



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M Tovey

**Respondent:** Melanie Starbuck

**HELD AT:** Sheffield

**ON:** 27 March 2019 and  
9 April 2019

**BEFORE:** Employment Judge Shulman

## REPRESENTATION:

**Claimant:** Mr N Tovey (husband)

**Respondent:** Mr A Starbuck (father)

# JUDGMENT

The Judgement of the Tribunal is that the Claimant was unfairly dismissed.

# REASONS

## 1. Claims

There are two claims for unfair dismissal, one which was lodged on 28 November 2018 and the other which was lodged on 17 December 2018. These claims were consolidated on 28 December 2018. There was an indication of a claim for unauthorised deduction of wages, but at the outset of the hearing this was not pursued.

## 2. Issues

2.1. What were the reasons for dismissal?

- 2.2. Whether the dismissals were fair.
- 2.3. In the case of the first dismissal whether or not the Claimant affirmed her employment contract.

### **3. The law**

- 3.1. The Tribunal has to have regard to the provisions of the law relating to unfair dismissal which can be found in section 98(1)(a),(2)(b) and (4) of the Employment Rights Act 1996. The Respondent has to show a reason for the dismissal and then there is a joint onus on both parties in the case of the Claimant to show that the dismissal was not fair and in the case of the Respondent to show that the dismissal was fair.

### **4. Facts**

- 4.1. The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities:
- 4.2. The Claimant was employed by her sister Melanie as a carer from 2008. Melanie is autistic and cannot read or write. In the last three years of the Claimant's employment Mr Alan Starbuck, the Claimant's father, made employment decisions for Melanie. The Claimant cared for Melanie for 11 years until she was dismissed, by her father. This is very much, therefore, a family situation with the direct involvement of a father and two daughters and on the periphery the Claimant's husband and the Claimant and Melanie's mother, who suffers from dementia. These are difficult issues to be dealt with before a Tribunal but the parties have a right to be here.
- 4.3. There was a history between the Claimant and her father, who was dissatisfied, rightly or wrongly with the Claimant's performance as a carer for Melanie. Indeed as long ago as May 2018 Mr Starbuck threatened to sack the Claimant. This incident seems to have been in a manner of a contest between the two of them and without, it would appear, any real grounds.
- 4.4. Things became much more serious on 3 October 2018 when, during a heated conversation, Mr Starbuck asked the Claimant for her resignation. The Claimant refused. Mr Starbuck then said he was sacking the Claimant for misbehaviour and he told the Tribunal he was goaded into it by the Claimant. We find as a fact that that was not the case. Mr Starbuck then proceeded to sack the Claimant for gross disobedience, but this alleged conduct was not substantiated before the Tribunal. During the conversation around the dismissal Mr Starbuck agreed three times to write and confirm the dismissal. He never did. He says that he retracted the dismissal but there was no evidence before the Tribunal that the dismissal was retracted and in any case it could not have been so without the Claimant's consent, which the Tribunal is satisfied she did not give. What she did was to continue to put sick pay in her pocket between 3 October 2019 and a second "dismissal" of which more below. She never returned the sick pay.
- 4.5. Up to 3 October 2018 or indeed thereafter the Claimant received no warnings in relation to her conduct. Indeed she appealed the first

dismissal and Mr Starbuck failed to follow the appeals procedure, which was in the Claimant's contract.

