EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4118257/2018
Held in Edinburgh on 6 and 7 February 2019
Employment Judge: Ms Amanda Jones (sitting alone)

Mr Cassidy Macfarlane	**Claimant - unrepresented**
Grant Property Solutions Limited	**Respondent – represented by Ms Annette Bennie of counsel JMW Solicitors LLP 1 Byrom Place Spinningfields Manchester M3 3HG**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was fairly dismissed and the claim is dismissed.

REASONS

INTRODUCTION

1. The claimant lodged a claim of unfair dismissal following his summary dismissal for gross misconduct from his role of IT Manager with the respondent. The claimant claimed that his dismissal was substantively unfair and also claimed that the procedure which had been followed was not reasonable. The respondent's position was that the dismissal was fair and that if there were any flaws in the procedure which rendered the dismissal

unfair, these would have made no difference to the outcome. The respondent also argued that if the dismissal was unfair, then the claimant had contributed to his dismissal and any compensation which might be awarded should be reduced accordingly.

ISSUES TO BE DETERMINED

2. The Tribunal was required to consider the following issues:

Was the claimant unfairly dismissed, and in particular:

i. Did the respondent dismiss the claimant on grounds of his alleged misconduct;
ii. Did the respondent carry out a reasonable investigation into the allegations against the claimant;
iii. Did the employer genuinely believe that the claimant was guilty of the misconduct complained of;
iv. Did the respondent have reasonable grounds for that belief.
v. Was the procedure adopted fair?
vi. Did the alleged misconduct amount to gross misconduct?
vii. Did the decision to dismiss fall within the band of reasonable responses?

b. If the claimant was unfairly dismissed, should the Tribunal make a basic award and/or an award in respect of compensation for loss of earning?

c. If so, should any such award be reduced to take account of the claimant's conduct and/or that the claimant would have been dismissed had a fair procedure been followed?

FINDINGS IN FACT

3. Having listened carefully to the evidence, considered the documents lodged, and submissions made on behalf of the parties, the Tribunal made the following findings in fact:

4. The claimant is a 45 year old man, who had been employed by the respondent for 10 years at the time of his dismissal. The claimant was employed as an IT Manager.

5. The respondent is a property investment, acquisition and management company which employs around 94 staff, most of whom are employed at the respondent's Head Office in Edinburgh where the claimant was also based.

6. The claimant's contract of employment made reference to a company handbook. The handbook was available on the respondent's intranet and included a Code of Conduct which formed part of the contract of employment. The claimant had been responsible for uploading the handbook.

7. The Code of Conduct stated: "Any form of bullying or harassment, whether prohibited under the Company's Equal Opportunities Policy or not, will normally be treated as gross misconduct." The Code of Conduct also stated that the intranet should be used only for business purposes and that abuse may result in disciplinary action. It also set out a non-exhaustive list of examples of gross misconduct including "Disorderly of indecent conduct; Discriminating or inciting others to discriminate on the grounds of sex, sexual orientation, race, colour, ethnic origin, age, religion or disability and the misuse of the Company's IT facilities including the sending, receiving, or viewing of indecent or otherwise offensive material."

8. On 17 April 2018, the claimant sent a colleague, Lily Galloway an email. Ms Galloway was a junior employee who worked as a property co-ordinator with the respondent and was 18 years old at the time.

9. The email subject was 'I' and said 'Completely lost track of what I was saying there. That was your fault. I could never work in a shared environment with you, you are FAR TOO DISTRACTING WHAT THE FUCK". The email was timed at 15.50.

10. AT 16.23, the claimant sent Ms Galloway a further email with the subject "I mean it" which contained a cartoon strip which appeared to show a man looking at a female colleague's breasts, her looking at him in an annoyed fashion and then him exposing the top part of his crotch.

11. Around this time, Ms Galloway's line manager, Scott Neilson noticed that the claimant was upset and she showed him the emails. He did not take any action at that point.

12. The following morning, 18 April, Ms Galloway asked to speak to her line manager at the beginning of the day as she had reflected on the emails overnight and was concerned about them.

13. Her line manager indicated he too had been concerned and was going to seek her out and that he would speak to his line manager, Andrew Hudson about the matter.

14. The claimant then sent a further email to Ms Galloway at 10.41 with the subject 'Good Morning'. The email said: "Hello, I apologise for the emails I sent you yesterday afternoon. They were meant in a complimentary way, but in hindsight it probably just made you uncomfortable. You are an asset to the company, and of course I am comfortable working alongside you. Once again, please accept my apologies." In very small type below that message a further sentence read "Just don't wear that dress again."

