Case Number: 2503521/2019

THE EMPLOYMENT TRIBUNALS

Claimant: **Miss L Hillary**

Respondent: **Mrs M Bignell t/a Mahon House Boarding Kennel and Cattery**

Heard at: Teesside Hearing Centre **On: 16 July 2019**
Deliberations: 17 July 2019

Before: **Employment Judge Speker OBE DL**

Representation:

Claimant: **Mr Morgan of Counsel**
Respondent: **Mr Hargreaves, Solicitor**

RESERVED JUDGMENT

1. The claimant was unfairly dismissed and her claim succeeds.

2. The claimant has not been paid her full notice entitlement and her claim in relation to this succeeds.

3. A remedy hearing will be convened at Middlesbrough for half a day in order to determine the payments due to the claimant. In advance of the remedy hearing, both parties shall file with the Tribunal 7 days before that hearing setting written submissions out their case with regard to the calculations. They shall exchange these submissions with the other side.

REASONS

1. These claims of unfair dismissal and failure to pay adequate notice were brought by Miss L Hillary against her former employer Michelle Bignell t/a Mahon House Boarding Kennels and Cattery. Both parties were legally represented. No statement of issues had been agreed in advance. The advocates confirmed that they acknowledged the issues on unfair dismissal were as outlined by me. It was also agreed that the claimant had been paid 4 weeks' notice but was entitled to

12 weeks' notice having over 15 years continuous service. The only issue was to the calculation.

2. Oral evidence was given by two witnesses on behalf of the respondent namely Mrs Michelle Bignell herself as the proprietor of the business and by her husband Keith Bignell. A bundle containing 82 pages of documents was supplied.

3. It was made clear by the respondent's representative that their case was that the claimant had been dismissed for some other substantial reason under Section 98 (1) (b) of the Employment Rights Act 1996.

4. I found the following facts:-

   4.1 Mrs Michelle Bignell is the owner and proprietor of Mahon House Boarding Kennels and Cattery. She purchased the business on 22 March 2018 from the previous owner Steve Jones. Mrs Bignell had previously worked as a school teacher and in other capacities. This was her first venture in this type of business and as an employer. It was very much a career change.

   4.2 Her husband Keith Bignell was not formally involved in the business. He was a joint owner of the property but not a partner or proprietor of the business. He assisted informally with work in the cattery.

   4.3 The claimant had worked for over 30 years in kennels and had worked in the Mahon House business since 13 August 2003. Her employment contract had been transferred to the respondent under the TUPE regulations. She therefore had over 15 years continuous employment. She was the only permanent employee although the business engaged casual staff to cover weekends and holidays. The claimant's contract provided for her to work Monday to Friday a minimum of 30 hours per week from April to September. From October through to March she worked 15 hours per week. She would work additional hours as agreed.

   4.4 The contract of employment which the claimant had signed in 2003 included a brief paragraph with regard to a disciplinary process. It also set out a fixed notice requirement of 4 weeks which was not in accordance with the legal entitlement of employees.

   4.5 In the early days of the employment Mrs Bignell and the claimant appeared to get on well. Mrs Bignell appreciated the assistance given by the claimant as to how the business operated because it was obvious that the claimant had considerable experience in this type of business. Mrs Bignell was working hands on rather than adopting a purely administrative and managerial role. This meant that it was expected that the two of them would work in co-operation.

   4.6 However from May 2018 onwards a number of incidents occurred in relation to which Mrs Bignell as employer was requiring the claimant to accept changes which Mrs Bignell was introducing and to work in the way

in which she required. Considerable evidence was given to the Tribunal with regard to each of these incidents which are as follows:-

a. On 30 May Mrs Bignell spoke to the claimant about concerns relating to an incident on 3 May where Mrs Bignell suspected that the claimant had taken some dog food for consumption by her own dog and had also removed ear muffs belonging to the business and had washed bedding belonging to her own dogs in preference to that to be done for the business. The claimant denied the charges but did acknowledge that she should have asked for permission before using the washing machine in this way. The respondent agreed that she would "draw a line" under all these issues. There was no disciplinary investigation or action.

