EMPLOYMENT TRIBUNALS

Claimant: Mrs B Snowden

Respondent: The Watercooler Warehouse Limited

HELD AT: Sheffield **ON: 1 February 2019**

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: In person
Respondent: Mr M Ward, employee, (assisted by Miss C Roper, HR Adviser).

JUDGMENT having been sent to the parties on 15 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the respondent.
2. The claimant was employed by the respondent in the capacity of office manager. She brings a complaint of unfair dismissal following the respondent's decision to summarily terminate her contract of employment. That decision was communicated in a letter to the claimant dated 20 June 2018 which she received on 21 June 2018. The latter date is therefore the effective date of termination of her contract.
3. On behalf of the respondent I heard evidence from Mark Wade. He is an employee of the respondent and is employed in the capacity as a service engineer. He was accompanied by Cara Roper, HR adviser. Although she was involved in the

preparation of the case, she attended the hearing in the capacity of an observer and played little if not no part in the hearing. Mr Ward, in addition to giving evidence, undertook the advocacy upon behalf of the respondent. The Tribunal also heard evidence from the claimant.

4. The Tribunal was presented with an unsigned witness statement from Eugene Connelly. He is the sole shareholder and director of the respondent. There was no explanation for Mr Connelly's absence from the hearing. Given the lack of any or any satisfactory explanation for his absence, that he was not present to have his evidence tested in cross-examination and that the Tribunal was presented with an unsigned statement from him the Tribunal gives little weight to Mr Connelly's witness statement.

5. I shall firstly set out my findings of fact. I shall then set out the conclusions I have reached by application of the relevant law.

6. Mr Wade and the claimant were employees of Cool Coolers (UK) Ltd. Mr Wade's account was that prior to working for Cool Coolers (UK) Ltd he and the claimant worked for Cool Coolers Ltd. Within the hearing bundle (at page 97) was a Companies House document showing that Cool Coolers Ltd was incorporated on 23 October 2003 and dissolved on 17 January 2012. Mr Wade was a director of Cool Coolers Ltd. Cool Coolers (UK) Ltd was dissolved on 4 April 2017 having been incorporated on 5 May 2019. The sole director of Cool Coolers (UK) Ltd was Oliga Treumova. She appears also to have been a director of Cool Coolers Ltd until September 2010. Mr Wade was in a relationship with Miss Treumova.

7. Cool Coolers Ltd and then Cool Coolers (UK) Ltd were in a commercial relationship with the respondent. Cool Cooler Ltd and then, upon its dissolution, Cool Coolers (UK) Ltd rented water coolers from the respondent. The business model was that Cool Coolers Ltd and then Cool Coolers (UK) Ltd would let them (by way of a sub-lease) to their retail customers and as part of the agreement would undertake to service the water coolers. Mr Wade did the servicing with administrative support provided by the claimant. Mr Wade's account is that this was a business model followed by Cool Coolers Ltd as well as Cool Coolers (UK) Ltd.

8. Mr Wade said that when Cool Coolers (UK) Ltd got into financial difficulties he approached Mr Connelly to enquire of the possibility of him and the claimant working for the respondent. This came to pass. The claimant was employed by the respondent as an officer manager from 1 March 2016.

9. Mr Wade said that the relationship between the respondent and Cool Coolers (UK) Ltd ended in early 2016. Further, the leases of the water coolers from the respondent to Cool Coolers (UK) Ltd ended. The respondent then leased them directly to at least some of Cool Coolers (UK) Ltd's erstwhile customers. Mr Wade continued to service the water coolers as part of the new lease arrangement between the erstwhile customers of Cool Coolers Ltd and Cool Coolers (UK) Ltd on the one hand and the respondent on the other as he had done when working for Cool Coolers Ltd and Cool Coolers (UK) Ltd. Again the claimant provided administrative support.

10. The letter of dismissal dated 20 June 2018 is at page 31 of the bundle. The respondent did not, prior to dismissing her, notify the claimant that she had a disciplinary case to answer. The respondent did not convene a disciplinary meeting at which the claimant could reply to the allegations against her. The respondent did not share with the claimant the results of the investigations which

the respondent had carried out into the matters of concern. The respondent also did not allow the claimant a right of appeal against her dismissal.

11. The claimant was dismissed upon the basis of the following four allegations:

    11.1. *On 14 November 2016* [sic] *she had transferred from the respondent's account the sum of £5,796 to a company called Demex. This was owned and operated by the claimant's husband.*

    11.2. On 5 January 2017 she gave the respondent's bank card and PIN number to two employees to enable them to buy fuel.

    11.3. On 19 December 2017 she left sensitive information on her desk, in particular the details from a debit card linked to the respondent's bank account (being the card number, expiry date and CVC number).

