EMPLOYMENT TRIBUNALS

Claimant: Miss S Coop

Respondent: Limited Edition Hair & Beauty Services

Heard at: Manchester **On:** 27 September 2019

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: In person
Respondent: Mr Goldring

JUDGMENT

The claimant was unfairly dismissed by the respondent. Her claim for unfair dismissal succeeds.

REASONS

Issues

1. It was accepted by the parties that the claimant was an employee of the respondent with sufficient qualifying service to bring a claim of unfair dismissal.

2. The issues, therefore, for the Employment Tribunal to determine were:

    a. whether the respondent had shown a potentially fair reason for dismissing the claimant; and, if so

    b. whether the dismissal was fair or unfair applying the test in Section 98(4) of the Employment Rights Act 1996 (ERA).

3. On point (a) the respondent said it dismissed for a reason relating to conduct, which is one of the potentially fair reasons for dismissal within section 98(2) ERA. The questions therefore for this Tribunal to determine were:

    a. Did the respondent have a genuine belief that the claimant was guilty of the conduct alleged?

    b. Did the respondent in fact dismiss for that reason.

4. As to point (b) if the respondent satisfied the Tribunal that it dismissed for a reason related to conduct, the next issue for the Tribunal to consider would be whether, in the circumstances, the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her.

5. If the Tribunal finds that there was an unfair dismissal, it will make any relevant findings as to the following matters:

    a. Whether either party unreasonably failed to follow the ACAS Code of Practice on Discipline and, if so, to what extent, if any, should any award of compensation be increased or reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

    b. Whether the claimant caused or contributed to her dismissal in such a way that it should result in a reduction of any compensation that might be awarded.

    c. Whether **Polkey** was relevant, in other words whether, if the dismissal was procedurally unfair, whether the claimant would have been dismissed in any event had a fair procedure been followed.

6. The Tribunal agreed with the parties at the outset of the hearing that any other issues relevant to remedy would be addressed in evidence and submissions only after a decision had been made as to whether the dismissal was fair or unfair.

Evidence

7. I heard evidence from the claimant and Mr Goldring for the respondent. Mrs Mills, the salon owner and the claimant's employer, did not attend to give evidence.

Findings of Fact

8. The claimant worked in a salon owned and run by her sister, Mrs Joan Mills, along with a number of other family members. For the last five years Mrs Mills has been in a relationship with Mr Goldring, who has assisted in the running of the business, mostly from an administrative point of view. The claimant had worked in the salon for over 20 years.

9. The claimant and her sister, and indeed the other family members employed in the respondent's business, had ups and downs in their relationships and fiery exchanges were commonplace but would always be resolved, perhaps by a hug or perhaps with flowers or an apology. Sadly, the claimant was bereaved a few years ago and some leeway had been given to her as a result of her behaviour which everyone understood arose from the difficult circumstances in which she found herself.

10. On 27 September 2018, after the claimant had been working for the respondent for over 20 years, an argument took place which resulted in the claimant telling Joan Mills to "fuck off" and refusing to leave the premises when asked. Consequently, a decision was taken, by Mrs Mills, in conjunction with Mr Goldring who she had called (by telephone) for advice, to close the salon as it seemed to be the only way to diffuse the situation.

11. Immediately after the salon was closed, all staff who were present in the salon at the time, including the claimant, went to Mrs Mills' house for a coffee. A non-paying customer who had been in the salon at the time also attended. Although relations were still frosty at this time, the claimant told Mrs Mills that she would see her tomorrow. This was not unusual in itself in the context of the relationship between the two sisters, and indeed the witness evidence from Pauline Bocking (another sister of the claimant and Mrs Mills who worked at the salon and was present at the time) talks about the incident which arose on 27 September 2018 as being "another example" as opposed to "a one-off or unusual example" of their relationship.

12. However, what was very different on this occasion to the occasions when there had previously been altercations between the sisters was that, that evening, a letter of suspension was posted through the claimant's letterbox at home. The suspension letter informed the claimant that she would be suspended on full pay. The allegation against her was "using obscene and foul language towards your line manager". The claimant was warned that the allegations "would be considered as a potential act of gross misconduct, and if proven, could result in a disciplinary sanction being issued up to and including dismissal with notice.