15. Mr Hudson and Mr Neilson then visited the office of Mr Moran, who is the Managing Director of the respondent. They told him that Ms Galloway was very upset and explained what had happened.

16. At some stage on 18 April, Ms Galloway's mother telephoned the respondent to express her concern at what had happened and indicate that she wished the matter dealt with as soon as possible.

17. At 9am on 19th April, Mr Moran had a meeting with the claimant. Also in attendance was a colleague Mr Wardall. Mr Moran informed the claimant that a complaint had been made by Ms Galloway's mother and that Ms Galloway herself had raised the issue of emails which had been sent by the claimant to her. The claimant immediately admitted sending the emails and indicated to Mr Moran that it was a 'moment of madness'. The claimant was advised that he was being suspended on full pay pending an investigation into the matter.

18. An email was sent by Mr Moran to the claimant's personal email account later that day confirming the claimant's suspension.

19. Mr Moran then asked a colleague, Colette Grant, who was a 50% shareholder, co-founder and sat on the respondent's board, to carry out an investigation into the complaint. Mr Moran provided a copy of the emails and a note of his meeting with the claimant where he suspended the claimant.

20. On 19th April, Ms Grant met with Ms Galloway and a Kirsten Burrow who also worked for the respondent was in attendance. A note of that meeting was produced to the Tribunal. During the meeting, Ms Galloway raised another incident at a staff day where she alleged that the claimant had made a comment of a sexual nature to her. The note of that meeting was provided to Ms Galloway who returned it to the respondent with tracked changes. The note made reference to Ms Galloway feeling 'degraded' and 'humiliated' by the claimant's conduct.

21. Ms Grant then met with Andrew Hutton and Scott Neilson later that morning as part of her investigation. That note records Mr Hutton as indicating that Ms Galloway's mother had called the respondent on 18th April at 3.30pm.

22. Mr Moran then emailed the claimant on 23 April enclosing a note of the meetings which had taken place and requiring the claimant to attend a disciplinary hearing on 27 April, where he 'would be given the opportunity to respond to the allegations made against you, namely that you sexually harassed Lily Galloway.'

23. There were then a series of emails between Mr Moran and the claimant in relation to the identity of the person who would accompany him to the hearing. It was ultimately agreed that the claimant would be accompanied by a colleague, David Brash.

24. The hearing took place on 27th April and Mr Moran was accompanied by a fellow Director, Anna Renton both of whom formed a panel to consider the allegations. Ms Burrow was again in attendance to take notes of the meeting. An audio recording was also made of the meeting.

25. The claimant was advised at the outset of the meeting that the allegations if established amounted to gross misconduct.

26. Following the hearing, the claimant provided a statement by email to the respondent. The claimant's position in that statement was that he had sent the initial two emails to Ms Galloway "in 'jokey' and 'bantery' way.' He went on to state "Receiving no similarly light-hearted response, I sent the third email in an attempt to apologise for any perceived offence. I again added humour to this apology in an attempt to show that I was at no point being serious. I then thought no more about it." He went on to state "Generally, the way that Lily's statement depicts me is shocking, and it has been made extremely clear to me that my humour is not for everyone. The fact that I sent this communication on internal company email – that I personally have ensured is traceable, backed up and secure, should illustrate that I really did not being I was doing anything 'wrong'. That said, this incident has given me cause for a huge amount of reflection, and self-consideration. I am definitely

going to modify my behaviour, be more professional in all communications and certainly not make questionable jokes or comments, particularly in official company communications.'

27. At the conclusion of the hearing, Mr Moran asked the claimant if he had anything else to add and he stated "Should I continue in my role at Grant Property, you can be rest assured that anything even close to this will never happen again and I will make huge changes to my professional attitude."

28. Following the hearing, Mr Moran made notes the relevant issues and his thought processes in relation to the decision reached by him. Having reached a decision, he discussed this with his fellow director.

29. Mr Moran concluded that the claimant should be dismissed. Mr Moran then sent an email to the claimant on 30 April setting out his decision and the reasons for this. While the claimant was dismissed with immediate effect, he was advised that he would be paid an ex-gratia payment of a month's pay and be entitled to keep his mobile phone.

30. The claimant was advised of his right to appeal.

31. The following day, Mr Moran sent an email to all staff advising them that the claimant had been dismissed for gross misconduct "due to his inappropriate behaviour towards another member of staff". The email also stated "If anyone feels uncomfortable in any way about how they have been treated by another member of staff please report it to your line manager or come straight to me."