    11.4. On 22 May 2018 at 17:39 she left the security reader linked to the respondent's bank account and company debit card on her desk.

12. Upon the first allegation, the claimant accepts that money was transferred to Demex. However, she says that this was by mistake and she informed Mr Ward immediately of the error and all of the money was transferred back within a matter of days. Mr Ward denied receipt of a text message which the claimant says she sent to him on 12 November 2016 notifying him of her error. A copy of the text message is at page 77. The claimant produced her mobile telephone and showed me the text message sent to a mobile telephone number which Mr Wade accepted was his. Mr Wade alleged that the claimant had concocted this text message recently. He said that there is an App available which enables this to be done. I reject Mr Wade's evidence upon this issue. He produced nothing to support the very serious allegation that he made against the claimant and there was certainly no evidence before me that the claimant had created or concocted a text in order to create a misleading impression.

13. I accept the respondent's account that the claimant left company debit card details on her desk on 19 December 2017. The claimant did not deny having done so. Indeed, in her witness statement (at paragraph 9(d)) she accepts that she had come across the paper bearing theses details when sorting through some old paperwork. It is her case that an apprentice had printed the details out to enable her to make purchases for work using the credit card details. The claimant says that she disposed of the document by burning it. She did this after it was discovered on her desk. Mr Wade took the photograph of the piece of paper upon the claimant's desk on 19 December 2017. He said that he was with Mr Connelly when the photograph was taken.

14. The claimant also accepts giving bank details to two employees on 5 January 2017 in order that they could put fuel in their vehicles. Again, she fairly accepts having done so. Mr Wade denied that this was condoned practice.

15. The claimant also accepted having left the debit card and card reader on her desk on 22 May 2018. The photographic evidence of this was taken at 17:39 after the claimant had left work for the day.

16. Following her dismissal, the claimant obtained new employment on 24 October 2018. She is paid at the rate of £11 per hour and works three days a week. She is working as a bookkeeper in Sheffield. She told me that she is happy in her new job. She said that there is no prospect of an increase in her hours and she is not

seeking to look for additional hours anyway as she is content with the current arrangements. Therefore, although her remuneration with her new employer is lower than it was with the respondent she fairly accepted that this was by reason of a lifestyle choice on her part.

17. Unfortunately, the claimant became ill on 21 June 2018. She was diagnosed as unfit for work until 7 September 2018.

18. The claimant did not receive a statement of initial employment particulars from Cool Coolers Ltd, Cool Coolers (UK) Ltd or the respondent pursuant to the statutory obligations under Part I of the Employment Rights Act 1996. The claimant had no contractual entitlement to any sick pay.

19. An issue arises in this case around the claimant's length of service. The claimant's case is that the work that she undertook for Cool Coolers Ltd and Cool Coolers (UK) Ltd should count towards her continuity of employment with the respondent upon the basis that there was a transfer of the undertaking for which she worked from one to the other. Based upon Mr Wade's account, I accept that the business of Cool Coolers Ltd transferred to Cool Coolers (UK) Ltd. Therefore, this preserved the claimant's continuity of employment. I also accept that there was a transfer of an identifiable part of the undertaking carried out by Cool Coolers (UK) Ltd to the respondent. The undertaking was concerned with the leasing of water coolers and the servicing of them for customers. Pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 therefore the claimant's continuity of employment was preserved and I find that her employment started on 1 April 2009.

20. Cool Coolers (UK) Ltd was in the business of leasing water coolers to customers. When Cool Coolers (UK) Ltd ceased trading the water coolers returned to the respondent who then leased them out directly to the customers. Akin to the arrangements between Cool Coolers (UK) Ltd and its customers the respondent provided the services of Mr Wade as service engineer in order to maintain the water coolers. Therefore, there was a significant degree of similarity between the activities of Cool Coolers (UK) Ltd and the respondent. The same water coolers were being used. The same services were being provided and the same service engineer (Mr Wade) was being used for this purpose. The claimant provided the same administrative support throughout. Plainly, the water coolers themselves were identifiable tangible assets being used for the purposes of the business as carried out by both entities.

21. In my judgment therefore, the claimant was plainly assigned to an identifiable part of the business being carried out by Cool Coolers (UK) Ltd which transferred its operation to the respondent. This transfer came about it seems at the behest of Mr Wade who persuaded the respondent to take on him and the claimant servicing the same customers and undertaking the very same kind of business. I accept that not all of the water cooler leases were transferred in this way following the demise of Cool Coolers (UK) Ltd. However, a sufficient number were transferred in order to constitute an identifiable part of the undertaking. The claimant continued to administer the business needs attendant upon the new arrangement following the transfer of part of Cool Cooler UK Ltd's business to the respondent.

22. It is not in dispute that the respondent dismissed the claimant. Therefore, pursuant to section 98 of the Employment Rights Act 1996 it is for the respondent to establish the reason for the dismissal of the claimant.