b. On 22 June 2018 the respondent raised with the claimant the fact that the latter was not using the steam cleaning system for the animal holding areas. This system having been recently introduced by the respondent. The claimant was continuing to use disinfectant which had been the long-term practice. However, she agreed that she would commence using the steam cleaning as directed. At this time the respondent also raised criticism as to the claimant leaving out adequate bedding for the dogs and pointing to DEFRA guidelines. The claimant did not accept that she had failed in these respects. Arising out of these discussions there was again no disciplinary process but the respondent stated to the claimant that a verbal warning was being given. There was no written confirmation provided to the claimant of this setting out precisely why a verbal warning was given and as to any requirements for change.

c. In August 2018 on a day when Mrs Bignell was to be away from the business with her grandchildren, the claimant had indicated that she would clean the holding blocks. This was part of the claimant's general duties as set out on the whiteboard. In the event the claimant did not do this as she stated she had not had time. Mrs Bignell pulled her up on this on her return. Miss Hillary apologised and said that she had not had time but would stay late in order to do this but Mrs Bignell said that she would do it herself.

d. On Friday 7 September the claimant completed her shift towards the end of which it was required that she ensure that adequate and appropriate bedding was available for all of the dogs in the kennel. Mrs Bignell inspected the kennels later and claimed that there was insufficient bedding in three of the kennels namely KL5, KR 12 and KR13 and this affected 6 dogs in total. As a result of this the respondent decided to give the claimant a written warning which she described as a "final written warning" and she prepared a letter to this effect to the handed to the claimant when she returned to work on Monday. The claimant attended work on Monday 10 September and was getting on with her duties. During the morning Mrs Bignell approached her and handed her an envelope. The claimant asked

what it was and was told it was a final written warning. The claimant did not open it to read it but put in in her pocket. Mrs Bignell alleged that Miss Hillary had screwed up the letter. The claimant maintained she had folded it twice and put it in her pocket. The Tribunal accepts the version given by the claimant because her description appeared realistic. The claimant was upset at being given the letter. It seems that Mrs Bignell realised that the claimant was upset and offered her the rest of the day off so that she did not have to complete her afternoon shift. When at home the claimant read the letter. It referred to the verbal warning on 22 June and set out in detail the allegations regarding lack of bedding and the 3 kennels on 7 September. It was stated that the claimant would be on two weeks probation (a provision set out in the contract of employment) and that if her performance was not satisfactory she would be instantly dismissed. Finally, the letter referred to the claimant's starting time of 8.30 am implying that she had been arriving late. There had been previous discussions about timing and the claimant had denied that she had been habitually late. There had been no formal warning given as to lateness in the past. Having read the letter the claimant attended the Citizens Advice Bureau for advice. They had suggested that she write a letter to her employer stressing that she wished to keep her job. The claimant decided not to write such a letter.

e. On 11 September she attended for work. She felt that the respondent Mrs Bignell was terse with her but did ask her if the claimant had been looking for another job. The claimant said she had not done so but had been to the Citizens Advice Bureau and would also be seeking advice from ACAS. When asked by Mrs Bignell how she was feeling, Miss Hillary replied that she felt she was being bullied by Mrs Bignell. There was a heated discussion between the two. Mr Bignell came out to the scene and Mrs Bignell said to him that "Lynne thinks we have been bullying her". The claimant said that it was not both of them, it was only Mrs Bignell. This was in fact the last conversation which Mrs Bignell had with the claimant. That afternoon when the claimant arrived for her afternoon shift Mr Bignell asked her to come in to talk about the situation, to try and defuse it. There was a dispute as to whether during that meeting Mr Bignell showed to the claimant a letter to the claimant setting out two options which were either an option for her to take a settlement figure or merely to leave and receive her notice and holiday pay and then have the right to pursue the matter in a Tribunal. The account given by the claimant is accepted with regard to this and that she was being asked to sign a document. She declined to do this until such time as she could see a solicitor. Mr Bignell's evidence was that he put to the claimant that the employment relationship had irretrievably broken down and that the claimant agreed. The wording Mr Bignell suggested that he used in relation to that conversation was not that which would be likely with the claimant. The Tribunal prefers the evidence of the claimant as to what took place and does not find that the claimant accepted that the relationship had irretrievably broken down.

f. Two days later the claimant received in the post her form P45 together with a cheque for notice and holiday pay. It was on receipt of the P45 that she acknowledged that her employment was at an end.