32. The claimant then appealed against his dismissal by email 4 May. His grounds of appeal were that misconduct was not proved; even if misconduct was proved or admitted, it was not gross misconduct; mitigating factors had not been taken into account; that efforts ought to have been made to salvage the working relationship and that there had not been a thorough investigation of the incident.

33. The claimant advised that another director, Paula Russell would chair the appeal hearing. There was various correspondence between the claimant and Ms Russell regarding the appeal hearing, where the claimant made a number of requests for information and for witnesses, including that Ms Galloway should be present at the hearing to be asked questions by him.

34. The claimant wished to be accompanied at the hearing by his wife who he indicated was a trade union representative. The claimant was not however a member of the union in which his wife worked and the respondent indicated that he would have to be accompanied by either a colleague or a union representative of his trade union.

35. Prior to the appeal hearing, Mr Moran instructed that a review be carried out into the claimant's email account. That review resulted in a number of other emails to young female colleagues coming to light together with pictures or memes with sexual content. One such email included a picture of a woman's leg with a raised skirt which had marks on the leg indicating what appeared to be descriptions of lengths of skirts from 'matronly' to 'whore'. This email had been sent to a female colleague with the subject 'IM SAYIN NUFFINK'. The colleague responded the following day with 'Shocking!!!'. The claimant replied to this email by saying "Thank f**k you replied, I was ready for you to lead a 'me too!" march on my office."

36. Mr Moran made a file note of this on 11 May and noted that the emails would be presented to the claimant prior to his appeal. These additional emails were presented to the claimant.

37. An appeal hearing took place on 13 June and was chaired by Paula Russell, the respondent's Assistant Director of Lettings. The hearing was recorded and a note of the hearing was produced to the Tribunal. During the hearing, the claimant read out a pre-prepared statement. The claimant agreed to provide a copy of the statement after the hearing, but there seemed to be

some confusion about this and a copy was not provided by the claimant until 2 July. The claimant also raised the suggestion of providing additional information, in particular a video and names of witnesses but in the event, the claimant confirmed by email of 4 July.

38. At the appeal hearing, the claimant's position was somewhat different to that adopted at the disciplinary hearing. In particular, the claimant suggested that Ms Galloway had not as alleged suffered 'significant distress'. The claimant also questioned Ms Galloway's motives in making the allegations against him, and suggested that "In this day and age I am sure that Lily has been subjected to far harsher words and more explicit pictures". He also suggested that in fact he had been made to feel uncomfortable by Ms Galloway's attire on the day of the original emails and had sent the emails to try and make her realise that her attire was inappropriate for work.

39. The claimant's appeal was also on the basis that the sending of the email to all staff advising them of his dismissal was prejudicial and that the investigation had not been thorough.

40. The appeal was dismissed by Ms Russell and her decision was set out in an email to the claimant on 6 July. Ms Russell did not accept that further investigation ought to have been carried out and that any deficiencies would not have had a material bearing on the outcome. She also found that the claimant's position in relation to the emails was inconsistent. She indicated that she did not take into account the additional emails as these had not been in the mind of Mr Moran at the time of the dismissal

41. The claimant has now obtained alternative employment although he was unemployed for a number of months and received 2 or 3 payments of benefits during that period.

OBSERVATIONS ON THE EVIDENCE

42. The Tribunal heard from Mr Moran and Ms Russell for the respondent and from the claimant himself. Mr Moran and Ms Russell were both credible and reliable in their evidence and made concessions in relation to matters where appropriate.

43. The claimant's evidence was inconsistent in relation to the reasons for the conduct which led to his dismissal. He suggested that there were various reasons for his conduct and while on the one hand accepted that his conduct was inappropriate, on the other hand he appeared to attach blame to Ms Galloway for inviting that conduct by wearing clothes which were not appropriate and also called into question the motives for her raising issues. He also at times sought to suggest that the emails he had sent were not really inappropriate at all particularly in light of the nature of materials which are posted on social media more generally now, and directed to women in particular.

44. There was in fact little dispute on the facts of the case, the claimant did not at any time seek to deny that he had sent the emails in question, although did dispute that Ms Galloway was genuinely upset by them.

RELEVANT LAW

Unfair dismissal

45. Section 98(2) of ERA sets out the potentially fair reasons for dismissal. Section 98(2)(c) states that the dismissal of an employee for a reason which relates to his conduct is potentially fair.

46. It will then be for the Tribunal to determine whether such a dismissal was fair in all of the circumstances of the case.

