Case Number: 2303634/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN**

BETWEEN: **Ms V Smith** **Claimant**

and

Two Towers Housing Co-Op Ltd

Respondent

ON: **4 May 2018**

APPEARANCES:

For the Claimant: **In person**

For the Respondent: **Mr Thirlwall – Volunteer committee member**

RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The Claimant was unfairly dismissed by the Respondent.
2. The Respondent shall pay the Claimant a basic award of £5,134.50.
3. No compensatory award is made

REASONS

1. By a Claim Form lodged at the Tribunal on 7 December 2017 the Claimant contends that she was unfairly. This matter was heard over one day. I heard oral evidence from Mr Thirlwall on behalf of the Respondent and the Claimant, Mrs Abigale Buckingham and Mrs Marilyn Stevenson in support of herself. I have carefully considered such documents as I have been

taken to in the bundle and read and listened to the closing submissions of the parties.

2. The Claimant was employed as the Manager with the Respondent between 1 April 2010 until her dismissal on 9 August 2017. The effective date of termination was 30 November 2011.

3. It is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a conduct reason. Once that reason is established I have to consider section 98(4) of the Employment Rights Act 1996 to consider whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case. I need to take account of the size and administrative resources of the Respondent when coming to my decision.

4. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether or not the processes and the decision to dismiss fell within a band of reasonable responses. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303***, and that I need to consider whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation.

5. I have come to the following findings having heard and considered all the evidence. These reasons are confined to those facts that are relevant to the issues and necessary to explain the decision reached.

6. The Claimant was employed as a manager. The Respondent is very small having two other employees in the office and two caretakers. It is run by a volunteer management committee. The Respondent manages the Two Towers flats in Southwark.

7. For some time, there had been friction in the office between the Claimant and Ms Linda Knight. This friction was exacerbated by the small nature of the premises. The Claimant had brought the issues to the attention of the management committee at the time they arose on various occasions between 8 June 2016 and 9 November 2016. On 22 June 2016 the Claimant wrote an email regarding *'a few incidents with Linda recently which I want to bring to the attention of the Employment Sub Committee…..'*. It seems that Mr Thirlwell spent some time with the Claimant and Ms Knight individually but did not try to mediate between them together. The issues continued resulting in Ms Knight making a grievance against the Claimant on 7 February 2017 saying she had been bullied by the Claimant. The was evidence that the Claimant felt she had been bullied by Ms Knight previously when she wrote to the management committee on 28 October 2017saying she was at the end of her tether. By all accounts it was an unpleasant atmosphere in the office such that the Claimant did not consider it appropriate for Ms Knights daughter to come to the office on work experience.

8. The Claimant was invited by letter dated 12 February 2017 to an initial meeting on 20 February 2017. The letter says, *"I should remind you that you are entitled to be accompanied by a work colleague or trade union representative and although this is not a disciplinary hearing the possible outcome of this investigation could lead to disciplinary action."* The Claimant was accompanied by Ms Stevenson to this meeting.

9. During this meeting the Respondent says that the Claimant used language from which it felt there was a threat to Ms Knight. The notes of this meeting record:

> *"VS: I would never have done this to my manager when I was her age*
>
> *TT: Asks if VS understands the severity of allegations & advises TOM's duty of care highlights a disciplinary could lead to dismissal found guilty, urges VS to speak to Union or Legal representative*
>
> *….*
>
> *VS This is ridiculous, Linda has to leave the office*
>
> *TT: Asks VS what she means by that, I cant dismiss someone for expressing they feel threatened*
>
> *VS But I'm in charge, I cant be in the same office as Linda"*

10. The Claimant accepts she was upset but denies saying anything or using a tone of voice that was threatening. She does not accept the notes as being an accurate reflection of the meeting and did not receive them until a few weeks before this hearing.

11. The Respondent's response was to suspend the Claimant. The Respondent says this was not a detriment to the Claimant as she was paid full pay until the termination of her employment the following August. The Respondent allowed the Claimant access to the offices to get information to respond to the allegations made against her.

12. On 21 March 2017 the Respondent sent to the Claimant an email enclosing the grievance made by Ms Knight and supporting documentation. The Claimant prepared a response to the letter of complaint and supporting information running to three typewritten pages.