Submissions

For the Claimant

5. Mr Morgan submitted that as to the notice claim, Miss Hillary had been employed for over 12 years and was entitled to 12 weeks' notice pay but she had only received 4 and according 8 weeks' pay was due. He submitted that this should be based upon the larger summer weekly pay rate bearing in mind that a week's pay for the purposes of the calculation should be the previous 13 weeks which had all been at the summer rate. However, he conceded that if she had worked those weeks as notice that they would have gone into the lower rate for winter work.

6. As to unfair dismissal Mr Morgan submitted that the evidence of the claimant, Miss Hillary, should be accepted as she was a credible and honest witness and should be preferred to that of Mrs Bignell. He suggested that Mrs Bignell had not been open and honest. An example of this was that she had backed off with regard to her original statement as to whether using steam cleaning was to be carried out at all times. Also in relation to the photographs of the incident on 7 September she had given the impression that these photographs were contemporaneous but had admitted in her evidence that they were taken at a later date and were based on a reconstruction. Also in relation to the warning given in June 2018, this was referred to in the warning letter as having involved the dog sleeping on a wet, cold floor but in evidence Mrs Bignell confirmed that when she had found the dog on the night in question she had put in bedding.

7. As to the effective date of termination, this should be taken to be when the claimant received her P45 because dismissal had not been communicated before then.

8. With regard to Mrs Bignell's concerns these did not add to anything sufficient to cause a breakdown in trust and confidence. None were properly investigated and some were not even mentioned to the claimant. Mrs Bignell was not looking to find out if there were any explanations.

9. Even in hindsight the incidents from May to December were not sufficient to cause a breakdown of trust and confidence. In her statement Mrs Bignell referred to the claimant's attitude and in support of this suggested that the claimant had screwed up the envelope containing the warning letter. The claimant entirely denied this but what was clear was that she felt bullied. Mrs Bignell admitted that she had been aware that the claimant had told her of her unfortunate experience of having been bullied at school, that she had low esteem and that she reacted badly when criticised and went into "lock down." When Mrs Bignell gave her the warning the claimant's response was to go into that lock down mode which the respondent was well aware off. Mrs Bignell kept telling the claimant she had worked in the job for too long and should be looking for another

job and that she should leave. Taking into account the claimant had made it clear that she enjoyed her job, which she had been in for 15 years, it was reasonable to take seriously her complaint of being bullied and that the claimant wanted the position to improve. This was not a spurious allegation by the claimant.

10. Mrs Bignell appeared to accept that the claimant felt bullied even though she did not describe her behaviour towards the claimant as bullying. She did not consider anything which could be done to improve the situation and did not speak to the claimant again after the conversation when the claimant said she felt bullied. When Mr Bignell suggested to the claimant that the relationship had broken down and gave her choices it was not correct to say that the claimant agreed with the suggestion that it had broken down.

11. The decision to terminate the claimant's employment was clearly made by Mrs Bignell as a response to the allegation of bullying on 11 September. Therefore the reason for dismissal was the claimant having accused her employer of bullying. This is not in accordance with "some other substantial reason." There was no sufficient evidence to show that there was a breakdown of trust and confidence. The claimant had just received a warning and felt pressurised. Her allegation of bullying was genuine and it was reasonable for her to expect it to be dealt with. Therefore Mr Morgan's submission was that there was no breakdown in trust and confidence and that Mrs Bignell had over reacted. Even if there was a difficulty in the relationship the employer did not act reasonably. Issues of conduct could have been dealt with in a better manner. There should have been investigation and not jumping to conclusions. The allegation of bullying could have been dealt with by Mrs Bignell sitting down with Miss Hillary or by involving Mr Bignell and asking Miss Hillary to explain and seeing what could be done to rectify the problems. Instead of this she was effectively given two options both of which meant leaving her job

For the respondent

12. Mr Hargreaves said that he agreed that as to notice the claimant had been under paid and was entitled to a further 8 weeks' notice pay. As to unfair dismissal he submitted on behalf of the respondent that dismissal was admitted. He suggested that Mrs Bignell had given very honest evidence, even some replies which were unhelpful to her case. However, he pointed out that there had been changes in the claimant's evidence from her written statement.