47. Section 98(4) states that whether a dismissal will be fair (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.

48. Therefore, a dismissal may be unfair because there were procedural flaws or because a reasonable employer would not have dismissed the employee in the particular circumstances. This has been described as acting 'within the band of reasonable responses'.

49. It is also important to bear in mind the provisions of the ACAS Code of Practice when considering whether a dismissal was fair or unfair.

50. Finally, it is crucial that the Tribunal in considering these issues does not adopt what has been termed 'a substitution mindset'. The Tribunal is required to consider whether the employer's actions were within the band of reasonable responses, not whether or not it agreed that the employer's actions were justified.

SUBMISSIONS

51. The respondent submitted that the dismissal was both procedurally and substantively fair. In the alternative, it was submitted that if the Tribunal found that there had been any procedural irregularity, as a result of *Polkey v A E Dayton Services Limited* [1987] IRLR 503, any compensation should be reduced by 100%. It was also submitted that compensation should be reduced by 100% on the basis that the claimant's conduct had been blameworthy and contributed to his dismissal.

52. It was submitted that the respondent's witnesses had been credible and reliable and that where there was any conflict in the evidence, their evidence should be preferred to that of the claimant.

53. In terms of the evidence, the respondent submitted that the claimant's tone was consistent with his position during the internal proceedings, in that he demonstrated a lack of insight into his actions and appeared to try to blame everyone but himself after his initial admission.

54. The Tribunal was referred to *Graham v The Secretary of State for Work and Pensions* [2012] EWCA Civ 903 as a case which set out a recent explanation of the well-established *Burchell* test, which was set out by the Employment Appeal Tribunal in *British Home Stores Limited v Burchell* [1978] IRLR 379. It was also referred to an unreported decision of the Employment Appeal Tribunal, *Buzolli v Food Partners Ltd* UKEAT/317/12/KN, where the EAT upheld a Tribunal's decision to conclude that notwithstanding procedural defects, the employer's decision to dismiss had been reasonable, and *Taylor v OCS Group Ltd* [2006] EWCA Civ 702. It was submitted that the present case fell entirely within the territory of *Taylor* in that the Tribunal should consider whether the entire disciplinary process was fair or unfair.

55. The respondent's position was that the claimant was dismissed for his conduct in sending emails. It was acknowledged both in evidence and submissions that there were aspects of the procedure which could have been better. In particular, it was acknowledged that the letter inviting the claimant to the disciplinary hearing should have made explicit reference to gross misconduct rather than misconduct. However, it was submitted that the claimant was aware that he may be dismissed given his statement at the hearing that 'if he stayed employed....'; that the claimant was aware of the terms of the respondent's policies and that the claimant was aware that he was being accused of sexual harassment which if established would amount to gross misconduct.

56. It was also submitted that the investigation was not perfect or forensic, but that it was reasonable in the circumstances, and particularly given the claimant's acceptance that he had sent the original emails.

57. The claimant submitted that he was not aware that he might be dismissed at the disciplinary hearing and therefore was not sufficiently prepared in advance of the hearing. He also submitted that the investigation was not reasonable and that mitigating circumstances were not taken into account. In particular, the claimant submitted that the failure to interview him prior to the disciplinary hearing itself was unfair and that his track record of supporting young people in the workplace was not taken into account.

58. The claimant also said that other investigations could have taken place including obtaining CCTV footage of Ms Galloway in advance of him having sent her emails, presumably in order to analyse what she was wearing at the time.

59. The claimant accepted in his submissions that the emails he had sent were inappropriate but submitted that sending them did not amount to gross misconduct and that the respondent had made flawed assumptions and there was a failure to adhere to the ACAS code.

DISCUSSION AND DECISION

60. The Tribunal preferred the submission on behalf of the respondent.

61. The Tribunal was satisfied that the respondent had dismissed the claimant on the grounds of conduct in terms of section 98 (2)(c)of ERA.

62. The Tribunal then turned its mind to whether that dismissal was fair.

63. In the first instance the Tribunal considered the procedure which was followed by the respondent. The Tribunal considered the nature and scope of the investigation which was carried out by the respondent. It is acknowledged that the respondent could have decided to have an investigatory meeting with the claimant prior to the convening of a disciplinary hearing. However, the Tribunal was mindful that the claimant had readily accepted that he had sent the emails in issue at the meeting at which he had been suspended. In any event, the Tribunal was of the view that while in some circumstances it may be unfair not to have an investigatory meeting with an employee in advance of a disciplinary hearing, that would not necessarily be the case. In addition, while the respondent could have sought to gather additional information or interview additional potential witnesses, the Tribunal was satisfied that the investigation which was carried out was reasonable in all the circumstances.