- 4.6. On 5 November 2018 the Claimant was called to a disciplinary hearing by letter and in that letter Mr Starbuck stated that he intended to dismiss the Claimant. The Claimant denies she ever received that letter, although she may have received it with another letter on or about 19 November 2018. Mr Starbuck raised the question of the Claimant's sickness, which had been continuing for stress since 24 September 2018. Mr Starbuck had failed to follow sickness procedures. Indeed Mr Starbuck had not contacted the Claimant at all during her sickness and it seems, apart from the submission of regular sick notes, that the Claimant did not contact him either. There was also a suggestion in that letter of 5 November 2018 that the Claimant had wrongly taken Melanie from her home.
- 4.7. The same letter also introduced the issue of the Claimant's mother and the Tribunal has been studious in excluding evidence about the Claimant's mother, save to say that Mr Starbuck's conduct in relation to the Claimant's mother had caused the Claimant considerable distress and could be said to be the turning point in the unfortunate relationship between Mr Starbuck and his daughter.
- 4.8. The Tribunal finds that the letter dated 5 November 2018 was not delivered to the Claimant until the further letter which was delivered on 19 November 2018, which we will call the second letter. The second letter unlike the one dated 5 November 2018 unleashed a catalogue of conduct alleged by Mr Starbuck against the Claimant.
- 4.9. There were 10 items of alleged misconduct and when the Tribunal took Mr Starbuck through them it was clear that there was little or no substance in any of them.
- 4.10. The Tribunal finds that they were a pretext for Mr Starbuck to try and get rid of the Claimant as follows:
  - 4.10.1. Allegation - The Claimant was off sick and attempting to take Melanie away. Mr Starbuck provided no dates for these allegations.
  - 4.10.2. Allegation - Taking holidays at short notice and without permission. Mr Starbuck was unable to provide any dates for these occasions.
  - 4.10.3. Allegation - December 2016 and January 2017. The Claimant took Melanie to assist the Claimant's daughter in a house move. Mr Starbuck alleges that this happened on a minimum of three separate occasions but the Claimant was not disciplined.
  - 4.10.4. Allegation - Melanie staying with the Claimant without permission. This happened once only in December 2017 on Mr Starbuck's admission.
  - 4.10.5. Allegation - Using spare bedroom in Melanie's house for storage – Mr Starbuck stated that this was in fact used predominantly by Sheffield City Council and he knew all about it.

- 4.10.6. Allegation - The Claimant not phoning Mr Starbuck whilst she was on duty – Mr Starbuck said this stopped for about six weeks for which the Claimant received an oral reprimand. This was not recorded in any personnel file or any other place.
- 4.10.7. Allegation - Taking family calls while working. Mr Starbuck agreed that these calls were to/from the Claimant's husband and/or daughters, who Mr Starbuck agreed were the Claimant's nearest and dearest. This was technically in breach of the Claimant's contract but no action was ever taken in relation to it.
- 4.10.8. Allegation - Upsetting staff – according to Mr Starbuck this affected staff called Louise and Annette – both declined to give oral evidence before the Tribunal. No action was taken against the Claimant in relation to any incident of upsetting staff.
- 4.10.9. Allegation - Criticising staff in the communications book. According to Mr Starbuck this happened once in July 2018.
- 4.10.10. Allegation - Making arrangements for Melanie, which were half an hour late. The Tribunal finds that this is of little substance.
- 4.10.11. In her evidence the Claimant provided reasonable and unchallenged explanations for each of these matters.
- 4.11. Handwritten on the second letter were offers by Mr Starbuck of a meeting on 20 or 21 November 2018. These dates were not convenient to the Claimant, who proposed a meeting in the following week.
- 4.12. The following week never came because by a letter dated 21 November 2018 the Claimant was dismissed and grounds were expressed by Mr Starbuck to be "better left unsaid".
- 4.13. In the Claimant's detailed contract of employment was a disciplinary procedure. This was observed by Mr Starbuck in the breach with no adherence to the stages of discipline, the way in which gross misconduct may be dealt with or the appeals procedure.

## **5. Determination of the issues**

After listening to the factual and legal submissions made by and on behalf of the respective parties:

- 5.1. The first dismissal was on 3 October 2018. There is no doubt that the Claimant was dismissed for misbehaviour and/or gross disobedience.
- 5.2. That is the conduct but no procedure was followed at all.
- 5.3. Having heard the two witnesses the Tribunal prefers the evidence of the Claimant in relation to the alleged retraction of the dismissal by Mr Starbuck. In other words the Tribunal finds that the retraction did not happen.
- 5.4. However by accepting sick pay thereafter the Claimant could be said to be affirming her contract. In so doing in that way that she continued to be bound by the contract and accordingly the dismissal was negated.
- 5.5. As to the second dismissal, even Mr Starbuck accepts that he dismissed the Claimant.

- 5.6. He did it following little or no procedure and having regard to the conduct listed above he could not be said to have acted reasonably
- 5.7. In all the circumstances the second dismissal (but not the first) was unfair and we now move to remedy.

Employment Judge Shulman

Date\_25 April 2019

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