



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss N Quelch**

**v**

**British Gas Services Ltd**

**Heard at:** Amersham

**On:** 23 & 24 September 2019

**Before:** Employment Judge Milner-Moore (sitting alone)

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr T Gillie (Counsel)

## **JUDGMENT**

1. The claimant was unfairly dismissed.
2. The basic and compensatory awards are reduced by 50% to reflect the chance that had a fair process been followed the claimant would have been fairly dismissed.
3. The basic and compensatory awards are reduced by 50% in light of the claimant's contributory conduct.

## **REASONS**

1. This case was listed before me to consider a claim of unfair dismissal. The following issues arose for determination:
  - 1.1. Had the respondent shown a reason for dismissal?
  - 1.2. Was the reason for dismissal a potentially fair one?
    - 1.2.1. The respondent contends that the reason for dismissal in this case was misconduct.
  - 1.3. Had the respondent followed a fair process ie one that was compliant with the ACAS Code and that fell within the range of reasonable

processes to be adopted by a reasonable employer in the circumstances, and

- 1.4. Was the sanction decided upon by the respondent within the range of reasonable responses for the misconduct in question?
- 1.5. In the event that the dismissal was unfair should compensation be reduced to reflect
  - 1.5.1. the likelihood that the claimant would have been fairly dismissed following a fair procedure,
  - 1.5.2. the degree to which the claimant contributed to her own dismissal.

### **Evidence received and matters occurring during the hearing**

2. I heard evidence from the claimant and from a number of witnesses for the respondent: Ms King Head (the claimant's line manager at the relevant time), Ms Jeavons (the investigator), Mr Mosley (one of the disciplinary decision makers) and Mr Fraser (one of the appeal decision makers). I also received two bundles of documents and some additional documents were added with the parties' agreement. I should record that at times when giving her evidence the claimant became distressed. She was offered breaks so that she could compose herself. On one occasion the hearing was paused for 10 minutes. On subsequent occasions the claimant elected to continue giving evidence.

### **Post hearing**

3. I gave an oral judgment and reasons at the time which I recorded on a Dictaphone but it appears that there was a malfunction and only half of the judgment was recorded. I have therefore reconstructed the remainder of the reasons (paragraphs 17 to 31) from the notes that I made in preparation for giving judgment.

### **Findings**

4. I made the following factual findings:
  - 4.1 On 12 September 2011, the claimant began employment with the respondent. In 2014, she began working as one of a number of concierges employed by the business. The concierges provided services to employees of the respondent (for example, arranging dry cleaning) and to the respondent itself, arranging for gifts such as hampers, vouchers, and flowers to be sent on its behalf to employees and customers.
  - 4.2 The respondent had contracts with various suppliers so that goods could be ordered on its account. One of those suppliers was the

Yankee Candle Company. It was a breach of the terms and conditions under which the Yankee Candle Company supplied its products to the respondent for the respondent to supply, or order products on behalf of, third parties.

- 4.3 The claimant was initially managed and supervised by Ms Geddes, the national concierge manager, until Ms Geddes was made redundant in early 2017. After her redundancy Ms Geddes established her own business (“Fabulous Hampers”). A number of the concierges, including the claimant, made use of that business to supply hampers to the respondent.
- 4.4 After Ms Geddes’ departure the claimant was provided with a company credit card and signed a document, the “*purchasing card holder declaration*” recording the respondent’s expectations as to its proper use. The claimant signed to declare that she would use the card for the respondent’s business purchases only and that she had reviewed the procurement standards and understood the requirements for the card’s use.
- 4.5 The respondent published various policies to which staff including a disciplinary policy in which misconduct is defined as behaviour that “*isn’t in keeping with what we normally require of you, that may have a negative effect on your work or is not in the company’s interest.*” Gross misconduct was defined as an offence “*so serious it removes the company’s trust and confidence in you*” and non-exhaustive pieces of examples of misconduct and gross misconduct was applied.
- 4.6 In addition, the respondent published rules of conduct for employees but again these were expressed not to be exhaustive. They included obligations not to misappropriate company money or property, to take care when handling company information, not to use company equipment otherwise than for company business and to take reasonable care of company equipment. The respondent also operated a grievance policy which records that, where a grievance overlaps with a disciplinary process, the respondent would consider whether or not to suspend the disciplinary process or where the two are related would deal with both at the same time.
- 4.7 In July 2017, the claimant’s line management passed to Sarah King Head. She had little knowledge of the processes operated by the concierge team and so began to try to find out about what the team did and how it worked. Over the next few months, the claimant was absent from work on a number of occasions, either due to migraines, or in order to care for her partner who had begun to experience epileptic seizures. Emails from the period show that Ms King Head was sympathetic to the claimant and encouraged her to take time off as necessary.