13. By a letter dated 3 October 2018, the claimant was informed by Mr Goldring that he was "still looking into the matter in hand". The claimant was advised that witness statements had been obtained and was further advised that the allegations against her now also included: "Refusing to leave the salon when reasonably requested to do so" and "Loss of business due to the necessity to close the salon because of your refusal to leave."

14. There was no investigation meeting with the claimant herself but investigations were conducted with two witnesses: Pauline Bocking and Dorothy Lord. Dorothy Lord was the non-paying customer/client in the salon at the time of the altercation. Pauline Bocking gave the opinion that the claimant had been throwing insults and twisting everything said, but referred to the incident, as stated above, as "another example".

15. By a letter dated 10 October 2018, the claimant was invited to a disciplinary hearing to take place on 13 October 2018 in the salon. The claimant was sent the statement of Pauline Bocking, which referred to the claimant carrying out "one of her awkward and unnecessary verbal attacks on our boss", and the letter contained confirmation that Dorothy Lord had also witnessed the claimant using "dirty language"; refusing "to leave the salon" and that the shop had to be shut to make the claimant leave. The letter confirmed that Mr Goldring would chair the meeting.

16. The claimant replied on 11 October 2018 to say that she didn't feel 24 hours was an adequate amount of time to prepare; asking for Pauline Bocking, Dorothy Lord and Mrs Mills to attend the hearing; and stating that she was waiting for witness statements from Mrs Mills and Dorothy Lord.

17. Eventually a disciplinary hearing was held on 18 October 2018. The venue was changed during the course of the hearing, as it began at a café in the Royal Oldham Hospital, but was actually held in the salon. The claimant was not permitted to bring her chosen companion to the hearing as she was neither a trade union representative nor a work colleague. Minutes of the hearing were available to the Tribunal. Paul Goldring, Mrs Mills' partner, conducted the hearing, and the claimant admitted to having used foul language and also refusing to leave the salon when requested. There was no further investigation, for example, to ascertain the claimant's point of view. Although the claimant admitted that she had used obscene language to her line manager, she stated that Mrs Mills had used foul language to her and had "said about cleaning the floor". She also said that Mrs Mills had also said that Barbara Bocking (another sister) had left because of the claimant because of when her partner died. Margaret Buckley, the notetaker, confirmed that that had been said.

18. The claimant specifically said that she had been provoked, bullied and pushed and that she did swear, but that her line manager shouldn't swear at her. The claimant presented Mr Goldring with a statement putting her story forward.

19. When Mr Goldring was asked about his role in that decision making process he said initially that the decision to dismiss had been that of Mrs Mills, however he later said that he had dealt with the disciplinary and investigation so that Mrs Mills could hear any appeal. The letter of termination indicates that the decision to dismiss was that of Mr Goldring, as he refers to the decision as "my decision" in that letter. Although it is unlikely that Mr Goldring would have dismissed Mrs Mills' sister, and employee, from her business without her approval, it was Mr Goldring who conducted the disciplinary proceedings and took the decision to dismiss the claimant.

20. The letter confirming the claimant's summary dismissal was dated 30 October 2018 and was delivered by hand. It upheld the allegations against the claimant. As regards the allegation that the claimant had used obscene and foul language, the letter stated, "I had also informed you during the meeting that there was no justification."

21. The letter gave the claimant the right of appeal, which the claimant did.

22. By letter dated 22 November 2018, the claimant was informed that there was no appeal to hear because the respondent did not believe that any additional information had been put forward and the claimant had said that she did not want her job back in any event.

The Law

23. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed (subject to certain qualifications and conditions set out in ERA).

Reason for Dismissal

24. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

25. A reason relating to the employee's conduct is a potentially fair reason falling within section 98(2).

26. Where an employer alleges that its reasons for dismissing the claimant was related to her conduct the employer must prove:-

a. that at the time of the dismissal it genuinely believed the claimant had committed the conduct in question and

b. that this was the reason for dismissing the claimant.

27. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the claimant had done so.

Fairness

28. If the respondent proves that it dismissed the claimant for a potentially fair reason, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) ERA.

