



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

Ms Katie Christie

AND

**Respondent**

Mrs Barbara Freeman

Trading as Upstairs and Downstairs Housekeeping

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Plymouth

**ON**

11 March 2019

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** Mr L Kinealy, Solicitor

**For the Respondent:** In person

### JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed; and
2. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £6,680.03; and
3. The Recoupment Regulations do not apply; and
4. The claimant succeeds in her claim for wrongful dismissal, but no award is made because her notice period has already been compensated for by reason of the above award; and
4. The respondent is also ordered to pay the claimant the sum of two weeks' pay being £520.78 because of her failure to provide the claimant with a written statement of the terms and conditions of her employment.

## **REASONS**

1. In this case the claimant Ms Katie Christie claims that she has been unfairly dismissed, and also brings a claim for breach of contract for her notice pay. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and that the claimant was not entitled to notice pay.
2. I have heard from the claimant. I have heard from Mrs Freeman the respondent and from Mrs Jacqueline McFettridge and Mrs Caroline German on behalf of the respondent. I was also asked to consider a statement from Ms Vikki Germon on behalf of the respondent, but I can only attach limited weight to this because she was not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent Mrs Barbara Freeman is in business on her own account trading as Upstairs Downstairs Housekeeping. The business undertakes domestic cleaning, washing, ironing and housekeeping for domestic customers, but also undertakes some limited commercial cleaning. The business is based in South Devon, and in particular the areas around and including Tavistock, Yelverton and Plymouth.
5. The claimant is Ms Katie Christie who had previously worked for the respondent on and off as a babysitter and cleaner. Her latest period of continuous employment commenced on 12 October 2015, and she worked as the respondent's office manager. She was not issued with a statement of the terms and conditions of her employment.
6. The respondent hoped to retire at about the time of her 60<sup>th</sup> birthday in October 2018. As part of her retirement planning she sold part of her business to the claimant in April 2017. The claimant paid £7,200 for that share of the respondent's business which is based in postcode PL19, which is in and around Tavistock. This represented an annual turnover of around £55,000, and the purchase price was paid in instalments, the last of which was paid in May 2018.
7. Following the claimant's purchase of that part of the business in April 2017, the claimant remained in the respondent's employment, and was employed as the respondent's office manager for three days a week, and spent the rest of the time managing and running that part of the business which she had purchased from the respondent.
8. The respondent dismissed the claimant summarily for gross misconduct at a meeting on 20 July 2018. There were effectively six reasons for this, as set out in the respondent's grounds of resistance to the claimant's claim. There were five historical or background issues, and the sixth issue relating to the alleged theft of a parcel which had arisen at the time of the dismissal. My findings in connection with each of these are as follows, starting with the five background issues.
9. The first and second background issues are the claimant's timekeeping, and working for her own interests when she was contracted to work for the respondent. Effectively the respondent asserts that the claimant was repeatedly unreliable in attending for work, and on occasions would let the respondent down by prioritising the need to cover the interests of her own business. However, in evidence the respondent accepted that there was an agreed level of flexibility and that was how they both operated. The claimant often needed to change hours at short notice, either to accommodate her own childcare or domestic arrangements, or to cover for her own staff if they had been unable to complete agreed shifts. The claimant and the respondent repeatedly exchanged text messages confirming what difficulties might have arisen, and what was to be done to cover them, and as the respondent admitted in evidence "it's how we operated". At no stage did the respondent ever challenge the claimant in a formal manner or commence any disciplinary process with regard to these issues. Throughout this time the respondent was fully aware that the claimant had two roles, that of the respondent's own office manager, whilst at the same