- 4.8 The claimant was also experiencing stress relating to her family life at this time. On 25 January 2018, she sent an email to Ms King Head stating that she had been feeling “*helpless, depressed and suicidal*” as a result of matters in relation to her family life and that, as a result, she had been prescribed anti-depressants by her GP. There is a dispute between the parties as to whether Ms King Head offered support to the claimant following the sending of that email. I accept Ms King Head’s evidence that, although this was not documented, she directed the claimant to the respondent’s counselling service and offered to refer the claimant to occupational health but that the claimant declined this because she wanted to be in work which she considered to be an area of her life that was “under control”. I make this finding because it is consistent with the claimant’s own evidence that she “*put a brave face on*” when speaking with Ms King Head and because the claimant herself says that she doesn’t remember a great deal about the weeks that immediately followed 25 January. It is also consistent with the fact that the claimant, although being seen by her GP, did not ask to be signed off by her GP.
- 4.9 In February 2018 questions were raised about a large order of products from Yankee Candles which had been ordered, apparently for Ms Geddes, and delivered to various concierges, including the claimant. That led to an investigation of the claimant’s conduct. On 6 March 2018, the claimant was suspended for acting in an unethical manner in relation to a third-party vendor and an investigation commenced as part of which her emails and computer files were accessed.
- 4.10 On 13 March 2018, the claimant was invited to an investigation meeting with Ms Jeavons to consider a number of allegations including: acting unethically in relation to a third party vendor creating conflict of interest, abusing her position by allowing a third party vendor to make purchases on the company credit card, ordering goods on the respondent’s account on behalf of the third party vendor putting the respondent in breach of contract with a supplier and being biased towards the third party vendor in breach of the respondent’s code of conduct.
- 4.11 A Mr Jones took a note of the meeting for the respondent. The claimant was accompanied at the meeting by a colleague. It later came to light the claimant’s colleague had recorded the meeting without making those present aware of this. The claimant subsequently placed reliance on differences between the transcript of the recording and the minutes produced by Mr Jones.
- 4.12 The investigatory interview was fairly lengthy. It lasted just short of two hours and the claimant made a number of admissions during that interview. In these findings, I have focused only on the matters that formed part of the respondent’s subsequent reasons for dismissal. The claimant admitted using Fabulous Hampers as a supplier. She

accepted that she had been on holiday with Ms Geddes after she had been made redundant. She admitted sending Ms Geddes a template blank letter head. She admitted using Ms Geddes to supply champagne and that Ms Geddes had simply ordered it from Sainsbury's for delivery to the respondent and had charged a 25% mark up on the champagne. She accepted that the company had therefore not received the best price. She also admitted sending the company credit card entrusted to her through the post to Ms Geddes so that Ms Geddes could make use of it and thereby reimburse herself in respect of sums that were owed by the Respondent to Fabulous Hampers. I should record that the claimant initially denied this when asked about it, but on being confronted with email evidence which showed that she had done so on two occasions (2 and 23 February 2018) she accepted that she had done so. At this time, it appeared from the investigation that Fabulous Hampers had been overpaid for services provided.

5. Ms Jeavons produced a lengthy investigation report with 100 pages of supporting material. She concluded that there was a case to answer in relation to the disciplinary charges. Her report was referred to Mr Mosley who concluded that a disciplinary hearing should be convened.
6. On 21 March 2018, the claimant was invited to a hearing to answer charges as set out in the letter inviting her to the investigation. The letter explained the ways in which this behaviour was considered to be in breach of the respondent's standards of conduct. The claimant was sent the materials obtained in the investigation and invited to say whether there were any further materials of relevance that she wished to rely on.
7. On 28 March 2018, the claimant submitted a grievance in a lengthy letter in which she complained about the manner in which the investigation had been conducted. She took issue with the accuracy with the notes of the investigation meeting and suggested that the investigator had not been impartial. She said that she felt unsupported or mismanaged by her previous line managers and she provided to Mr Mosley the email that she had sent to Ms King Head on 25 January 2018 which referenced her severe depression, stating: *"I was not provided personal support from my line manager despite writing a confidential email (enclosed at Annex A) explaining my health and family issues for which I am under special medical care"*.
8. On 29 March 2018, Mr Mosley replied to say that the grievance would be dealt with as part of the disciplinary process and asked her to indicate where she considered the notes of the investigatory interview to be inaccurate.
9. On 3 April 2018, the claimant sent a letter confirming that she would attend the disciplinary hearing and asking for some further witnesses to be called. She also asked for further documentary evidence to be produced regarding her performance, the quality of the hampers that had been produced by Mags Geddes, some usage logs and invoices and she asked for further