29. Section 98(4) ERA provides that "the determination of the question whether (a) the dismissal is fair or unfair (having regard to the reason shown by the employer) 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".

30. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer who discharged the employee on the grounds of the misconduct in question "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. First of all there

must be established by the employer the fact of that belief, that the employer did believe it. Secondly that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

31. The concept of a reasonable investigation can encompass a number of aspects including: making proper enquiries to determine the facts, informing the employee of the basis of the problem, giving the employee an opportunity to make representations on allegations made against them and put their case in response and allowing a right of appeal.

32. In 2009, ACAS issued its current code of practice on disciplinary and grievance procedures. The Tribunal must take into account relevant provisions of the code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) TULRCA).

33. Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

34. The Code also states that an employee who is not satisfied by the outcome of disciplinary proceedings should appeal and should be allowed to do so by the employer. It goes on to state that appeals should be heard without unreasonable delay and should be dealt with impartially (wherever possible by a manager who has not previously been involved in the case).

35. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (**Fuller –v- Lloyds Bank** 1991 IRLR 336 EAT). Furthermore defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, later stages of a procedure are sufficient to cure any earlier unfairness.

36. In applying section 98(4), the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd –v- Jones** 1982 IRLR 439). This "range of reasonable responses" test applies equally to the procedure by which the decision to dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

37. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under Section 113(4) ERA. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 ERA.

38. Where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) ERA). In this regard, the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

39. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In **Polkey –v- A E Dayton Services Limited** 1987 ICR 142 the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed.

40. Separately, if it appears to the Tribunal that either the employer or the employee has unreasonably failed to follow or comply with the ACAS Code referred to above, the Tribunal may increase or decrease any compensatory award by up to 25% if it considers just and equitable in all the circumstances to do so (s207A TULRCA).

41. Furthermore, where the Tribunal finds that dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) ERA). As with any reduction under s122(2), the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

Conclusions

42. I find that conduct was the reason that the respondent dismissed the claimant. This is a potentially fair reason for dismissal. It was the claimant's conduct, and what happened in the salon that day, that precipitated the events that led to dismissal, notably the claimant swearing at Mrs Mills and then refusing to leave. It is clear that that conduct, which was admitted by the claimant, was what caused the disciplinary proceedings to be held, which resulted in dismissal.

43. I also find that the respondent had a genuine belief that the claimant was guilty of the conduct alleged and, in fact, dismissed the claimant for that reason. There is no indication that there was any other reason for dismissal.

44. Having satisfied the Tribunal that it dismissed for a reason related to conduct, the next issue for the Tribunal to consider is whether, in the circumstances, the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her.

45. I found that the respondent acted unreasonably in treating the claimant's conduct as sufficient reason for dismissing her, for the reasons set out below. In making my decision, I have taken into account the size and administrative resources of the respondent, a small salon owned and run by Mrs Mills with some assistance from her partner, Mr Goldring.

46. The decision making process was flawed. Once the claimant admitted to swearing and refusing to leave the salon, the decision was made. The respondent's mind was closed to any argument or evidence being put forward as to provocation or the particular circumstances of the case. For example, the claimant referred to the fact that Mrs Mills had referred to her partner Lee, and said that the claimant's behaviour after he died was the reason another sister who worked at the salon left. Mrs Buckley confirmed this had been said but it was disregarded by Mr Goldring who stated in the dismissal letter that there was no justification. In other words, his mind was closed. Once the claimant admitted that she had sworn, his mind was made up, regardless of any reason the claimant put forward.

47. Similarly, the claimant explained that she didn't want to leave the salon because a client was due to attend and she didn't want to let her down. Again, that was not taken into consideration. For Mr Goldring, it was enough that she had refused to leave the salon. He didn't consider it necessary to understand why that had happened.

48. Mr Goldring clearly consulted with Mrs Mills, had listened to her version of events, and accepted what she said. However, the claimant never had any understanding or knowledge of anything Mrs Mills was saying, had no opportunity to understand Mrs Mills' side of the argument, and, most importantly, Mrs Mills' side of the story was never put to the claimant for her to comment on. It was clear that the claimant wanted to hear Mrs Mills side of the story as she asked for her to attend the disciplinary hearing.

