Case Number: 1401504/2016

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Suleyman**

Respondent: **North Bristol NHS Trust**

Heard at: **Bristol** **On: 15 and 16 June 2017**
Civil & Family Justice Centre

Before: **Employment Judge R Harper**

Representation
Claimant: **Mr Bidness-Edwards, Counsel**
Respondent: **Mr S Nicholls, Counsel**

JUDGMENT

1. The claim of unfair dismissal succeeds.

2. The claim for holiday pay is dismissed upon withdrawal.

3. The claim under Section 38 of the Employment Act 2002 succeeds.

4. The respondent is to pay to the claimant the sum of £ 1586.76

REASONS

1. The claimant brings two claims before the Tribunal. The main one is of unfair dismissal and the second one was for holiday pay. It was clarified during the hearing that the holiday pay claim was withdrawn and it is therefore dismissed. Even although not specifically claimed by the claimant, it is nonetheless incumbent upon the Tribunal to consider whether it is appropriate to make an award under Section 38 of the Employment Act 2002.

2. In relation to the claim of unfair dismissal the Tribunal has had consideration to Section 98(4) Employment Rights Act 1996 which requires the Tribunal to have regard to equity and the substantial merits of the case and the size and administrative resources of the respondent. In this case it was a large respondent. The Tribunal has also had to have regard to the following cases:

    - **British Home Stores v Burchell:** the test in that case is for the Tribunal to consider, having evaluated the evidence, whether the respondent had a genuinely held belief that the claimant was guilty of misconduct; whether that belief was reasonably held after a reasonable investigation.

    - The Tribunal is required to consider the test in **Sainsbury's Supermarkets v Hitt** namely that it must evaluate what the respondent did at all stages of this case.

    - The Tribunal is required to consider the test as set out in **Foley v Post Office** and **Iceland Food v Jones** which requires an assessment of whether the application of the sanction of dismissal was within a reasonable range of response.

3. The Tribunal has been invited by the claimant to consider whether or not to make an enhancement of the compensatory award because of alleged breaches of the ACAS Code. Additionally the Tribunal has been invited to consider making a reduction of any award under the principle of Polkey v AE Dayton Services and/or whether the award should be reduced having consideration of any contributory fault.

4. The claimant was employed on 14 April 2012 and this came to an end on 11 May 2016. The ET1 was filed in time on 16 September 2016.

5. In reaching these findings of fact the Tribunal has received evidence on oath from the claimant, from Victoria Packer and from Kathy Mills. The Tribunal has also considered the oral closing submissions of both Counsel and the Tribunal has considered all the documentation to which its attention

has been drawn. The Tribunal makes the point that if its attention has not been drawn to a document then it has not considered it. The Tribunal has considered all the written and oral evidence of the witnesses.

6. The claimant lives in Rhoose near Barry in South Wales and was working at Southmead Hospital in North Bristol and she would commute each day when she was working. Initially she drove but at some unknown precise date at the end of 2014 her car was written off by somebody and she no longer has a car and relied on public transport.

7. The Tribunal has taken some judicial note of the fact that at the end of last year there were difficulties with the Severn Tunnel preparing the line for electrification but nonetheless the point is well made by the respondent that it was incumbent upon the claimant to ensure somehow that she got to work on time.

8. The claimant worked on bank and the shifts were selected by the bank and agreed with her. Therefore the start times could not be said to be at times which were unsuited to her ability to get to work on time. She said in her evidence and was not challenged that on occasions the bank agency would ring up and ask her at short notice to attend. To some extent that explains how her arrival might appear to have been late. However, it is quite clear from the evidence of the respondent in paragraph 14 of Ms Packer's first statement that the claimant was late on over three hundred occasions and indeed an analysis of the period running up to her dismissal shows that she was late on nearly fifty percent of the occasions in that three month period.

9. Lateness of itself, on an isolated occasion, is not a serious matter but it becomes serious in the sort of workplace that the claimant was operating because the shifts have to be properly manned and staffed. For somebody not to turn up on time not only causes much disquiet amongst other team members but it also potentially places the safety of patients at risk.

10. The difficulty for the respondent in this case is that they believed at the time that the employment came to an end that the claimant was not an employee. They believed that she was a bank worker.