explanations of one of the disciplinary charges. She prepared a lengthy note in which she flagged omissions and inconsistencies in the record of the interview. She also included, as part of the further documentary evidence, an extract from her GP notes which showed that she had visited her GP in a distressed state on 15 January 2018 and had been prescribed anti-depressants. She had later been seen by the crisis team on 30 January 2018 and was recorded as having presented at that time with “*high risk suicidal ideation*” as a result of issues in relation to her family life. She had been supported subsequently by the crisis team with home visits and telephone calls. No formal diagnosis of any specific mental health condition was set out in the notes.

10. On 4 April 2019, a disciplinary hearing took place before Mr Mosley and Mr Took. An HR notetaker took minutes and no issues have been raised as to their accuracy. The claimant was accompanied by a colleague. During the disciplinary hearing the claimant made a number of statements. Again, I record only those matters that are relevant to the eventual reasons for dismissal. She accepted that the respondent had been charged £390 for champagne by Mags Geddes for an order costing only £214. She said that she had been unhappy with this but had not sought a refund because she considered other suppliers would also have charged a mark-up. She accepted that she had made an error of judgment in posting the credit card to Mags Geddes but attributed this to the stresses of her personal life at the relevant time.
11. Mr Mosley explored with the claimant why she considered additional witnesses were necessary and it appeared that she wished to have these to address the quality of the hampers provided, or the fairness of her appraisal, or in the case of a Mr Trainer to address her lack of training in the concierge role. She said that she was asking for monthly usage sheets and invoices to show that the amounts paid to Fabulous Hampers were correct. I should record here that, by the time of the disciplinary hearing it was accepted by the Respondent that Fabulous Hampers had not been paid more than was owed for hampers. In fact, it appeared to have been under paid. The Respondent had therefore suffered no loss as a result of the misuse of its credit card. After the disciplinary hearing, Mr Mosley spoke to Ms King Head and Ms Jeavons but he did not minute those discussions.
12. On 15 May 2018, the claimant was dismissed for gross misconduct. The reasons for that decision are set out in a letter of that date which appears at 361 of the bundle. Mr Mosley considered that the claimant had acted unethically specifically relating to a third-party vendor creating a clear conflict of interest. He said:

“You have used Fabulous Hampers as a sole vendor which the panel believe is a conflict of interest although this does not appear to be in breach of any governance process as one was not in place. Notwithstanding this, the panel do believe you treated Fabulous Hampers more favourably resulting in additional cost to the business. There is evidence to support this, namely the scenario whereby 12 bottles of champagne were ordered by Fabulous Hampers at an inflated price. The panel would know that they do not believe that this allegation meets the definition of gross misconduct but do believe

that misconduct has occurred and have taken this finding into account in determining the final outcome. You have abused your position by allowing a third-party vendor to make purchases from your company credit card. The evidence available confirms that you posted out your corporate credit card to Mags Geddes. After discussing the allegation with you, you confirm that you did post the card out to Mags in order to pay for hampers you had received. Based on the findings the panel believe that at the point that you posted the card to the third-party vendor, Fabulous Hampers, you lost control of the responsibility of any charges that could be applied to the account as you could not guarantee the transactions that would be added to the card or what would happen to the card whilst it was in the possession of the third-party vendor.”

13. The panel concluded that this was gross misconduct and stated:

“In reaching this decision the panel has taken into account your duty of confidence and confidentiality, duty not to misuse company property, duty to exercise reasonable care in performing your duties and the fact that you are in breach of NatWest purchasing cardholder declaration that you signed...”

The panel finds that this action has irreparably damaged the company’s trust and confidence in you and your judgment.”

14. The panel explained how they had arrived at the decision that dismissal would be an appropriate sanction for the misconduct as follows:

“Before arriving at this decision, the panel took into account all the evidence including the information you presented concerning your reasoning for posting out your corporate credit card. Your main point of mitigation is that you believed that this was the quickest way to pay invoices from Fabulous Hampers as they were waiting to be added to SAP which you stated was being arranged by the concierge at Stockport. You also advised that you utilised Fabulous Hampers as a sole supplier as you previously received poor feedback on the quality of hampers from the previous supplier.”

15. He referenced the claimant’s assertion that:

“you were not supported by your current and previous line managers specifically as you believed that your job role had changed as you no longer have the time available to create your own hampers, resulting in your need to outsource this activity.”

