



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Owens

Respondent: Mr Olu Femiola t/a Manor Park Care Home

HELD AT: Leeds

ON: 22 August 2018

BEFORE: Employment Judge Cox

REPRESENTATION:

Claimant: Mr M Owens, husband

Respondent: In person

JUDGMENT having been sent to the parties on 3 September 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Mrs Owens brought two claims to the Employment Tribunal. One was that the Manor Park Care Home whom she worked for as a cook had breached her contract of employment by dismissing her without the one month's notice she was entitled to under her contract. The other claim was that she had been unfairly dismissed and during the course of the hearing it was established that she began working for the home on 4 January 2016 and she was effectively dismissed by a letter which was posted to her recorded delivery on 3 January 2018 and which she received on her return home and was signed when she picked it up from the sorting office on 8 January 2018.

2. She was dismissed in summary on 8 January 2018 and that therefore as she had completed two years employment with the company she was entitled to bring a claim of unfair dismissal.
3. The first issue for the Tribunal was what the reason or principal reason for her dismissal was. The decision appears to have been effectively a joint decision between Mrs Ashiru the home's manager and Mr Femiola who is the home's owner. The recommendation to dismiss was Mrs Ashiru's but Mr Femiola needed to approve that decision and he did so.
4. I am satisfied that the principal reason that Mrs Owens was dismissed was a reason relating to her conduct namely that she had failed to order food for the home on 2 January 2018 and secondly that during the course of a meeting she had with Mrs Ashiru just before 2pm on that day she had shown insubordination.
5. That a reason related to an employee's conduct is a potentially fair reason for dismissing them.
6. The next question the Tribunal had to decide therefore was whether the home had acted reasonably in all the circumstances in dismissing Mrs Owens for that conduct and that decision had to be reached in the light of all the circumstances of the case and in particular the Tribunal had to take into account the contents of the ACAS code of conduct on the way disciplinary matters should be handled in employment. The ACAS code of conduct sets down basic principles of fairness and actually the care home's own disciplinary procedure reflects the ACAS code.
7. In terms of the first aspect of Mrs Owens' behaviour she accepted it was her responsibility to order food for the home on that day and that she had not done so. That potentially had quite serious consequences for the home in that there was going to be a disruption for staff having to go out and do ad hoc shopping to cover the shortfall but the Tribunal takes into account that in fact Mrs Ashiru the manager could also do that food order and in fact did so later the same day.
8. Nevertheless the Tribunal accepts that this was a significant and important part of Mrs Owens' duties and she had not complied with it. Mrs Owens explained to Mrs Ashiru that she hadn't had time to do the food order but the Tribunal accepts Mrs Ashiru's evidence that she did not make clear that she had had problems during the course of the day with obtaining petty cash from the senior carer Nazma??? to purchase potatoes for the residents' lunch and that had taken up quite a lot of time meaning that the arrangements for the morning had all been behind and that was the reason she hadn't had time to do the food order.
9. Nevertheless the Tribunal thinks that if the carer had been acting reasonably they would actually have held a formal disciplinary meeting to discuss Mrs Owens' failure to implement the food order. If it had been done in that way she would have had the opportunity to raise the fact that she had had a difficult morning because she had had to spend time obtaining money and going out to buy potatoes.
10. The Tribunal strengthened in that conclusion by the fact that Mrs Owens did mention that issue at the meeting on 2 February 2018 that Mr Femiola conducted. So whilst the Tribunal doesn't think that Mrs Owens did raise this issue with Mrs Ashiru on the day, if there had been a proper and well-structured disciplinary meeting she would have had the opportunity to do so and the Tribunal thinks she would have done.

