EMPLOYMENT TRIBUNALS

Claimant: **Mrs Sarah Pearson**

Respondent: **Minster Law Solicitors**

Heard at: **Hull** **On:** **Friday 11 May 2018**

Before: **Employment Judge R S Drake**

Representation
Claimant: In Person
Respondent: Ms A Smith (Counsel)

JUDGMENT

1 The Claimant's complaint of unfair dismissal fails and is dismissed

2 The Claimant's complaint of breach of contract fails and is dismissed.

3 Because this decision was reserved and concluded after deliberation and is now promulgated in the absence of the parties, I have decided to exercise my power under Rule 62 to set out reasons in full as below

REASONS

Issues

1. I determine that the issues to be examined were as follows: -

1.1 Can the Respondents show what their reason was for dismissal of the Claimant?

1.2 Can the Respondents show they entertained a reasonable suspicion amounting, on the specific facts as found in this case, to belief in the guilt

of the Claimant of gross misconduct; thus, can they establish the fact of their belief, that they had in mind reasonable grounds upon which to sustain that belief, and that at the stage they formed that belief they had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

1.3 Can the Respondents show that the reason relied upon was a potentially fair reason for the purposes of Section 98(1) and (2) of the Employment Rights Act 1996 ("ERA").

1.4 Is the Tribunal satisfied that the Respondents acted reasonably in all the circumstances relying upon the reason demonstrated, if so proved, as being a sufficient reason in all the circumstances of such conclusion, taking into account their size and administrative resources having regard to the equity and substantial merits of the case for the purposes of Section 98(4) ERA.

2. If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason the Tribunal but is satisfied the dismissal was nonetheless unfair, it would have to determine whether the Claimant had contributed to any extent and if so to what extent to her dismissal, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. Though this was a live issue at the start of the hearing, I determined it ceased to be live once I reached the conclusions as set out below.

3. The standard of proof required is the usual civil law standard and thus that of a balance of probabilities.

<u>The Law</u>

4. The law applicable to this case is set out principally in Section 98 of the ERA is as follows:

"(1) In determining for the purposes of this Part whether 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 the dismissal and

(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…."

(2) A reason falls within this subsection if it

(a) ……..

(b) Relates to the conduct of the employee."

5. If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) Depends whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case."

6. In the event of a Claimant's complaint under Section 111 ERA being successful, a Tribunal is to consider Section 118 ERA as to what award it should make, either as a Basic Award under Section 119 to 122 and as a Compensatory Award under Section 123.

For the purposes of this case where the provisions of Section 119 most particularly apply, the provisions of Section 122(2) provide as follows:

(2) Where the Tribunal considers that any conduct of the Claimant before the dismissal….was such that it would be just and equitable to reduce or further reduce the amount of the Basic Award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

7. When considering making a Compensatory Award the provisions of Section 123(6) are to be considered by the Tribunal which provides as follows:

"(6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant it shall reduce the amount of the Compensatory Award by such proportion as it considers just and equitable having regard to that finding."

8. The Tribunal also takes into account the effects of the House of Lords decision in the case of **Polkey –v- A E Dayton Services Limited [1988]** confirming that where the sole question for the Tribunal was whether the employer acted reasonably at the time of dismissal, the Tribunal can take into account whether had the employer acted reasonably at the time it would have dismissed in any event, then this should be reflected in the level of compensation awarded if at all.

9. The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office and HSBC Bank –v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses

which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. one other literally) reasonable employer to act.

The Facts and Reasons for the findings thereof

10. The Tribunal made the following findings of fact based upon evidence that it heard from the Respondents' Head of Portal and Small Claims Ms Victoria Fear (the dismissing officer) and its Head of Product Performance Mr Marcus Taylor (who heard and dismissed the Claimant's appeal), and then from hearing the Claimant herself. The findings of fact relevant to the Tribunal's decision are as follows: -

10.1 The Claimant was employed by the Respondents at their offices in Wakefield and at the time of the termination of her employment by them had been engaged since 2010. At the time of dismissal, she held the post of Team Leader (leading a group of case handlers in a call centre) to which she was appointed in June 2016. This was a post of seniority and responsibility involving management of other employees and acting as an example of best practice, and thus being a role model. It carried with it express (as set out in several written Policies and Procedures) legitimate expectations as to behaviours and performance management at group and personal level

10.2 The Respondents are a Legal Practice regulated by the SRA and thus must comply with exceptionally high standards of external and internal practice not the least of which is Principle 6 of the SRA Code of Practice. I will not set out a statement of that Principle in full here but summarise it by saying that it requires that the totality of the Principles in the Code must be complied with by all persons engaged in an SRA regulated legal firm including employees to an extent dependent on their position.

