Case Number: 3201936/2018

RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Hailey**

Respondent: **Byfords Building Services Ltd (in voluntary liquidation)**

Heard at: **East London Hearing Centre**

On: **7 February 2019**

Before: **Employment Judge A Ross (sitting alone)**

Representation

Claimant: Mr Monighan (FRU Representative)

Respondent: No appearance

JUDGMENT

The judgment of the Employment Tribunal is that: -

1. The complaint of unfair dismissal is upheld.
2. The complaint in respect of a redundancy payment is dismissed on withdrawal.
3. The Respondent shall pay the Claimant compensation of £11,383.78 assessed as follows:
    - 3.1 Basic award £5,080.00
    - 3.2 Compensatory award £6,303.78.

REASONS

1. The Claimant was continuously employed by the Respondent or associated employers from the 7 April 2008 until his summary dismissal on 18 April 2018. He was employed as a handyman or multi-trade workman. Having complied with Early Conciliation, the Claimant brought complaints of unfair dismissal and a claim for a redundancy payment. Before me, he applied to amend his claim to add a claim of breach of contract in respect of unpaid notice of pay. I refused that application for reasons given at the time. The Claimant accepted that he was not dismissed for redundancy and that complaint was dismissed on withdrawal.

2. For reasons given at the time, I concluded that:

   2.1. The Claimant was continuously employed between the above dates and that the Tribunal had jurisdiction to determine his complaint of unfair dismissal.
   2.2. It was not reasonably practicable for the Claim of unfair dismissal to be brought within the primary limitation period, and that it was brought within such further period as was reasonable in the circumstances.

The issues

3. The issues were as follows:
   3.1. Has the Respondent shown the reason for dismissal?
   3.2. Was it for a potentially fair reason?
   3.3. Was the dismissal procedurally unfair?
   3.4. If so, what was the percentage chance that the Claimant would have been dismissed in any event? If so, when would dismissal have occurred?
   3.5. If procedurally fair, was the decision to dismiss within the band of reasonable responses open to the employer?
   3.6. Whether the Respondent unreasonably failed to comply with the ACAS code of practice.

   If the dismissal is found to be unfair:
   3.7. What basic award is the Claimant entitled to?
   3.8. What compensatory award would be just and equitable?

The evidence

4. The Claimant provided a bundle of documents. Page references in these set of reasons refer to pages in that bundle. The Claimant's representative helpfully prepared a separate bundle containing his Skeleton Argument, the witness statements and authorities.

5. I heard oral evidence from the Claimant who verified his witness statement and gave some supplemental oral evidence. I accepted his oral evidence.

Findings of fact

6. The Claimant was employed by the Respondent as a handyman working for residential property clients. He has multi-trade skills.

7. The Claimant explained the history of his employment from April 2008 with three companies who had the same directors: Mr Malcolm Byford and Mrs Coral Byford.

8. Each of these three companies appeared to run into financial difficulties after a few years. For the employees such as the Claimant, certain features were common in each case. In respect of the Respondent, the features are explained at paragraph 4-6 of the Claimant's witness statement. These included that wages were paid late. I accepted paragraph 6 of the Claimant's witness statement was accurate. The problems of the company would in general terms be common knowledge and the topic of banter and speculation amongst the workforce. In the experience of this Tribunal, that is inevitably what would happen in the real world.

Suspension

9. The Claimant was suspended on 27 March 2018. At the meeting on that day, it was the first he had heard of any allegation. He was informed by Malcom Byford, the company secretary, that he was being suspended for spreading rumours of redundancy and speculating about the Respondent company "*going down*". The Claimant denied it, stating that he had only been part of a general conversation of amongst the employees about the state of the company. The Claimant was suspended but not given any written statement of allegations. The Claimant was invited to a disciplinary hearing by text. He was not informed of the disciplinary charges in this text.

Disciplinary hearing

10. The disciplinary hearing was held 13 April 2018. To describe it as a hearing would technically be correct. It would be incorrect, however, to describe it as a fair hearing. The Claimant was not given any of the evidence against him until the end of the disciplinary hearing. The disciplinary invitation letter was given to him at the same time. Two of the three or four statements relied upon were from anonymous witnesses.