11. On 26 January 2017 Employment Judge Pirani, having heard evidence and representations on both sides, concluded that the claimant was an employee and also that she had the required period of service to bring a claim in the way that she does. The reason this causes difficulty for the respondent is that, working on the assumption at the time that she was a worker and not a full-time regular employee, they did not apply the disciplinary procedure which is clearly set out in the bundle. The claimant was employed under a contract of employment which is to be found starting at page 110. Although she started employment in May 2012 she was not given this statement until September 2012. No convincing reason for that delay is given. Under Section 1 of the Employment Rights Act 1996 there is a requirement to provide terms and conditions of employment within eight weeks of the commencement of the employment. Although the document provided in fact is quite thorough and does cover the points set out in Section 1 it was given late.

12. The respondent says that, in effect, the Tribunal should take into account the letters to be found on page 126, 127, 128 and 129 of the bundle because they say that these amount to warnings. Pausing there for a moment, it is important to note the reason why the respondent terminated the working relationship and the only clear place that the Tribunal finds the answer to that question is in paragraph 35 of Miss Packer's statement which says as follows:

> "In light of the effect the claimant's conduct was having on the Trust's staffing finances and patient care and because her lateness and cancellations had not improved despite receiving numerous warnings I felt that there was no other option but to terminate her bank agreement".

13. Therefore it is clear that there are two aspects for the reasons why the dismissal took place namely lateness and cancellations.

14. The so called warnings on pages 126 – 129 are not of themselves warnings in the sense of the disciplinary policy. They are headed "letters of concern." I find as a matter of fact, that this all that they were. They were not warnings. They simply drew to the attention of the claimant that there were concerns about the short notice cancellation. There is no document that could be called a "warning" in relation to lateness. On that point there is an evidential dispute to resolve because on 4 or 5 May 2016 Kathy Mills had a telephone conversation with the claimant and there are divergent views as to exactly what was said during that conversation. Mrs Mills' recollection of events is primarily set out in paragraph 11 of her statement. That also has to be considered alongside the paragraph 33 of Ms Packer's statement because that paragraph says as follows:

> "In my absence my colleague Kathy Mills rang the claimant to provide her a final warning in respect of her lateness and short notice cancellations. I had previously discussed the claimant's case in detail with Kathy. Unfortunately I am informed that there is no written record of this conversation between Kathy and the claimant".

15. This flags up an important issue because if it was right that there was a final warning given to the claimant by Mrs Mills, Mrs Mills made it very clear that she did not have authority herself to impose a disciplinary sanction and a final warning would fall into that category. It is quite astonishing that if it is deemed to be a final warning that there is no written document to support that or if there was, that it has been lost, bearing in mind that it was such an important document. Even though the claimant was spoken to by Mrs Mills the very next day the claimant arrived at work late and it was that which really resulted in the email being sent to her by Ms Packer which is to be found on page 134 – 135.

16. The problem as far as the respondent is concerned, and Mr Nicholls on the respondent's behalf does not seek to dodge the issue, is that there are numerous procedural defects with this dismissal.

17. I am satisfied on the evidence that the evidence supports the respondent's contention that this was a conduct dismissal. However, the reason why the

claim for unfair dismissal succeeds is that there was a woeful lack of procedure having regard to Section 98(4) of the Employment Rights Act. The defects include,

(1) there was no investigation at all;

(2) there was no invitation to any disciplinary meeting;

(3) she was not told of her right to be accompanied;

(4) there was no disciplinary meeting at which she could have advanced her views;

(5) the claimant was not advised of her right of appeal;

(6) there is no compliance with the ACAS Code of Conduct;

(7) the same person investigated the matter and dealt with the matter and Ms Packer acknowledged in her cross examination that that was inappropriate;

(8) the claimant was not told that the "letters of concern" were deemed by the respondent to be "warnings" and had a shelf life of some months.

18. Those are the procedural defects in this case. The conclusion therefore of the Tribunal is that, having regard to the test in British Home Stores v Burchell the evidence does not support that it was a fair dismissal having regard to the procedure.

19. The Tribunal has also had consideration to the test in Iceland Food v Jones and Foley v Post Office as to whether or not the application of sanction of dismissal was appropriate in this case. It is not for the Tribunal to substitute its own view, and it does not do so, but the Tribunal finds that the application of the sanction of dismissal in this case was not within a reasonable range of response. The claim for unfair dismissal therefore succeeds.