- time managing that aspect of the business which the claimant had purchased. The respondent had not brought to the claimant's attention in any formal manner that their working arrangements in this respect were in any way unsatisfactory.
10. The third historical issue relied upon is that "the claimant used her own employed staff to undertake work for my business that I expected her to deliver for me herself". However, it is clear from the evidence which I have heard that both the claimant and the respondent used many of the same cleaning staff for the two separate businesses, as a natural succession from the recent sale of part of that business. The claimant's role included planning the respondent's staff rota, and the claimant would repeatedly allocate shared staff to do the cleaning for both the respondent's rota, and for her own part of the business. Similarly, at no stage did the respondent ever raise this matter as a formal issue or commence any disciplinary process.
  11. The fourth historical issue is that "the claimant made direct approaches to my staff to offer them employment making them potentially unavailable to work for me. This represents a clear conflict of interest potentially damaging my business." This relates to two communications which the claimant had with certain members of staff. The first occurred in July 2017 when the respondent was on holiday and the claimant sent an email with the rota attached to the respondent's employees. All the staff approached were also employees of the claimant's part of the business. The claimant effectively wished to reassure her staff that she wished to progress with her business, and could offer employment to them after the respondent's retirement. The respondent accepted during this hearing that she agreed with the approach at that time and did not take the approach seriously because their relationship was working. The second communication was in January 2018 and again the claimant was inviting her staff to discuss their working arrangements after the respondent's retirement. The respondent was aware of this communication in January 2018 and agreed that it related to the claimant's making plans after she had retired, and she took no action at the time when she became aware of it in January 2018. The respondent agreed today that she only effectively became concerned when this was looked at in conjunction with other matters at the time of the dismissal several months later.
  12. The fifth historical issue is that: "For several weeks in November/December 2017 the claimant (who was in charge of paying my staff) failed to pay one of my employees (who chose to be paid in cash) despite receiving the payment details from my accountant." The employee in question is Isabel German, referred to as Bel, who worked minimal shifts and who would attend at the office to collect her payslip with the relevant cash included, because she preferred to be paid cash. There was a confusion at the time as to whether Bel had collected her pay slips from September. The claimant had apparently prepared the payslips, but there was insufficient cash in the office to include the relevant cash. There may have been an initial concern that cash might have gone missing. This matter was raised and discussed at the time between the claimant and the respondent. The matter was resolved in December 2017 and the respondent decided to take no further action at that stage.
  13. Each one of these five historical matters was therefore something which the respondent was fully aware of for a period of several months prior to the dismissal meeting on 20 July 2018, and in respect of which the respondent chose not to take any action against the claimant either formally or informally. They had a working relationship which was successful and suited both of them, and during which the claimant continued to pay the instalments due in respect of her purchase of part of the respondent's business. For these reasons I find that there were no significant conduct or performance related issues between the parties as at the time of the claimant's dismissal on 20 July 2018.
  14. The final ground for dismissal of the claimant for alleged gross misconduct concerned a parcel which had been delivered to the home of Isabel German (Bel), and which the respondent concluded the claimant had stolen. This followed a complaint from Bel that she could no longer work with the claimant because a parcel had gone missing during her family's absence on holiday. They had made enquiries of the parcel company who

- confirmed the parcel been delivered, and it was subsequently found in the claimant's house. They assumed that the claimant had taken the parcel dishonestly.
15. However, the claimant had an innocent version of events, and the respondent accepts that she did not ask the claimant for her version, and did not know that other members of staff would support the claimant. She acted only on the information from Bel German's family and concluded that the claimant had acted dishonestly in removing the parcel, and decided to dismiss mainly for this reason, but also for the other five historical matters explained above.
  16. The claimant explained at this hearing that Bel German was leaving on holiday and that the claimant had to attend at her house to collect a Hoover. On arrival the Hoover and the parcel in question were outside Bel German's front door in her absence. The claimant took the parcel home and put it on her stairs where she was in the habit of leaving items and correspondence for her employees who knew that they could come and collect them. Other members of staff knew that that parcel was there on the stairs. The claimant's six year old daughter on one occasion tried to open the parcel, which the claimant resealed. She did not know what was in it. It was merely on the stairs awaiting the return of Bel German to collect it. This version of events was not challenged by the respondent at this hearing, and I find the claimant's explanation entirely plausible, and therefore I prefer the claimant's version of events. I find that the claimant removed the parcel as a helpful gesture, and in no way can be said to have stolen it or taken it dishonestly, and accordingly the claimant did not commit any gross misconduct in this respect.
  17. The respondent had not suspended the claimant on full pay nor informed the claimant that she was to attend the disciplinary meeting at which he might be dismissed for gross misconduct. She was not offered the opportunity to have a representative or fellow employee as her companion at that meeting. The respondent did not investigate the potential gross misconduct with the claimant or any other members of staff which would have uncovered the innocent explanation. The respondent decided to dismiss the claimant summarily for this gross misconduct, and also for the five historical matters mentioned above, which the respondent had known about for several months, but without taking any other disciplinary action.
  18. Following her dismissal, the claimant was very upset and sent an immediate letter of complaint. The respondent replied with a short letter, but has accepted in her grounds of resistance to these proceedings that she did not offer the claimant the right of appeal.
  19. Having established the above facts, I now apply the law.
  20. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
  21. I have considered section 98 (4) of the Act which provides "... 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 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".
  22. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
  23. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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 the amount accordingly."
  24. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in

- consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
25. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
  26. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
  27. Under section 38 of the Employment Act 2002, if the employer was in breach of his duty to give a written statement of initial employment particulars and the employment tribunal finds in favour of the employee or makes an award to the employee, then the tribunal must increase the award by an amount equal to two weeks' pay, and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks' pay instead.
  28. I have considered the cases of: British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
  29. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
  30. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
  31. In the first place I find that there were significant procedural breaches in connection with the disciplinary and dismissal procedure adopted by the respondent by reference both to the ACAS Code and the normally accepted principles of fair industrial practice. The claimant was not suspended on full pay pending an investigation, and was unaware that she had been called to a disciplinary meeting which might have resulted in her dismissal for gross misconduct. She was not afforded the opportunity to be accompanied by a representative or companion. She was not offered the right of appeal. The respondent has accepted that she did not offer the claimant the appropriate procedural protection by reference to the ACAS Code.
  32. In addition, I also find that at the time the respondent dismissed the claimant, the respondent had not carried out as much investigation as was reasonable in the circumstances of the case. The claimant had an innocent version of events and a full explanation in reply to the allegation that she had stolen the parcel, and other members of her staff were aware of the circumstances. If the claimant had been informed of the allegations against her before her dismissal, she could have informed the respondent of