11. Coral Byford was the hearing officer. She relied on a letter from Steve Archer, the owner of a client business. This purported to be from Ricky Archer (his son) and Andrew Cooke. However, Mrs Byford knew and accepted at the appeal hearing that it was compiled by Steve Archer. This letter was also unsigned.

12. Mrs Byford made no effort in advance of the hearing to investigate the 8 or 10 persons in the conversation at the time of the alleged misconduct. She made no attempt to investigate the evidence of those witnesses after the disciplinary hearing when the Claimant had fully set out his case.

13. An essential part of the Claimant's case was that witnesses had motives to fabricate evidence, because he had allegedly had been "*picking at their work*". In the invitation letter to the disciplinary hearing (p.92) received after the hearing had finished, a new central allegation was made, which was that the Claimant had described Mr Byford as "*useless*". This was not part of any investigation process nor put to the Claimant.

14. At the disciplinary hearing the Claimant explained there was a general

discussion about the Respondent being in financial trouble and he had been part of that and that self-employed workers had spoken to him about their concerns because he had been there 10 years and was the most experienced. He had explained that if he was in their position, he would look to get another job if he had a family and a mortgage, but this was all part of a general conversation. The Claimant had not stated what the self-employed persons should do.

15. The Claimant's letter of dismissal included allegations allegedly found proved which were not in the charges such as "*breach of confidential information*" (which was entirely unspecified) and "*serious damage to business reputation*" (which was unspecified) and that a client had refused to allow him onto another project. The Claimant was summarily dismissed on 18 April 2018.

16. The Claimant appealed, his appeal was heard by Mr Byford and dismissed.

17. Before me, the Claimant's evidence was that he had the longest service in the company. He was an exemplary employee and was usually first on site and last off site. He had no warnings about either his work or his conduct, nor had he been told not to discuss the company and its performance, whether specifically or generally. When he had commenced work for the Respondent, he had not been given a contract of employment and there was no evidence of any code of conduct or disciplinary policy. The Claimant believed that a belief in misconduct was not the reason for his dismissal. He considered that the reason was probably because he stood up to Mr Byford and explained why jobs could not be finished in unrealistic times.

Findings of fact in respect of remedy

18. The Claimant was paid up to the 18th April 2018. The Respondent made pension contributions in the same sum as the Claimant made. These are shown in his payslips, such as at that page 210 and are in the sum of £4.07p per week.

19. The Claimant could use the company van for personal use subject to a deduction to reflect petrol wear and tear and 16p per mile. The use of the company van is not reflected as a benefit for a tax purposes in the payslips from which I can conclude that it was of a low value. Doing the best, I can, I estimate that this was worth about £50.00 per week to the Claimant.

20. The Claimant accepted that he would have been dismissed on the 6 July 2018 as the same time as the other employees, when the Respondent went into voluntary liquidation. In submissions, Mr Monighan could not find an argument as to why his loss would continue after that point.

21. From his schedule of loss, the Claimant earned £1520.00 net up to the point at which he would have been dismissed fairly through redundancy. Up to this point the Claimant had incurred expenses of £30.01 and tradesman insurance of £238.46. The Claimant set up his own self-employed business in the same area of work after dismissal. Therefore, I find the insurance policy would have been purchased in any event had he been made redundant fairly. He is therefore only entitled to the additional insurance premiums for the period between 18 April and 6 July 2018 which I assessed to be £60.00.

The Law

22. A potentially fair reason is one which relates to conduct: see section 98(2)(b) Employment Rights Act 1996 ("ERA").

23. Gross misconduct is conduct which is so serious that it goes to the root of the contract by its very nature. It is conduct which could justify a dismissal even for a first offence.