23. It was Mr Connelly who took the decision to dismiss the claimant. It is his name upon the letter of dismissal at page 31. The reason for the dismissal of an employee is a set of facts known to the employer or beliefs by him that cause him to dismiss the employee. The Tribunal must decide firstly whether the employer believed that the employee was guilty of misconduct.

24. I had no credible evidence from the decision maker (Mr Connelly) as to the facts or beliefs held by him at the time of dismissal. I cannot therefore be satisfied that the respondent believed that the claimant was guilty of misconduct. Quite simply, there was no evidence from the respondent upon this issue. It follows therefore that the respondent's decision to dismiss the claimant must be held in law to be unfair as the respondent has failed to show a statutory permitted reason for her dismissal.

25. That being the case, the Tribunal must decide the appropriate remedy. In this case there is no suggestion of re-employment. Therefore, the remedy will be an award of monetary compensation made up of a basic award and a compensatory award. The relevant statutory provisions are to be found at sections 118 to 126 of the 1996 Act.

26. The basic award may be reduced in circumstances where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, then the Tribunal shall reduce that amount accordingly.

27. 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. There must be conduct on the part of the employee which was culpable or blameworthy in the sense that it was foolish or perverse or unreasonable in the circumstances. For the purposes of the compensatory award (but not for the basic award) the conduct must contribute to the dismissal. It must also be just and equitable to reduce the assessment of the employee's loss. It is a question of fact as to whether the employee was guilty of contributory conduct.

28. It is open to the Tribunal find the dismissal was procedurally unfair, but that had a fair procedure been adopted the employee would have been dismissed in any event. That is a matter which may affect compensation. The question therefore is whether, acting reasonably, the respondent could (within the range of reasonable managerial responses) have dismissed the employee in any event: what would have happened had a reasonable procedure been followed?

29. The Tribunal must therefore assess the chance that the claimant's employment would have been terminated for a good reason. This is not an all-or-nothing approach as the Tribunal can assess the chance that the employee would have been fairly dismissed.

30. Upon a consideration of the chance of a fair dismissal, the Tribunal must consider the evidence before it and determine firstly whether the employer had a potentially fair reason for the dismissal of the claimant. The Tribunal must then go on to consider whether the employer would have had reasonable grounds upon which to sustain that belief having carried out as much investigation as was reasonable in all the circumstances of the case and then whether the dismissal fell within reasonable responses open to the reasonable employer in accordance with the equity and substantial merits of the case.

31. On the facts of this case, I accept that the respondent could have sustained a reasonable belief that the claimant had committed the four acts of misconduct alleged against her and set out at paragraph 11. She fairly accepted having transferred money to her husband's account. She accepted having given two employees the company bank card and PIN number details and having left sensitive information on her desk on 19 December 2017 and 22 May 2018.

32. The difficulty that the respondent has is that the first three of the allegations (at paragraphs 11.1 to 11.3) occurred a long time before the dismissal. The respondent was aware of the incidents of 14 November 2016, 5 January 2017 and 19 December 2017 shortly after each of them occurred. The respondent did nothing about any of them at the time. The failure to take action at the time gave a clear indication to the claimant that she was not going to be disciplined. Plainly therefore it would have been contrary to equity and outside the band of reasonable responses to have dismissed her for any of those incidents.

33. The most serious of the three was the transfer of money to her husband's account. The claimant acted to correct the error immediately and was candid with her employer about it. There was no suggestion of any dishonesty on her part. There was no personal gain. The respondent did nothing about this at the time and thus lead the claimant to believe that her account was accepted.

34. The respondent took no action to disabuse the claimant of the notion that it was acceptable practice to give employees the bank details in order that they could fuel their vehicles. Even if such was unacceptable on that one occasion, no action was taken against her about it.

35. The claimant also has mitigation around the incident of 19 December 2017 in that she came across the details which had been printed out by somebody else. She perhaps ought to have destroyed the paper immediately rather than leaving it on her desk. However, the fact of the matter is that she did not create the offending document. She took steps to destroy it shortly after it was spotted by Mr Wade and Mr Connelly who took no action against her following its discovery.

36. The plain fact of the matter is that the claimant was given a false sense of security that none of these incidents would result in any disciplinary action being taken by her. Therefore, had the respondent carried out a fair procedure it could have fairly determined that the claimant had committed all three acts of alleged misconduct but it would not be within the range of reasonable responses to dismiss her for any of them or even for all three of them combined given the equity and substantial merits of the case. By June 2018 it was far too late in the day to resurrect matters which had taken place some months prior. This has all the hallmarks of an employer determined to find reasons for the dismissal of an employee.