16. The letter went on to deal with the grievance points raised by the claimant and to conclude that these were not material to the decision to find gross misconduct and to dismiss and in particular the panel stated:

“Whilst the panel does not uphold the allegations in your grievance that you were not sufficiently supported, the actions for which you are being summarily dismissed would still form gross misconduct despite the alleged lack of support. In the panel’s view the actions taken by yourself would still stand if there was evidence of you not receiving the appropriate levels of support.”

17. The letter recorded that the panel had considered the claimant’s length of service and previous good record but nonetheless considered that dismissal was the appropriate sanction.

18. On 21 May 2018, the claimant submitted a letter of appeal. Amongst other points she stated that there had been a failure to take in to account her personal circumstances specifically the fact that her partner's ill health and her family circumstances had

“a negative effect on my well-being to such an extent that I was suicidal and referred to the Community Mental Health Team, for my own safety and they visited me on several occasions to check my well-being. On 25 January, I sent an email to my line manager explaining the situation and asking for support but I received none. My still ongoing treatment was being prescribed anti-depressants by my doctor as well as receiving counselling and was clearly evidenced in the medical notes”.

The claimant said that this had contributed to her error of judgment in sending the purchasing card.

19. The appeal meeting took place before an appeal panel which included Mr Fraser on 27 June 2018. During the hearing, the Claimant again accepted her error of judgment in sending out the corporate credit card but explained that she had not been thinking straight at the time. After the hearing Mr Fraser made enquiries with Ms King Head to establish what support had been offered to the claimant. Ms King Head confirmed that after what she described as a “*heart breaking call*” with the claimant on 25 January 2018 she had signposted the claimant to support but that the claimant had wanted to be in work.
20. On 8 July 2018, the respondent wrote to the claimant setting out its decision on the appeal. It upheld the disciplinary charges, concluding that the misuse of the credit card amounted to gross misconduct. It dealt with the issue of mitigating circumstances. It concluded that the claimant had been offered support by Ms King Head but concluded

“the panel are unable to find any evidence to indicate that there is a rationale for you choosing to post your company credit card to a third party.”

## Law

21. Under section 98(1) and (2) of the Employment Rights Act 1996, the onus is on the employer to show a potentially fair reason for dismissal. Misconduct is a potentially fair reason. Thereafter it is necessary to consider whether the dismissal for that reason was fair in all the circumstances. Section 98(4) of the Employment Rights act sets out the approach to that question...

“the determination of the question of whether the dismissal was 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 sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case”.

22. In considering the fairness of the dismissal it is necessary to evaluate the fairness of the procedures culminating in the dismissal (including whether



these were compliant with the ACAS code) and to consider whether both the procedures followed and the choice of dismissal as a sanction fell within the range of reasonable responses open to a reasonable employer confronted with the misconduct in question. Where the procedural approach and the decision to dismiss as a sanction for misconduct are matters that fall within the band of reasonable responses open to a reasonable employer confronted with the misconduct in question, then the dismissal will be a fair one. I have borne in mind that my role as an Employment Judge considering the fairness of a dismissal is not to ask myself what I would have done were I in the shoes of the employer.

23. Section 123 of the Employment Rights Act 1996 provides,

“123(1) Subject to the provisions of this section and sections 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer...”

This provision enables a Tribunal to reduce compensation to reflect the degree of likelihood that, had a fair process been conducted, a fair dismissal would have resulted. (commonly referred to as a “Polkey reduction” by reference to the case of **Polkey v AE Dayton Services Ltd** [1987] IRLR 503). The decision in **Software 2000 Ltd v Andrews** (and paragraph 54 in particular) provides helpful guidance to Tribunals when considering whether it is possible to make an assessment of the likelihood that a fair dismissal would have occurred.

24. Section 123(4) of the Employment Rights Act 1996 provides

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that failing”.

Section 122(2) provides that a reduction may be made to a basic award where this would be just and equitable in order to reflect any conduct on the part of the claimant provided, that such conduct occurred before dismissal.

## Conclusions

25. I accept that the respondent has shown a potentially fair reason for dismissal, namely misconduct. It had concluded that the claimant had committed misconduct in giving favourable treatment to Fabulous Hampers, resulting in the company overpaying for champagne, and that the claimant had committed gross misconduct in allowing a third party to make use of a company credit card. The respondent’s belief that the claimant was guilty of such misconduct was genuinely held and had been formed following an investigation during which the evidence and the claimant’s own admissions established the misconduct. It was clear that the use of Fabulous Hampers to supply champagne had resulted in increased costs to the company which

could have been avoided if the claimant had ordered it herself. It was also clear that, on two occasions, the claimant had sent her credit card through the post and provided card details so that Mags Geddes could make use of it with a view to recouping money owed to her by the respondent. She had done this on 2 and 23 February 2018. In doing so she breached the card holder's declaration and the respondent's own disciplinary standards as to the misuse of company property. Although the respondent suffered no loss it could have done so.