24. I directed myself to section 98 (4) ERA which provides as follows:

> "*4. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employers 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.*

25. The burden of proof on the issue of fairness is neutral. In considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

25.1.1. did the employer have an honest belief that the employee was guilty of misconduct?
25.2. was that belief based on reasonable grounds; and
25.3. was that belief formed on those grounds after such investigation as was reasonable in the circumstances?
*(*see *BHS -v- Burchell* (1980) ICR 303*).*

26. I directed myself to the principles which I must apply when applying Section 98(4) ERA, which are:

26.1. the Tribunal must not substitute its own view for that of the employer as to what was the right cause to adopt for that employer;
26.2. on the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal;
26.3. the Tribunal should ask did the employers action fall within the band of reasonable responses open to an employer in those circumstances. (see *Foley –v- Post Office* [2000] IRLR 3*).*

27. I reminded myself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached, including the investigation (see *Sainbury's Plc –v- Hitt* [2003] ICR 111*).* Reading *Hitt* and *Foley* together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer.

28. I directed myself that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. In *South Maudsley NHS Foundation Trust –v- Balogan* UKEAT0212/14, the EAT held at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other.*

29. Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405, the EAT, with Mr Justice Elias presiding, held that the relevant circumstances include the gravity of the charge and their potential effect on the employee. At paragraph 59, he explained:

> "*A serious allegation of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him"*.

30. In *Linfood Cash and Carry v Thompson* [1989] ICR 518, the EAT provided guidance on how employers should deal with cases involving evidence from informants. This guidance included (at p.523-524):

> "*We have been told by both sides that there seems to be no decision of this appeal tribunal giving guidance upon appropriate procedures for an employer to adopt where informants are involved. It is obvious that from whichever side of industry one looks it is important that dishonesty and lack of trust should, where possible, be eliminated, but a careful balance must be maintained between the desirability to protect informants who are genuinely in fear, and providing a fair hearing of issues for employees who are accused of misconduct. We are told that there is no clear guidance to be found from Acas publications, and the lay members of this appeal tribunal have given me the benefit of their wide experience.*
>
> *Every case must depend upon its own facts, and circumstances may vary widely — indeed with further experience other aspects may demonstrate themselves — but we hope that the following comments may prove to be of assistance:*
>
> *1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.*

2. In taking statements the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.
3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.
5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.
6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.
7. The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.
8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.
9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.
10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form."

Applying Section 123(1) ERA 1996: The Polkey principle

31. If a Tribunal finds a dismissal unfair on procedural grounds but the employer can show that it might have dismissed the employee if a fair procedure had been followed, the Tribunal may make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed in any event (see *Polkey-v- Dayton Services* [1988] ICR 442).

Contributory Fault

32. Section 123(6) ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the action of the Claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

Submissions

33. Mr Monighan prepared a helpful Skeleton Argument which he supplemented with oral submissions.

Conclusions

34. Applying the facts found to the law I reached the following conclusions on the issues in this case.

Issues 3.1 – 3.2: Has the Respondent shown a potentially fair reason for dismissal?

35. The Respondent has not advanced any evidence in support of the allegation that the Claimant was dismissed for gross misconduct.

36. Moreover, I have outlined above the unfair and inadequate disciplinary process which I found to be well outside the bound of reasonableness even taking into the account the circumstances and the size of this employer. Indeed, I found it was so flawed it pointed to the Respondent not having a genuine belief that the Claimant was guilty of gross misconduct.

37. I concluded that the Respondent had not shown the principal reason for dismissal. For this reason alone, the complaint of unfair dismissal must succeed.

Issue 3.3: Procedural fairness

38. If I am wrong about the above, I concluded that the dismissal was procedurally unfair in any event, for the following reasons:

- 38.1. The Claimant was not told of particulars of alleged misconduct prior to this disciplinary hearing, and was not told of entire charges prior to the disciplinary hearing.
- 38.2. Applying the guidance in *Linfood*, the anonymous statements were insufficient to provide the Respondent with reasonable grounds for the belief alleged because there were no statements setting out the factors set out in paragraph 2(a)-(d) of the *Linfood* guidelines, nor any further investigation to find corroboration, if any.
- 38.3. Mrs Byford could not have reasonable grounds for the alleged belief based on the two anonymous witness statements and the letter from two alleged witnesses, written by a third person (Steve Archer) and not signed or verified by the two witnesses in any event. This is particularly so where the evidence of the Claimant at the time was that the anonymous witnesses had reasons to fabricate.
- 38.4. The Claimant was not given the evidence relied upon by the Respondent ahead of the disciplinary hearing. He could not have known the case against him.
- 38.5. The above defects were not cured by the appeal because there was no investigation into the comments of the Claimant at the disciplinary hearing stage, so the flaws up to appeal were not remedied. The Respondent could have made further enquiries of the informants or the other witnesses referred to.
- 38.6. There was no reasonable investigation, even if this was a small company. The allegations were serious enough to warrant a charge of and dismissal for gross misconduct, where there was a trusted employee with long service. In those circumstances, the band of reasonable responses required other witnesses to the alleged conversations to be interviewed.