13. The next meeting was on 4 July 2017 when the Claimant was accompanied by her trade union representative Mr Cooper. There is a dispute about what the nature of this meeting was. The Claimant and her representative believed it was the next investigation meeting to consider the grievance. Mr Thirlwell said it was a disciplinary hearing. The Claimant was dismissed after the hearing.

14. I have to consider what the status of the meeting on 4 July 2017 was. I have considered the emails sent prior to this meeting. All emails refer to 'Interview', 'update', 'investigation' or 'grievance' in the heading. There is no mention of a disciplinary hearing or anything similar. I have considered the body of these emails and nowhere is there any mention of the

grievance being converted into a disciplinary matter. In the body of emails for example, the word 'interview' is used. Mr Thirlwell accepts that this word was not used and puts it down as a 'typo' or the wrong words used.

15. Mr Thirlwell says that he explained the purpose of the meeting at the start. The minutes record:

> *"TT: Introduction*
>
> *Explains why we are here apologises for the time taken to get to this point and explains the procedures going forward and that no decision will be made today".*

16. The minutes do not say what was explained. Mr Thirlwell's evidence was that he would have said it was a disciplinary hearing. Even on his own evidence however, he concedes that the Claimant was not told prior to the meeting itself that it was a disciplinary hearing. Both the Claimant and Mr Cooper, her union representative say that they did not know it was a disciplinary hearing, that they were not told before, at the time or after it was a disciplinary hearing and that if they had been told, they would have left the meeting.

17. The Claimant believed the meeting was an investigation and having waited so long on suspension, wanted the matter progressed. What happened was a three-hour meeting with question after question being asked of the Claimant. The minutes show the number of questions asked. It is not necessary for me to detail all the questions asked, however on reading the minutes of the meeting and looking at the language used, it is clear that the Respondent had prepared a series of questions which it asked one after the other. There is no mention in the minutes of them considering the three-page response the Claimant had sent them, or considering whether Ms Knight's behaviour was, as the Claimant said, difficult. There is no record of the Respondent considering the matters raised by the Claimant to the management committee in the summer of 2016. The Claimant says she spoke to them about the difficulties she was having with Ms Knight but that they did not take proactive action.

18. The Respondent also focussed on six key areas from the grievance and the supporting documents. This in itself is a proper course of action, however it resulted in the Respondent only considering a selection of emails referred to by Ms Knight which were prejudicial to the Claimant. There is no record of them considering other emails which show a normal working relationship, or which show Ms Knight in a negative light.

19. The Respondent has a disciplinary and grievance policy. This is a policy which is agreed with the London Borough of Southwark. For some reason, which was never made clear, the Respondent chose not to use it and said it used the ACAS code of practice which superseded any written policy. The Respondent did not provide a copy of the procedure it said it followed.

20. The Respondent's policy provides at paragraph 5.4:

"The employee must be given

- *At least 2 days notice of the disciplinary hearing*
- *Details of the alleged misconduct*

and be advised that the hearing might lead to the termination of employment or even immediate dismissal."

21. The Claimant was informed on 9 August 2017 by letter that she was dismissed. The letter says *"On receipt of this formal complaint and in keeping with our Duty of Care we suspended you (without detriment) and instigated an investigation into these claims We interviewed all staff and had an investigation meeting with you and your trade Union Representative, Chris Cooper present……"* The only meeting Mr Cooper attended was the meeting on 4 July 2017, in the dismissal letter the Respondent is acknowledging this was an investigation meeting.

22. This letter was the first the Claimant knew that other staff members had been interviewed. The Claimant had not had the opportunity to see their statements and comment on them. The Respondent said that on the morning of the 4 July meeting (before the meeting with the Claimant) it interviewed Alison who also said she had been bullied by the Claimant.