11. The Tribunal doesn't accept that it was reasonable for Mrs Ashiru to conclude that Mrs Owens had not prioritised the residents' needs unless and until she had done a measured assessment of why exactly Mrs Owens had not ordered food on that day. The Tribunal also doesn't accept there was any additional culpability on Mrs Owens. She didn't make matters any worse in other words by the fact that she refused to implement the food order just before 2pm given that it was going to take her some time to complete the order and her shift was finishing so the home didn't have any right to ask her to work beyond 2pm and as I have already mentioned Mrs Ashiru could step into the breach and do the food order herself.
12. On the other aspect however the reason for Mrs Owens' dismissal, the Tribunal does accept that Mrs Owens displayed insubordination towards Mrs Ashiru during the course of the meeting just before 2pm. The Tribunal notes that Mrs Owens herself accepts that she was irritated at that meeting and the Tribunal considers it entirely credible that she was in a very bad mood by the time she met with Mrs Ashiru given that she had had a difficult morning and she was questioned about why she hadn't had time to order the food when she knew that she had had challenges to her time because of the difficulties with obtaining petty cash to buy the potatoes.
13. The Tribunal also accepts that Mrs Owens did slap down her resignation letter on to the table. She didn't throw it at Mrs Ashiru but she clearly showed some degree of disrespect and irritation and indeed anger in the way she did that. The Tribunal bases that conclusion in part on the fact that if Mrs Owens was leaving anyway she would not have been inhibited in the sense that she wouldn't have needed to show any respect to a manager who she was no longer being managed by.
14. Nevertheless the Tribunal takes into account that even if Mrs Owens did show insubordination at that meeting which is obviously a serious matter, there was no compliance with the care home with the basic principles of the ACAS code of practice, no disciplinary meeting was held to discuss her insubordination with her in effect that all the care home did was send her a letter that her insubordination and the failure to order the food had led the care home to decide to dismiss her.
15. If there had been a proper disciplinary hearing Mrs Owens would have had the opportunity to consider whether she was to apologise for the way she conducted herself at her meeting with Mrs Ashiru and explain the circumstances of the morning and how trying they had been but that meeting never happened. I'm not saying that I accept that Mrs Owens would necessarily would have apologised but she would have had the opportunity to do so. The Tribunal doesn't accept that the meeting on 2 February 2018 was in any way an appeal hearing. The Tribunal accepts that Mr Femiola was in fact reviewing Mrs Ashiru's decision but that was not made clear to Mrs Owens. She wasn't told that this was being viewed by the company's appeal meeting. It was simply Mr Femiola's response to her request that they should meet so that the care home could explain the reasons for her dismissal. Because it wasn't Mrs Owens didn't know that it was being viewed by Mr Femiola as an appeal meeting. She was not inhibited in her criticism of the company as she would have been if it had been an appeal meeting to her knowledge because she was not viewing it as an opportunity to show that she should be given her job back. So the Tribunal doesn't accept that Mrs Owens' conduct at that meeting on 2 February was supportive of any sort of argument that she had insubordinate at her meeting with Mrs Ashiru. But as I have already said

the Tribunal accepts on the evidence its heard that in fact she was insubordinate of that meeting.

16. Because there has been such a comprehensive failure by this care home to comply with the basic principles of the ACAS code of practice the Tribunal is satisfied that this dismissal was unfair and that aspect of Mrs Owens' claim is therefore upheld.
17. The next stage for the Tribunal is to consider in relation to the unfair dismissal what compensation it should award. The basic award for unfair dismissal is based on an employee's age and length of service at the date that they were dismissed. Mrs Owens had been working for the care home for two years and so she was entitled to two weeks' pay. A weeks pay is calculated on the basis of an average over the previous 12 weeks and I've looked at that and there was 11 weeks of that period when Mrs Owens was earning £186 gross for her normal weekly working week of 24 hours and there was one week at which she was being paid at £192. I've done an average on that and I've come out at £186.50 being her average weeks' pay for that 12 week period. Two weeks at £186.50 is £373. So the basic calculation of the basic award was £373, but as I am going to explain in a minute I did decide to reduce that award on account of Mrs Owens' conduct and I will explain that as I say in due course.
18. Turning to the compensatory award which is basically what the Tribunal thinks just and equitable to award Mrs Owens to reflect the loss she suffered as a result of her dismissal, there is clearly going to be a period when she needs to be working for her new employer for two years or more before she acquires any right to claim a redundancy payment or compensation for unfair dismissal and therefore I award her a sum of £300 in relation to the loss of her statutory rights. I also note that she had to incur £44 in terms of a disclosure and barring service check in order to secure new employment, or in her search for new employment I should say. However the Tribunal considers that in terms of loss of earnings Mrs Owens' loss should be limited to the period between 8 January 2018 when her employment with the care home came to an end till 2 March 2018 because at that point her notice of resignation which she handed into the company on 2 January would have taken effect in any event even if she hadn't been dismissed. That gives me a total loss of earnings of eight weeks (and I've used Mrs Owens' figure in her claim form of £764 for her net monthly pay which broadly reflects the wage slips I have seen in the hearing file), so the calculation I've done is £764 x 12 and divided by 52. That gives me an average net weekly wage of £176.30. Over an eight week period that totals £1,410.40.
19. Adding all of those things together, the loss of statutory rights, the expenses incurred in getting a DBS check and loss of earnings for that eight week period I reach the figure of £1,754.40.
20. The next thing I considered was whether what the chances that even if Mrs Owens hadn't been unfairly dismissed as she was that she would nevertheless have left the employment of the care home, and I think that there was quite a high chance that she would actually have either been dismissed or would have resigned even if the care home had gone down the route of carrying out a proper disciplinary process. I think that because Mrs Owens was already leaving the home's employment there was quite a high chance that she would have decided to resign rather than face the disciplinary process and also because I consider that she was insubordinate during the meeting with Mrs Ashiru, even if there had been a proper disciplinary process and she decided to go through that process I think there was