Issue 3.4 Claimant's dismissal
39. I find that the Claimant would not have been dismissed for misconduct had a fair procedure been followed. I accepted that it was very likely that the discussion of the company fortunes in a general sense would be the topic of discussion amongst the work force. The Claimant did not have any confidential information. He was clearly very much a working man.

40. I accepted the Claimant's evidence corroborated as it was by Mr. Bacon's witness statement, that he was only ever part of a general conversation.

41. I emphasise that I am not substituting my decision for that of the employer in this case. I have found that the employer has not shown the reason for dismissal.

42. In any event, I have found that the employer's procedure and the employer's decision to dismiss were both outside the band of reasonableness in the circumstances, taking into account equity and the merits of the case and the size and resources of this employer.

Issue 3.5: was dismissal within the band of reasonable responses
43. Without any warning or standard setting, dismissal of the Claimant was well outside the band of reasonable responses in the circumstances of this case. The Respondent lacked the reasonable grounds for any belief in misconduct and certainly gross misconduct. The Respondent failed to carry out any reasonable investigation to enable it to have reasonable grounds for any belief. In addition, the sanction of dismissal was outside the band of reasonable responses.

Issue 3.6: Failure to comply with ACAS code of practice
44. The Respondent did breach the ACAS code of practice in numerous respects. I appreciate that the Respondent is a small company but there was no mitigation. I concluded that the compensatory award should be uplifted by 25%.

Remedy
45. The Claimant is entitled to a Basic award assessed on the basis of 10 years employment. At the time of dismissal, his gross pay exceeded the statutory maximum for this purpose. The Basic award is therefore: £508.00 x 10 = £5080.00.

Compensatory Award
46. It would be just and equitable for the Claimant's compensatory award to be capped at the point at which he would have been made redundant in any event. It was not suggested that there was no redundancy situation. It was accepted that the Claimant would have been made redundant with other employees. In my judgment, from what I heard and the fact of the voluntary liquidation, he would have been made redundant fairly on 6 July 2018.

Loss of earnings
47. From 18 April 2018 to 6 July 2018 is 79 days amounting to 11 weeks and 2 working days. Taking the Claimant's net weekly wage as £485.67 (which is an average from the previous 12 weeks prior to the dismissal), the net loss of earnings over the weeks up to dismissal (11.4 weeks) is £5536.63.

Loss of pension contribution
48. £4.07 per week (taken from p210) x 11.4 weeks = £116.39.

Loss of use of company van
49. £50.00 x 11.4 weeks = £570.00.

Loss of statutory rights
50. I have allowed £250.00 because the Claimant was going to be dismissed in any event on 6 July 2018. I have therefore discounted the sum which I would otherwise have awarded by 50%.

51. In respect of claim for the loss of right to long service. I have awarded no compensation because the Claimant would have lost such long service in any event through redundancy on 6 July 2018.

52. As for sums spent on mitigation, the Claimant has claimed various sums spent during self-employment. I have allowed the Claimant the sums spent in self-employment as follows:

52.1. £30.01 petrol (incurred, going out pricing for jobs for his new self-employed business);
52.2. £60.00 for tradesmen insurance (assessed at approximately a quarter of the annual premium);

Mitigation
53. I have deducted from the compensatory award £1,520.00 under mitigation. The Claimant did not receive any ESA or other work-related state benefits.

Total Compensatory award
54. I have found the total compensatory award to be £5,043.03.

55. I have applied the uplift of 25% for unreasonable failure to comply with the ACAS code of practice, which adds an additional £1,260.75.

56. The total compensatory award is therefore £6,303.78.

Employment Judge A. Ross

11 March 2019