13. He referred to the fact that the claimant and respondent had been very friendly for the first few months. However, there were then minor issues which led to a weakening of the relationship. As employer Mrs Bignell was entitled to address concerns which she had with the claimant's work which included her not following directions or using equipment or processes supplied. Some of the concerns were serious, for example the dog food which appeared to have been taken, but Mrs Bignell had taken no action and was clearly not trying to get rid of her employee.

14. It was submitted that trust and confidence was affected by a number of issues, the most serious being where the welfare of the animals was involved. This included the incident about bedding, raised in June and the final incident which was raised leading to the written warning. The claimant had accepted that it was her responsibility to leave suitable bedding for all of the dogs. Where this was not done affecting 6 dogs this was a very serious and unacceptable situation. Mrs Bignell would not have given a warning if the incident had not occurred, despite the claimant's denial.

15. As to the final warning letter, Mr Hargreaves stated that he was not pretending all of the actions taken by the respondent were in accordance with ACAS procedures. However the respondent was entitled to give a warning and Mrs Bignell says that Miss Hillary screwed up the letter in front of her which was clear insubordination. It was accepted that no appeal was offered but this was a small employer and the test of fairness should take this into account. The claimant had been advised by the CAB to put in a letter but chose not to do so, so she could have done more to improve the situation. The bullying allegation came on the back of the warning letter and appears to have been a response to having received a warning. The claimant herself acknowledged that the relationship between her and Mrs Bignell was fragile. The claimant was in a damaged relationship as a result of her poor performance and showed lack of remorse and finally screwed up the letter and alleged bullying. If Mrs Bignell felt that the relationship had broken down irretrievably then it was fair to dismiss for this reason. Any investigation would have come to the same conclusion. The claimant herself had contributed by her actions and she had failed to put in any letter. There was no evidence that she had taken reasonable steps to mitigate her loss.

16. Mr Morgan responded that there should not be any finding of contribution as there was no culpable or blameworthy conduct on the part of the claimant which contributed to her dismissal. Complaining of bullying was not blameworthy conduct. Also there was no relevance of *Polkey v Dayton* in this case. As to compliance with the code, Mr Morgan considered that there should be an uplift but he would not argue for 20 per cent.

The Law

17. **Employment Rights Act 1996 Section 98 (1)**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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 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.

Findings

18. In relation to the unfair dismissal claim, dismissal was admitted. The first issue for me to determine is under Section 98 (1) what was the reason or if more than one the principal reason for the dismissal and whether this was reason falling within sub section 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding a position which the employee held.

19. Evidence was given of a history of conduct complained of by the respondent which led to the giving of a written warning. Although the letter did not contain within it the phrase “final written warning” it was treated by the respondent as amounting to a final written warning. The letter told the claimant that she was to be on a 2 week probationary period as provided for in her original employment contract signed on 13 August 2003 under the heading “Disciplinary.” It was stated in the clause that only 2 probationary periods would be acceptable implying that after a first 2 week probation, this could be repeated.

20. On the day after the claimant was given the final written warning letter and in a conversation she had with Mrs Bignell, Miss Hillary stated that she was being bullied. The respondent clearly took exception to this and it was noted that she did not speak to the claimant again after that conversation. The further dealings were between the claimant and Mr Bignell the husband of the respondent although it was clear that he had no position within the respondent company and had been given no formal standing with regard to dealing with the claimant’s employment. However, the claimant and Mr Bignell were willing to engage in conversations about the employment.

