough . In mid 2016, again within 2 days of Child 2’s birthday, she checked again. Her sole motivation in my view was to safeguard the children, and knowing where X was necessary to that end.

4.5. On the second question the clue is in her claim form. C refers a decision of the Employment Appeal Tribunal, which she found by searching on the internet . The President, Mrs Justice Simler, dealt with an appeal from a judgment of an Employment Judge that a lady I will call M was unfairly dismissed by the same employer, R, because no reasonable employer would have dismissed in the circumstances of the case but that she had contributed to her dismissal by culpable and blameworthy conduct assessed at 75 per cent. As in this case, M was aware of all relevant rules, had an unblemished disciplinary record over 15 years of service, but significant personal issues, including financial and mental health problems, She had rented a room in her home to a tenant, L. who defaulted on rent payment which put M in a difficult financial position. She accessed L's personal information, discovered he had been in receipt of housing benefit then, posing as L, rang a local authority to obtain confirmation housing benefit had been paid. She emailed asking the local authority to investigate the situation. L made a complaint about M’s conduct. There was an investigation meeting. M made no attempt to conceal what she had done saying her actions were out of character and out of desperation and explained her personal and financial situation. At a disciplinary hearing M was candid in her admissions, recognising what she did was wrong.. The dismissing officer sought advice from HR after the disciplinary hearing. The advice was the offence "would seem to fit within Section 1.1 of the matrix", so she dismissed. An appeal confirmed that decision. The Employment Judge found R was plainly entitled to conclude M had committed acts of misconduct but very significant mitigating factors, all known to R, were ignored. R’s approach was summed up in the advice from HR which demonstrated a blinkered approach that because M’s actions were categorised as gross misconduct which could only be excused if there was violence or threats of violence dismissal should follow automatically . In the Employment Judge’s view R relied too rigidly on the matrix in their policy and failed to look at all the circumstances in the round as any reasonable employer would have done.

4.6. Mrs Justice Simler found the Employment Judge erred in law in making a finding of fact for which there was no evidence and in relying on matters that had not been mentioned or treated as relevant during the course of the hearing. Her Ladyship allowed the appeal but did not substitute a finding of fair dismissal. Rather she remitted the case for rehearing by a different Employment Judge. The case does not establish any new legal principle about unfair dismissal but tells Employment Judges what they should not do.

4.7. I asked C in clear terms what she thought would have happened if she had admitted guilt but gone on to say she only did it to protect the children . Her answer

was R would have dismissed her anyway because that is how they deal with gross misconduct cases. If in that hypothetical situation, R had dismissed my decision would have been similar to that of the Employment Judge in M's case but hopefully without making the same errors. C's mitigation is infinitely stronger than M's. In this case R referred to the same rules and the "matrix". Had R dismissed ignoring the mitigation, I would have cited Ladbroke Racing v Arnott and Whitbread Plc v Hall and probably found dismissal was outside the band of reasonable responses.

4.8. However, that hypothetical situation is not what happened either at the internal stages or here. Rightly or wrongly, but I find genuinely, C believed telling the truth would seal her fate. As she said to AM she would lose her job " *over the likes of her"* (meaning X) . British Leyland –v-Swift is no more than a reflection of what happens in any trial, civil or criminal, and in everyday life . If someone who has done wrong admits, explains and apologises, they deserve leniency. If they do not, no decision maker can be expected to afford it to them .

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T M GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 25th JANUARY 2018