49. In this case, these factors were exacerbated by the fact that the claimant was not allowed to appeal the decision. Had she been able to speak to her employer, Mrs Mills, directly, the outcome may have been different and she may have had the opportunity to have any mitigating factors considered.

50. I also find that a dismissal in these circumstances was outside "the band of reasonable responses of a reasonable employer". There is no evidence whatsoever to show that this particular argument, or altercation, between Mrs Mills and the claimant was any different to previous situations. By way of example, the statement from Pauline Bocking states: "this is another occasion of", not "this time it was different". If this established pattern of behaviour was a pattern the respondent wanted to bring to an end, then it would have been reasonable to give the claimant a warning that her behaviour was no longer acceptable and had to stop, particularly after such a considerable time working for the respondent. It is clear from the evidence that there have been many previous fallings out. If the claimant had overstepped the mark in some way, given the family history and given what had been accepted in the past, it would have been appropriate to say "you have overstepped the mark, don't overstep the mark again, this is a warning now that this must not happen again otherwise you will be dismissed", This did not happen, nor did the respondent give that, or any other course of action, any consideration at all,

and instead the respondent dismissed the claimant for behaviour which was relatively commonplace, so commonplace in fact that the claimant thought nothing of going to Mrs Mills' house for a coffee after it happened, fully expecting to "kiss and make up", in time, as usual.

51. What really made the difference in this case was that, whereas previously matters have all been sorted out, in time, Mr Goldring sent the claimant a suspension letter. As a result, Mr Goldring did not get the apology or the remorse that he felt he should have had. The claimant felt he was responsible for the turn of events, because in all other cases in the past she and Mrs Mills had had their coffee (and I am using coffee as an analogy), they had said "see you tomorrow" and they had gone back to normal. What changed was that, suddenly, and for no apparent reason (to the claimant), there was formality in the form of a suspension letter.

52. It was as if the respondent, once the claimant admitted swearing and refusing to leave, believed that dismissal was the inevitable consequence. There was not thought as to whether, particularly in light of the claimant's length of service, there could be any alternative sanction which might be reasonable in all the circumstances of the case. Failure to consider whether an alternative sanction could be appropriate was unreasonable in itself.

53. In all the circumstances of the case, including the size and administrative resource of the respondent, the dismissal was unfair.

54. I went on to consider whether the dismissal would have occurred in any event had a fair process been followed, and whether or not the claimant caused or contributed towards her own dismissal. Both of these could have a bearing on any compensation that is awarded.

55. I found that the claimant would not have been dismissed in any event had a fair process been followed. If the process had been fair, both sides of the story would have been heard, the claimant's "story" (as regards provocation and so on) would have been taken into account and there would have been a realisation that the relationship was volatile, and therefore, that a marker needed to be put down by way of a warning.

56. For the claimant to have caused or contributed to her dismissal, there must be some wrongdoing. I consider that the claimant did contribute to her dismissal. It was the claimant's conduct, the swearing and the refusing to leave, which is not acceptable conduct in the workplace, which were the events that led to the dismissal. That does not mean to say the dismissal was fair, rather that there was culpable or blameworthy behaviour from the claimant. So, although the decision to dismiss was not within the band of reasonable responses, I do find that the claimant contributed to her dismissal by 25%. The reason I have made that level of finding is because had the claimant, for example, left the building when asked, it could have calmed things down. However, given my findings about the fact that altercations such as this were not uncommon, it would not be appropriate to decrease compensation by as much as 50%. It is a finding that acknowledges that the claimant had a part to play in the events that lead to her dismissal.

57. Given the size and administrative resource of the respondent, there has been no unreasonable failure to follow the ACAS Code of Practice. Although the claimant wasn't permitted an appeal, I find that the respondent did its best, with the limited resources available to it, to follow a fair procedure. Mr Goldring, who was really only trying to help out, did his best and acted in good faith. Any failings cannot, in those circumstances, be unreasonable.

Employment Judge Rice-Birchall

Date: 18/11/2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 November 2019

FOR THE TRIBUNAL OFFICE