20. Turning to the specific related matters that the Tribunal has been required to determine: as earlier recorded the Tribunal find that there has been a wholesale breach of the ACAS Code without any good reason and would impose a 25% enhancement of the compensatory award.

21. In relation to any reduction under the principle of Polkey the Tribunal is not persuaded that there should be any reduction in the sum because of that. This is a case where the respondent simply did not give the opportunity for the claimant to have her say and properly explain the reasons for some of the lateness. For example, the respondent did not investigate the rather scrappy letter that was written by the train Company in relation to the last incident of lateness. Having regard to the submissions on both sides the Tribunal does not make a Polkey reduction.

22. Turning to the question of contributory fault. It was, as earlier set out in these reasons, not challenged that there were some three hundred occasions when the claimant was late. Having been spoken to by Mrs Mills and then the very next day turn up late to the respondent was somewhat provocative even if there was a good reason for it. I am persuaded that this is a case where a reduction should be applied for contributory fault. This is an art and not a science. It is the exercise of the Tribunal's discretion. I find, applying all the factors which are set out earlier in these reasons, and without rehearsing them again, that an appropriate reduction for contributory fault should be 50%.

23. In relation to the Section 38 award, although I have to admit that I was going to award four weeks pay I am persuaded by what Mr Nicholls says that although there was default it was corrected albeit rather slowly. He has persuaded me that although it is appropriate to make an award that an award under Section 38 should be a two weeks award and not a four week one.

24. Having announced the decision on liability at the end of day one, the Tribunal rose at about 4:30 on the first day and it was clear to all concerned that there was a requirement for all to turn up on the second day to deal with the question of remedy. There is no doubt that everybody in the Court room would have understood that to be the situation. Indeed there was a short discussion at the end of day one about the witnesses being temporarily released from their inability to discuss matters with their respective counsel because there would be the need to give sworn evidence on day two.

25. Although the claimant's witness statement in paragraphs 16, 17 and 18 in particular refer to attempts at obtaining alternative employment an analysis of the emails that are provided in the bundle result in the conclusion that only one of them has a date reference. This is the one on page 166F which refers to the possibility of an interview on 6 April 2017 but there is no confirmation that the time had been agreed or indeed that she actually attended that interview.

26. I am told that she started a University course. This is referred to in her statement but I have no idea what that course is about apart from the possible suggestion it might be something to do with textiles. I have no idea when that course started. I have no idea between the EDT and the start of that course what efforts were made to obtain employment. It may be the case that it is a lifestyle choice that she has made and it is not fair if that is so for any liability to fall on the respondent to pay for that lifestyle choice.

27. There is no evidence apart from that one email above referred to that she has made any other attempts to get alternative employment. The difficulty for the claimant is that she was due to attend Court at 10.00am on the second day. She did not do so. Her Counsel had a message on his phone and the message was that she did not have funds to come over from Rhoose to Bristol and therefore she did not attend. Since she did not attend of course she could not give further details, on oath, about her mitigation. As Mr Nicholls has said for the respondent rather succinctly the evidential burden is on her although the burden of proof in relation to mitigation is on

the respondent. I cannot be satisfied at all that she has made any efforts to obtain employment. If she chooses not to turn up to the Tribunal that is a matter for her but she will have to live with the consequences. The tribunal can only make decisions on evidence placed before it. If, by absenting herself for no good reason and against a factual backdrop of multiple lateness arriving in the workplace, she places no proper evidence of job searches and details of the course she is on and the reason she chose to do so then she has to understand that, in the absence of such evidence, it is not for the tribunal to speculate as to what might have been.

28. The figure that I award for the basic award is £1,133.19 which is 50% of the calculation based on 4.5 multiple times the weekly amount but subject to the reduction for contributory fault so £1,133.19 is the figure after it has been reduced. The figure for the weekly net is £453.57 and the award I make is for two weeks but that is also subject to the reduction for contributory fault so the two components that I order are £1,133.19 plus £453.57 which his a total of £1,586.76. I have considered whether it is appropriate to make an order for loss of statutory rights but do not think that it is appropriate because at the moment I am not satisfied that she intended to obtain alternative employment and therefore she does not need protection for building up the period of two years before she could bring a claim against a future employer.

29. Therefore I am not satisfied that it is just and equitable to make any other order for loss of earnings to date. No loss of earnings after today's date was claimed but in any event would not have been awarded so the sum actually awarded is £1,586.76.

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Employment Judge R. Harper

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Date 18th July