10.3 There are conflicts at various points in the considerable volume of documentary (375 pages) and oral evidence before me. I prefer the accounts of what happened as corroborated by four independent witnesses interviewed by the Respondents and reviewed by Ms Fear during disciplinary proceedings and I prefer her account of what she concluded happened accordingly, because the Claimant's position changed in this aspect of her case at various stages and was characterised by at best inconsistency or at worst obfuscation and/or attempts to down play the significance of her actions

10.4 An accusation of bullying and harassment had been levelled at the Claimant by another subordinate employee Ms MA during a Grievance Procedure hearing on 31 August 2017. The complaint specifically cited an intimidating atmosphere being created by the Claimant using inappropriate foul language directed to and at Ms MA personally in the open and her being refused a toilet break whilst engaged in a client call on a particular date when she had made it known to the Claimant that she was unwell

with a urinary disorder. It was alleged that the Claimant twice refused permission for a break which led then, in the context of the strained relationship caused by the Claimant, to Ms MA having an accident at her desk and thus being exposed to serious indignity and humiliation, and her being removed from the workplace by her seat being wheeled away from its station by the Claimant. The Claimant sought in later disciplinary and appeal proceedings and today to deny or at best minimise this action.

10.5 However, the Claimant accepted she had used foul language and directed it at the Claimant on previous occasions in the open and had tried to foist responsibility for deciding whether Ms MA could take a toilet break onto Ms MA herself. The Tribunal prefers the account of the self-corroborating witnesses and of Ms Fear, and concludes that even if refusal was not express it was certainly in the context of the situation strongly implied. Similarly, for the reasons of preferring the Respondent's evidence already outlined, I find that the Claimant did try to remove Ms MA from her workplace in an excessively physical manner and without appropriate dignity, sympathy or empathy.

10.6 The Claimant was called to and attended a disciplinary hearing on 19 September 2017 following the raising of Ms MA's grievance. The issues of Ms MA's complaints were discussed and put to the Claimant after she had been appraised of them, their potential seriousness, and she was advised of her right to be accompanied (which she exercised), and with full disclosure of all the evidence against her garnered from prior investigation. The Claimant accepted the facts of what had happened but sought to down play the seriousness of her use of foul language by describing it as customary banter, with which view the witnesses did not agree, and by suggesting Ms MA's complaint was motivated by bad faith following less than satisfactory results on appraisal during her probation in post.

10.7 The Tribunal is satisfied Ms Fear took all this into account but concluded that use of foul language was proved and was unacceptable (by virtue of accepted internal Policies and requirements as to behaviours) and the Claimant had twice refused Ms MA's request for a break and that her attitude towards her and her actions led directly to the accident occurring which did in fact cause serious distress and embarrassment in several respects including not just the accident itself but also the aftermath actions of the Claimant. .

10.8 Ms Fear considered all issues relating to what she concluded were breaches of Policy including particularly the agreed "Fair Treatment" and "The Way we Work" Policies with great seriousness having regard to the Claimant's seniority of position. She concluded that the Claimant's actions and behaviours were thus proved and constituted gross misconduct meriting summary dismissal. She applied her mind to other options but having regard to the Claimant's position and her actions also amounting to breach of Principle 6 of the SRA Code, she concluded she had no other viable reasonable option but to dismiss.

10.9 The Claimant was dismissed confirmation of which was set out in a letter dated 25 September 2017 against which she appealed. Mr Taylor heard her appeal on 9 October 2017. As the Tribunal has no reason to doubt his sincerity of testimony, it finds that he did so by complete rehearing and reconsideration as if from fresh of all the evidence before Ms Fear and not by simple review of her decision. Because the Claimant challenged procedure, he also looked for procedural fault and he considered what he perceived were new points raised by the Claimant in her appeal not previously canvassed by her at disciplinary hearing stage. He found no earlier procedural fault requiring him to change the decision and he reached the same conclusions as Ms Fear about the evidence before both her and him. New evidence was introduced in the form of examples of written banter by other parties as described thus by the Claimant. Mr Taylor found it was not of the same kind or as serious as the foul language used by the Claimant which he concluded had indeed been directed on occasions at Ms MA personally.

10.10 The main new point raised in the appeal was the Claimant's asserted perception that she had been dismissed for the accident incident only whereas the Tribunal finds that Mr Taylor certainly considered this and concluded that she had been dismissed for a combination of the environment created by her and also the resulting accident suffered by Ms MA on the day in question and therefore not simply for one incident alone.