21. The actions of Mr Bignell were reasonable to try and diffuse a heated situation between his wife and her employee. However the meetings with Mr Bignell did not appear to be an investigation as to why the claimant said she felt bullied and

what if anything could be done to try to improve the relationship between the claimant and the respondent bearing in mind that a final written warning letter had only just been received. It was clear that following the conversation with Mrs Bignell she decided that she would bring the claimant's employment to an end and that Mr Bignell would be discussing with the claimant the terms upon which this was to happen. I therefore find that the reason why the respondent terminated the employment of the claimant was because she alleged that Mrs Bignell was bullying her and that Mrs Bignell did not wish to continue the claimant's employment.

22. The respondent maintains that there was some other substantial reason to terminate the employment namely that the duty of trust and confidence had irretrievably broken down. The basis of this appears to have been when given a written warning Miss Hillary alleged she was being bullied. Mrs Bignell ultimately conceded that when dealing with a complaint of bullying, it was important not only for the employer to deny that she felt there was bullying conduct but to look at this from the point of view of the claimant. As stated, Mr Bignell knew that the claimant was vulnerable in some respects, had had unfortunate bullying at school, reacted adversely to criticism and would go into lock down mode and would be difficult to engage. These were matters which any reasonable employer should take into account. As a former school teacher Mrs Bignell had experience of dealing with bullying and perceiving the impact of bullying upon the victim. She should not have treated the allegation of bullying itself as a reason to conclude that her relationship with Miss Hillary had broken down irretrievably, bearing in mind that in recent times the two had worked very closely and constructively together. A reasonable employer would have investigated this, allowed some time for the parties to cool down and looked for constructive ways forward in the relationship. The implication from the evidence was that for some time the respondent may have been looking for a way of ending the claimant's employment notwithstanding that the claimant made it very clear that she enjoyed her work, that she had been in that type of occupation for 30 years and that she did not wish to leave her job,

23. For an employee to allege bullying is not in itself an act to which should be treated as showing that the employment relationship is at an end. The respondent had suggested that the claimant had failed to lodge any grievance but in fact there was no grievance procedure contained in the contract of employment. When the allegation of bullying had been made, Mrs Bignell either herself, or using her husband or some outside agency, could have addressed this in a sympathetic manner. The respondent should also have taken notice that in the past when changes in instructions had been given to the claimant, she had taken no notice of these and adopted changes introduced by Mrs Bignell.

24. I have applied the general test of fairness as set in Section 98 (4) of the Employment Rights Act. I find that the employer did not act reasonably in treating the reason given as a sufficient reason for dismissing the claimant. I make this finding taking into account all of the circumstances including the size and administrative resources of the employer's undertaking. I acknowledge this was a sole employer and that Mrs Bignell had very short experience of being an employer. However, she did have experience in working for various

organisations where there was a HR facility and she was aware of the need to manage staff by making referrals to HR. While as a sole employer she did not have such a facility, it was still appropriate for her to take advice or bringing in her husband or some other agency to assist her with her employee in a fair and reasonable manner. Whilst standards may vary depending upon the size and administrative resources of employers and undertakings, the principles that all employees should be dealt with in a fair and reasonable way apply everywhere, whether the employer is a large national company or as here a very small business

25. As a final written warning had been given in and a period of probation imposed, the claimant's employment was to continue and the claimant would have had the opportunity of showing that she could perform her duties in a unacceptable manner. She felt that the way in which the respondent was dealing with her amounted to bullying, that she was entitled to raise this and also entitled to have the matter considered in a fair and reasonable manner. This did not occur. The response to her complaint of bullying was for her employer to decide that her employment was to be terminated. That was unfair.

26. As the hearing of the evidence and the submissions extended until almost 5.30 pm there was insufficient time for deliberations and accordingly judgment was reserved. Full evidence has not been given with regard to remedies and accordingly a remedies hearing will be convened for half a day to consider further evidence in relation to the claim for compensation. Both parties must prepare calculations as to the amount of compensation to be paid to the claimant in relation to her unfair dismissal claim.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 July 2019