a chance that Mrs Owens would have been dismissed for that insubordination. On that basis the Tribunal has decided that it is just and equitable to reduce the amount of the compensatory award by 50% to reflect those possibilities and that brings it down to £877.20.

21. The next issue the Tribunal had to decide was whether it was appropriate that Mrs Owens' compensation should be reduced to reflect the fact that she had been guilty of culpable conduct. The Tribunal accepts that Mrs Owens' behaviour at the meeting with Mrs Ashiru was culpable in the sense that she did display insubordination at that meeting and it clearly was also misconduct albeit the Tribunal for reasons I'm going to explain in a minute didn't think it was gross misconduct for her to fail to carry out to implement the food order. She could at least have raised with Mrs Ashiru that she was struggling to find the time to carry out that order so that Mrs Ashiru could have stepped into the breach earlier to do the order herself.
22. On that basis those two aspects of Mrs Owens' conduct I do believe to be culpable or blameworthy and I think it is appropriate to reduce her compensation by 50% to reflect that. That brings the compensatory award down again from £877.20 to £438.60.
23. The next thing the Tribunal had to decide was whether or not the compensation Mrs Owens is awarded should be increased to reflect that the fact that the care home as I have already said completely failed to follow any aspect of the ACAS code of practice. The Tribunal accept that this is a small employer but it simply is not acceptable that even a small employer doesn't follow what are actually very basic principles of good employment practice set out in the ACAS code and in fact are reflected in the care home's own procedure so I think it is entirely appropriate that the care home should have followed its own procedure which reflects the requirements of the ACAS code. On that basis the Tribunal is prepared to increase the award it makes to Mrs Owens on account of the care home's failure to follow the ACAS code of practice by 25%.
24. The compensatory award having been reduced down to £438.60 it is then increased by 25%. It comes back up to £548.25.
25. The basis award the Tribunal as already explained that it feels that Mrs Owens was guilty of culpable conduct and that the compensatory award should be reduced by 50% on that basis. The Tribunal is satisfied that the basic award should also be reduced on that basis. So that bring the basic award down from £373 to £186.50. So totalling those two figures, the basic award of £186.50 and the compensatory award of £548.25. That bring the total compensation that the Tribunal awards Mrs Owens for her unfair dismissal to £734.75.
26. The other aspect of Mrs Owens' claim was in relation to breach of contract. The issue here was whether or not the Tribunal accepted on the evidence that it heard that Mrs Owens in fact had been guilty of gross misconduct. If she had then the care home had no obligation to give her one month's notice as set out in her contract of employment. The Tribunal accepts that Mrs Owens' failure to order food for the home was misconduct even if she had no time during the course of the morning she could have asked Mrs Ashiru to implement the order for her and/or to get the petty cash sorted out quicker so that she would have time to do the order herself, but the Tribunal doesn't consider that was gross misconduct because there were in fact mitigating factors although this was an important part of Mrs Owens'

duties on that day she had other things to deal with and she did not wilfully refuse to carry out that duty, she just ran out of time.

27. So in terms of that aspect of her behaviour the Tribunal does not accept she was guilty of gross misconduct. On the other hand in terms of her attitude and behaviour towards Mrs Ashiru at the meeting the Tribunal accepts that although there were difficult circumstances leading up to that meeting Mrs Owens' conduct did amount to gross misconduct in that she was clearly disrespectful and insubordinate in her attitude towards Mrs Ashiru at that meeting.
28. As the Tribunal are satisfied that that did amount to gross misconduct the Tribunal does not accept that Mrs Owens was entitled to any damages for the fact that the care home did not give her notice of dismissal and therefore that aspect of her claim fails.

Employment Judge Cox

Date : 17 October 2018

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