37. The respondent is on somewhat firmer ground around the incident of 22 May 2018. That was relatively recent. The claimant accepted that she had left the debit card and card reader upon her desk overnight after she left work that day. The respondent could therefore have entertained a reasonable belief that the claimant had committed that act of misconduct. The question that arises therefore is whether it would have been within the range of reasonable responses to dismiss her for it.

38. On any view, dismissal of her for that one-off act would have been outside the range of reasonable responses. The conduct falls well short of a repudiatory action on her part showing an intention not to be bound by the contract such as to

constitute gross misconduct. It appears to have been an inadvertent error. That in my judgment would have warranted words of advice or at most a first written warning.

39. That said, the claimant's conduct that day was unprofessional. It is unfortunate for her that she shone the spotlight on herself by leaving sensitive information lying around on her desk. Therefore, I find that had a reasonable procedure been followed the claimant would not have been dismissed for the incident of 22 May 2018. However, her conduct was such that she must bear some responsibility for her own misfortune in being unfairly dismissed.

40. The lion's share of the responsibility for the unfair dismissal rests firmly with the respondent. The respondent failed to carry out anything resembling a fair procedure. The decision to dismiss her for stale allegations fell outside the range of reasonable responses and was inequitable. The claimant must however bear a minor share of responsibility for shining the spotlight upon herself with her somewhat unprofessional conduct that day. That conduct in part lead to her dismissal. For the purposes of the compensatory award therefore there is a causal link between the act and the dismissal. In my judgment it is just and equitable to reduce the basic and compensatory awards by 10% to reflect the claimant's conduct.

41. The basic award shall therefore be in the sum of £4,121.65. This is upon the basis that the claimant's continuity of employment was from 1 April 2009 to 21 June 2018. It is net of the 10% reduction for contributory conduct.

42. Upon a consideration of the compensatory award the Tribunal shall make an award of such amount as is considered just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Had the claimant not been unfairly dismissed on 21 June 2018 she would have been unable to work anyway due to her ill health. Therefore, she should be awarded compensation for the loss of statutory sick pay that she would have received from the respondent for the period between 21 June 2018 and 7 September 2018 in the sum of £1,012.55.

43. It is the claimant's responsibility to take reasonable steps to mitigate her loss. In other words, an employee who is unfairly dismissed must proceed upon the basis that there is no prospect of the recovery of compensation from the employer. I am satisfied that the claimant took reasonable steps to mitigate her loss as she obtained alternative employment commencing on 24 October 2018. Taking into account her illness she obtained alternative work reasonably quickly. If the employer wishes to argue that the employee has failed to mitigate then the burden is upon the employer to demonstrate that. There is no evidence from the respondent to support any contention of failure to mitigate upon the part of the claimant. I therefore award the claimant loss of wages between 8 September and 24 October 2018 in the sum of £1,496.95. Following the 10% deduction for contributory conduct the amount awarded for past loss of wages between 21 June and 24 October 2018 is in the sum of £2,258.55. I make no award for loss of earnings after 24 October 2018 because the claimant has made a lifestyle choice to settle for working three days per week with her new employer.

44. I make an award of £300 for loss of the statutory right not to be unfairly dismissed and for loss of the notice period. She shall also be awarded £44.62 for loss of

pension contributions from the respondent. Net of the 10% deduction for contributory fault these other losses amount to £310.16.

45. Thus, the net compensatory award is £2,568.71. The grand total of the unfair dismissal award net of contributory conduct is £6,690.65.

46. As the claimant was in receipt of Job Seekers Allowance during the prescribed period between 21 June and 24 October 2018, the Recoupment Regulations apply. These are explained in the explanatory note which accompanied the Judgment.

47. I increase the compensatory award by 25% to reflect the respondent's breach of the *ACAS Code of Practice: discipline and grievance.* Frankly, the respondent's conduct of the disciplinary process fell way below the standard of the reasonable employer. There can be no excuse for such wholesale failure to have regard to the fundamental tenets fairness whatever the size of the undertaking. The uplift is made pursuant to the powers in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in the sum of £642.18.

48. I also award the claimant two weeks' wages pursuant to section 38 of the Employment Act 2002 in the sum of £678.46. This is to reflect the failure upon the part of the respondent to provide the claimant with a statement of terms and conditions pursuant to Part I of the Employment Rights Act 1996. Section 38 empowers the Tribunal to make an award of two weeks' or four weeks' pay to reflect the failure. I make an award of two weeks' pay. In contrast to the flagrant failings around the fairness of the disciplinary procedure I do accept there to be some mitigation of the respondent's position upon the basis that the respondent had transferred to it the claimant's employment and that the failure to issue her with a statement of terms and conditions rests with others. That said, the respondent took no steps to issue a statement of main terms and conditions to the claimant itself and has acquired liability upon the transfer for the failures of the transferors.

Employment Judge Brain

Date 7 March 2019