23. The Claimant was given the right to appeal which she did. The Respondent initially did not send the Claimant a copy of the minutes which were requested by Mr Cooper by email dated 29 August 2017. In this letter Mr Cooper referred to the fact that neither he or the Claimant had been told it was a disciplinary hearing and that they did not have all the interviews relating to the matter and believed it to be an investigation meeting. Mr Spencer (a committee member) responded on 5 September saying that it was *'axiomatic a point on which you agreed on the day, (and the ruling of case for BUSHEL v B.H.S refers (sic). In our opening discussion you asked the panel to clarify the meeting and its process. After doing this and highlighting the gravity of these allegations the panel as you wish to take time to digest the areas of emails that were to be covered, the panel even asked if you wish to adjourn this meeting to a later date. You yourself dismissed the opportunity for an adjournment and stated you was happy to continue (sic).*'

24. Taking all this into account, I am satisfied that the Claimant was not told and did not know that the meeting on 4 July 2017 was a disciplinary hearing and on balance find that this was not explained during the meeting itself. I prefer the evidence of the Claimant and Mr Cooper and find that the reasons she agreed to go ahead with the meeting was because she believed it was an investigation meeting only.

25. Although the Claimant appealed and two dates for appeal were set up, the Claimant did not attend the appeal. The reason she gave for not attending was firstly that Mr Cooper was unavailable for the first meeting set for 12 October 2017 and for not attending the second meeting the reason given was that it was to be heard by one person only and not a panel (I note the Respondent's procedure provides for a panel) and that only the evidence

from the previous meeting would be considered. The appeal was considered in the Claimant's absence and rejected.

26. The Claimant moved to Manchester in January 2017 and from that time until her suspension worked four days per week for the Respondent staying in London during that time. Since her dismissal, the Claimant has not attempted to find alternative employment. The reason she gives is that she would not get a reference. She did not ask the Respondent if it would give her one so would not know if this was the case. Given that most references now are purely factual, just confirming dates of employment and job title, I find it is possible that the Respondent would have provided a reference for her.

27. I conclude that the Respondent has demonstrated that the Claimant was dismissed for a conduct reason. The procedures carried out within the final disciplinary process were however not accordance with the disciplinary policy or within ACAS guidelines. The Claimant was not given every opportunity to defend herself against the allegations and indeed did not know that she was attending a disciplinary hearing. I am not satisfied that the investigation was reasonable. The Respondent appear to have had an agenda at the 4 July 2017 meeting, and devised its questions in advance without allowing the Claimant the opportunity to put her case fully. There were clearly difficulties in the working relationship between the Claimant and Ms Knight and those difficulties had been ongoing for some time. There was no attempt to investigate whether Ms Knight was to blame in full or in part.

28. The failure to notify the Claimant that the 4 July meeting was a disciplinary hearing which could lead to the termination of her employment and the failure to let her have copies of all statements relied on in themselves are sufficient to find that the Claimant was unfairly dismissed.

29. I also find the Respondent's comment that the Claimant was suspended '*without detriment'* puzzling. Whilst the Claimant was paid throughout her suspension, it was clearly detrimental to her to be suspended with an outstanding grievance against her, for such a long period of time (nearly 10 months). It is further puzzling to me why the Respondent did not progress matters quicker (even taking into account the volunteer status of the committee) given it was paying the Claimant in full and is not a rich organisation.

30. I am very conscious that the Respondent is a very small organisation and that the management committee is wholly made up of volunteers. I was told that the Respondent took legal advice early. I do not expect the level of formality or depth of investigation that I would expected from a larger organisation with more resources, however, even taking this into account I find that the Claimant was unfairly dismissed.

31. Turning to compensation, the Claimant is entitled to a basic award of £5,134.50 (7 years' service x £489 x 1.5).

32. I find that the Respondent failed to follow the ACAS code of practice in that it did not state that the 4 July meeting was a disciplinary meeting, and failed to investigate properly or give the Claimant sight of all documents it relied on. I also find that the Claimant failed to follow the ACAS code by not attending the appeal hearing. I find them equally culpable and therefore the uplift in compensation for the Respondent's failure is negated by the decrease in compensation for the Claimant's failure.

33. In any event, I find that the Claimant made no attempt to find alternative employment with no good reason and that this is a total failure to mitigate her loss. The Claimant clearly has administrative skills which are transferrable into many different fields of work. She now lives in Manchester which is a city with many businesses. The onus is on the Claimant to take reasonable steps to mitigate her loss. I find that it was reasonable not to look for work until her appeal outcome, but thereafter it was not reasonable. The Claimant was paid in full until the appeal outcome. In light of her failure to look for further work I make no award for future loss and award a basic award only.

Employment Judge Martin
Date: 08 May 2018