10.11 He also addressed the Claimant's assertion that the penalty of summary dismissal was too severe, but he concluded it was not, given her seniority and the cumulative effect of her behaviours and actions which he regarded as gross misconduct given his view that they fell within the definition of grounds (including inter alia bringing the Respondents into disrepute) for summary dismissal as set out in the Claimant's contract.

10.12 Mr Taylor reached his conclusions upholding dismissal and dismissing the appeal the reasoning of which he set out in his outcome letter dated 27 October 2017. He referred to each of the grounds of appeal asserted by the Claimant and the new evidence she sought to introduce and thus he showed thereby that he had addressed due attention to them all. He addressed in particular the issue of whether Ms MA bore a grudge against the Claimant which she impliedly asserted should disqualify her account, but he concluded that the account of her accident and the environment leading to it were consistent with the corroboration he found in witnesses' testimony and in that impliedly the Claimant acceptance the facts thus found but sought to minimise their significance or divert attention from them.

10.13 Mr Taylor also addressed the fact that the Claimant sought to argue that because she had been advised to modify her behaviours after the accident incident, that fact should not be overtaken by the subsequent grievance raised by Ms MA especially as it was raised in bad faith. He concluded that the situation merited more than just advice to change behaviours but should be judged on it and its preceding environment's own merits afresh.

Conclusions on Application of Law to Facts

11. The Tribunal finds that the Respondents have easily shown that the Claimant's conduct was the reason they had in mind for dismissal. They have also shown that they conducted fair and reasonable procedures in leading up to and reaching a conclusion as to misconduct and the outcome. The real issue in this case is whether their conclusions are reasonable in characterising the Claimant's behaviours and actions as gross misconduct and therefore whether the reason shown is a sufficient reason for dismissal.

12. Particular seriousness was attached by the Respondents to the situation because they are a regulated legal practice bound by rules relating to professional behaviours within and without the office. The Tribunal concludes it was reasonable for them to do so. They were aware of the Claimant's position of seniority and that as she is clearly a sophisticated and intellectually well-versed individual, she could reasonably be expected to lead by good example, and that failure to do so would reasonably be regarded as more serious than if she were in a more junior position.

13. The Tribunal further finds that the Respondents had established that they believed that the Claimant had committed an act of gross misconduct. Before the disciplinary hearing they had carried out investigation into it leading to the Claimant's partial but obfuscatory admission of her acts and that there was no other investigation necessary other than to ascertain reasons for the Claimant's actions or any mitigation. The Tribunal finds that in this respect the Respondents carried out as much investigation as would be carried out by another reasonable employer in the same circumstances and that therefore their conclusions as to the facts and the weight to attach to them were procedurally safe, and the reasons for their findings of fact which this Tribunal shares were equally sound and safe.

14. The Tribunal carefully considered whether the raising of grievance by Ms MA being potentially malicious impeached her account of events but concluded that as the event itself was proved without necessary reliance on her evidence alone, and because it didn't change the fact of what the Claimant did or its significance and the environment she had created by her behaviours were unaffected by the potential (but unfound) impeachability of Ms MA's evidence.

15. The Tribunal finds that given the seriousness of the Claimant's actions and behaviours as found by the Respondents and shared by this Tribunal, the Respondents did attach as much weight as would be attached by another reasonable employer to the situation. They did consider whether a lesser sanction was appropriate but concluded it was not and the Tribunal finds that was a conclusion which another reasonable employer could safely

and reasonably reach in the same circumstances even if there may be some employers who might not. The test is as set out in **Iceland** and is based on what an other reasonable employer might do, not what it might not do. The sanction of dismissal was not one which potentially fell outside the bounds of what another reasonable employer would do in the same circumstances. The dismissal was fair.

16. However, if the Tribunal had found that the Claimant had been unfairly dismissed, because of her admitted and proved actions and behaviours she had contributed to her own dismissal completely by a factor of 100%. it would thus not be just and equitable to award compensation in such circumstances.

17. Therefore, the Tribunal concluded that the Claimant had been dismissed fairly on the basis that dismissal was not too severe a sanction outside a band of reasonable responses, but that had that not been the case she had nonetheless contributed to her own dismissal by a factor of 100% and that in any event it was not just and equitable to award compensation given the degree of contributory responsibility.

18. Given that thus the Tribunal finds that the Claimant had indulged in behaviour which she knew or ought to know was unacceptable and that she did commit the act of refusing the toilet break sought by Ms MA and thus exposed her to serious distress and embarrassment, her acts amount to gross misconduct at common law. Thus, her claim for wrongful dismissal (i.e. in breach of contract) also fails and is dismissed.

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Employment Judge R S Drake

Date: 13/06/2018