26. I consider that the procedures adopted by the respondent were largely fair. The claimant was allowed the right to be accompanied throughout the processes. There was an investigation, as part of which the claimant was invited to put her side of the story to the investigator. The matters which resulted in dismissal were fully investigated. I do not consider that the further documentary material that the claimant had requested, or the further witnesses that she asked for, would have assisted her given that the misconduct for which she was dismissed were matters that were admitted. The claimant was invited to a disciplinary hearing before a separate disciplinary panel and a number of the disciplinary charges were abandoned at that point, when it appeared that they could not be sustained. The disciplinary panel considered the claimant's grievances as part of their decision making. The claimant was granted a right of appeal before separate decision makers
27. However, I consider that the processes followed by the respondent fell outside the range of reasonable responses in relation to the treatment of the evidence submitted by the claimant as to her mental health at the relevant time. I bear in mind the general principle that the cogency of investigation should reflect the circumstances and the gravity of the disciplinary charge. The claimant here was facing a charge of gross misconduct and she had submitted substantive evidence to show that her mental health was very poor at, or around, the time that the gross misconduct occurred. The respondent's disciplinary and appeal decision makers had considered whether the claimant had been supported at work by her line management. They concluded that she had been and reasoned that a lack of support could not in any event have explained her actions. However, the decision makers did not consider, independently of the question of support from management, whether the claimant's state of mental health, as evidenced by the GP and other medical records that she had submitted, might have explained, or significantly contributed to, what was indeed an error of judgment and so have been a significant mitigating circumstance. I consider that a reasonable employer would have considered specifically whether the claimant's mental state at the time was such that it was likely to have affected her judgment and, if in any doubt, would have considered whether to investigate that issue by obtaining further medical evidence on this specific point. The respondent failed to do so. I therefore find that the decision to dismiss was unfair

### **Polkey reduction**

28. The respondent argues that a 100% reduction should be made to any compensation awarded to the claimant on the basis that the claimant would inevitably have been fairly dismissed following a fair procedure
29. As the Software 2000 case makes clear assessing whether a Polkey reduction should be made, and to what extent compensation should be reduced, may involve some speculation. However, I do not consider that the position is as clear as the respondent contends. I consider that there must have been a significant chance that further medical investigation and more detailed consideration of the relevance of the claimant's mental health as a mitigating circumstance would have tipped the balance in the claimant's favour against the sanction of dismissal. I consider it likely, given the medical evidence submitted by the claimant, that had the respondent investigated, e.g. with occupational health advisers, the impact of her mental state as at the end of January on her judgment that it might well have received advice that her judgment was affected to a degree and might well have decided against dismissal.
30. However, I also consider that there is also a significant chance that the respondent, even after investigation of the medical position, would not have considered that the claimant's mental state was sufficient mitigation for the act of gross misconduct and that it would have dismissed the claimant and that such dismissal would have been within the range of reasonable responses. The card was sent on two occasions (the second time being at the end of February) in circumstances where the claimant had remained at work throughout and was not presenting herself as unfit to work. I therefore consider that a 50% reduction should be made to reflect the likelihood that the claimant would have been fairly dismissed following a fair process.

### **Contributory conduct.**

31. The claimant admits that she did misuse the company credit card by sending it to Ms Geddes and she did so on two occasions. Although she regarded Ms Geddes as a trustworthy individual the claimant must have known that it was wrong to send the card out in this way. Although no loss was occasioned to the respondent, it was a misuse of the card and a breach of the respondent's disciplinary standards. This conduct was blameworthy and was the cause of the disciplinary proceedings which resulted in her dismissal.
32. However, I consider that, at the relevant time, the claimant was undergoing very considerable personal stress. She had sought medical treatment for stress and depression at the end of January and I find that this is likely to have contributed to what was a significant error of judgment on her part. Whilst I consider that her adverse mental health and the stress that she was experiencing at the relevant time are a mitigating factor, I do not consider that they constitute a complete mitigation. I note that the claimant remained at work during this period and that this was not an isolated instance of poor

judgment. She sent the card out on two occasions. I therefore consider that her conduct was nonetheless blameworthy and that it caused, or contributed to, her dismissal and that it is just and equitable that the basic and compensatory awards should be reduced as a result. I consider that a 50% reduction for contributory fault is appropriate to reflect the degree of contribution in this case.

Employment Judge Milner-Moore

Date: 25 November 2019

Sent to the parties on:

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For the Tribunal Office