- this, and then the respondent would have been in position to investigate the matter fully with other members of staff.
33. Even if the respondent suggests that she genuinely believed the claimant had committed gross misconduct, I find that any such belief could not have been held on reasonable grounds. In the first place there was an innocent explanation to the alleged theft of the parcel. In addition, the other five historical matters relied upon by the respondent were not sufficiently serious to assist in any conclusion that the claimant was guilty of misconduct such as to give rise to the need to dismiss. In each of these five historical allegations the respondent was fully aware of the circumstances, and had been for several months, and did not consider them in any way sufficiently serious to merit any disciplinary action.
  34. In conclusion therefore, I find that the claimant had not committed gross misconduct; any belief held by the respondent to that effect was not a reasonable belief; at the time she held that belief the respondent had failed to carry out a fair and reasonable investigation; and there were significant procedural breaches.
  35. For all of these reasons (and even bearing in mind the small size and lack of administrative resources of this employer) I find that the dismissal of the claimant was not fair and reasonable in all the circumstances of the case. Accordingly, therefore I find that the claimant was unfairly dismissed and she succeeds in her unfair dismissal claim.
  36. In addition, I have found that the claimant did not commit gross misconduct, and accordingly the respondent was not entitled to dismiss the claimant without notice. The claimant therefore succeeds in her claim for breach of contract in respect of her two weeks statutory notice.
  37. I now turn to potential remedy. The claimant does not seek reinstatement or re-engagement, and seeks compensation. In connection with potential compensation, having found that the claimant did not commit gross misconduct, and that there were no historical matters sufficiently serious to merit disciplinary proceedings at the time the respondent was aware of them, there cannot be said to be any contributory conduct on the part of the claimant such as would make it just and equitable to reduce the basic award under section 122(2) of the Act, nor that the dismissal was to any extent caused or contributed to by any action of the complainant, such that it might be just and equitable to reduce the amount of the compensatory award under s123(6) of the Act.
  38. Similarly, in my judgment it cannot be said that if a fair procedure had been adopted then a fair dismissal would have resulted, and accordingly I decline to make any deduction by way of potential compensation under the Polkey principles.
  39. I turn first to the basic award. The claimant had two years' service and was aged 28 at the time of her dismissal. Her gross weekly pay was £260.39. The basic award is therefore £520.78.
  40. For the compensatory award, this is calculated at the claimant's net loss, which was £208.89 per week. The claimant did not apply for any alternative employment in mitigation of her loss caused by the loss of her job with the respondent, because she chose to concentrate on building up her business. In my judgment she entitled to do so to increase the success of her self-employed venture, but there must come a time when it is longer just and equitable for her to seek to recover her lost salary when so doing. For these reasons I award a period of 26 weeks' loss only from the date of the claimant's dismissal, which comes to £5,431.14. The claimant also brings a claim for loss of statutory employment rights and claims £350.00, and I also make that award. The starting point of the compensatory award is therefore £5,781.14.
  41. The claimant has also made a claim for 25% uplift by reason of the respondent's failure to apply the provisions of the ACAS Code. I apply section 207A(3) of the 1992 Act and I find the respondent's failure to comply with the ACAS Code to have been unreasonable. However, given the respondent's small size and administrative resources, I consider that an award of 10% by way of uplift is just and equitable under section 207A(4). I therefore apply an uplift of 10% to the basic award of £5,781.14, which is increased to £6,359.25.
  42. The total award for compensation for unfair dismissal is therefore £6,880.03, and I consider this sum to be just and equitable. The respondent has already made a payment of £200.00 towards this amount, and the outstanding award is therefore £6,680.03.

43. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
44. I also make an award under section 38 of the Employment Act 2002 because the claimant has been successful in these proceedings in circumstances where the respondent was in breach of her duty to provide a written statement of the terms and conditions of the claimant's employment. Given the size and administrative resources of this respondent, I consider that it is just and equitable to award the minimum amount of two weeks' pay, which is a sum of £520.78.
45. Finally, no award is made in connection with the claimant's lost notice period under her breach of contract claim, because this period has already been compensated for as part of the basic award.
46. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 18; a concise identification of the relevant law is at paragraphs 20 to 30; how that law has been applied to those findings in order to decide the issues is at paragraphs 31 to 36; and how the amount of the financial award has been calculated is at paragraphs 37 to 45.

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Employment Judge N J Roper  
Dated 11 March 2019