64. The Tribunal agreed with the claimant in his criticism of the email inviting the claimant to the disciplinary hearing. The respondent accepted that the email should have made clear that the allegations amounted to gross misconduct and advise the claimant that he might be dismissed. However, the Tribunal accepted the respondent's submission that the claimant was aware that he was at risk of dismissal and had sufficient information to allow him to prepare for the hearing. The claimant was aware that he was accused of 'sexual harassment', he had been suspended from work. Indeed, his evidence was that he was so concerned about the situation, that he did not tell his wife that he had been suspended for some days and kept to his usual routine.

65. The Tribunal noted that Mr Moran opened the disciplinary hearing by stating that the allegations constituted gross misconduct. The claimant could have, but did not, request a postponement of the hearing had he misunderstood the situation. The Tribunal did not accept as credible the claimant's position that he was so distressed throughout the hearing that he did not hear Mr Moran make this statement. Neither did the claimant raise the issue in his written statement which he forwarded after the hearing itself. Further, the claimant

stated at the end of the hearing that 'should he continue in his role at Grant Property'. The Tribunal formed the view that the claimant was aware prior to the disciplinary hearing that the allegations against him were so serious that his continued employment was at risk.

66. The Tribunal was however very troubled by the decision of the respondent to send an email to the entire office advising them of the claimant's dismissal and that it was for 'inappropriate behaviour towards another member of staff'. The timing of this email, prior to the period in which the claimant could appeal against the dismissal was particularly inappropriate. It is clear that there was potential for this email to prejudice the claimant's right to a fair appeal hearing.

67. However, the Tribunal is also mindful that it should consider the procedure as a whole. The claimant had considerable opportunities to put forward additional information in advance of, during or after the appeal hearing. He was in extensive communications with the respondent and raised many issues with them.

68. Moreover, it was clear that the appeal hearing was more than simply a review of the decision taken at the disciplinary hearing. The Tribunal was of the view that the appeal hearing was fair and was not tainted by the terms of the email. The Tribunal was satisfied that Ms Russell approached the matter with an open mind. The Tribunal was in these particular circumstances, satisfied that the procedure which was followed was reasonable.

69. The Tribunal then considered whether dismissal of the claimant was within the band of reasonable responses. The Tribunal was entirely satisfied that dismissal was reasonable.

70. The respondent's handbook made clear that harassment and in particular sexual harassment was a very serious issue which could result in dismissal. In addition, the handbook made clear that misuse of the respondent's email

systems and the sending of offensive emails could amount to gross misconduct.

71. The claimant was a senior employee in a key position of trust with the respondent. The claimant had sent two emails which could amount to sexual harassment. He then compounded the issue by sending a further email the next morning, while initially bearing to be an apology, could in fact be seen as a further act of harassment. While the claimant was initially apologetic for having sent emails, his position then continued to alter throughout the process.

72. The Tribunal accepted the submission of the respondent that the claimant lacked insight into his conduct. Although on the one hand the claimant was apologetic, he was also seeking to minimise the importance of his conduct. He sought to suggest during his appeal and before the Tribunal that the recipient of the emails was not genuinely upset as she would have been subjected to worse treatment online more generally.

73. While the Tribunal was conscious that the claimant had significant service with the respondent and had never been subject to any disciplinary proceedings in the past, it was satisfied that the respondent was entitled to conclude that the claimant's conduct amounted to sexual harassment and that dismissal was within the band of reasonable responses. While the claimant sought to suggest that his intention in sending the emails was to try to raise with Ms Galloway that her clothing was inappropriate, it was also mindful that the respondent was not advised of this until the claimant's appeal hearing and did not accept the explanation.

74. If the Tribunal is wrong to conclude that the procedure which was followed was fair, the Tribunal is of the view that the procedural irregularities were such that *Polkey* should apply and that any compensation which would have been awarded to the claimant should be reduced by 100% as, given the seriousness of the allegations against the claimant, dismissal was inevitable.

75. Further, if dismissal was not within the band of reasonable responses, then the Tribunal would have concluded that it was just and equitable to reduce the basic award and any compensation awarded to the claimant by 100% on the basis that his conduct was blameworthy in terms of sections 122 and 123 of the Employment Rights Act 2006.

Employment Judge: Amanda Jones
Date of Judgement: 27 March 2019
Entered in register: 28 March 2019
And copied to parties