Case number 2405482/19

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant Mrs T Hall

Respondent Weightmans LLP

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Liverpool on 25 September 2019.

EMPLOYMENT JUDGE Warren

Representation
Claimant: Mr P Hall, husband
Respondent: Mr D Tinkler, Counsel

RESERVED JUDGMENT

The claim of unfair dismissal is ill-founded and is dismissed.

REASONS

Background and Issues

1 By an ET1 received on 9 May 2010 the claimant alleged that she had been unfairly dismissed by the respondent, her employer. Her employer, a firm of solicitors, denied that the dismissal was unfair but asserted that it was for the potentially fair reason of conduct, and that a fair procedure had been followed.

The Evidence

2 The Tribunal heard evidence from the claimant in her own regard and Ms SJ Howitt and Mr S Jones for the respondent. There was an agreed bundle of documents. The parties had made witness statements which were utilised as

their evidence in chief. Statements were received and read from Lee Tennant and Lyndsay Hall (the claimant's daughter) in support of the claimant's case. They did not attend to give evidence and be cross examined, and so less weight was placed on their evidence. The standard of proof applied to the evidence was 'the balance of probabilities'. The Tribunal gave some limited assistance to Mr. Hall who was representing his wife. He did have some experience as a union representative and assistance was given in phrasing questions to which he sought answers, with the respondent's agreement. After hearing all of the evidence, the following facts were found.

The Facts

3 The claimant was employed by the respondent as a facilities assistant from February 1995 to January 2109. On 23 October 2018 it was alleged that the claimant had brought her adult daughter (an ex-employee of the respondents), and 2 young grandchildren into the respondent's premises during her lunch break, and shared lunch with them in Arthur's, a staff social area, before leaving them ,unaccompanied, and then later left them in the client suite where she worked. It was considered that the two young children were at risk because of the automatic sliding doors and lack of direct adult supervision, a toddler having been seen crawling towards the doors, and an older child standing in the doorway.

4 The claimant was invited to attend an investigatory meeting chaired by Rachel Ivatt, on 25 October 2018. She was refused the right to be accompanied as such right was not included in the respondent's policy. During the interview, the claimant alleged she had been working on her computer whilst her family had been on site. A request was made for her internet search history. The report showed that at the material time the claimant had been online, but not for work purposes, along with a further period of 1.25 hours earlier in the day when she was on duty and apparently browsing the net for personal purposes.

5 A further investigation was undertaken of her internet usage for the whole month of October 2018 which demonstrated a consistently high usage for non work related searches across most working days at a level which Ms Ivatt considered unacceptable. The Tribunal had 117 pages of data supplied as an additional bundle of documents showing hundreds of entries recording access to shopping web sites such as Evans, Shoeaholic, Ryan air, Easyjet and Debenhams.

6 A second investigatory meeting took place on 7 November 2018 to continue the discussion about the claimant's family being on site and the internet usage. The claimant did not, in the view of Ms Ivatt adequately explain her internet usage. Minutes were kept as of all meetings in this case.

7 On 29 November 2018 Ms Ivatt completed an investigation report which recommended that there was a disciplinary case to answer both in relation to the internet usage, and the claimant having her family unsupervised in the offices of Weightmans whilst she should have been working. The claimant denied there was any risk to her grandchildren by leaving them with her daughter in the client suite, and did not accept there was any cause for concern with regard to her usage of the internet for non work related searches. She believed she may have briefly looked at a site then left it open whilst she moved away to undertake work, and visiting other sites merely to delete emails from particular companies. It is notable that she did not at any stage mention that she was looking on behalf of Penelope, her colleague.

8 The claimant had just finished a short call with Ms Ivatt on 29 November 2018, in which Ms Ivatt asked her to go to a private room for a meeting when her co worker, Penelope, entered the room. Penelope was a relatively new employee, whom the claimant said she had assisted to obtain the job. Penelope's English was not good. Penelope was the ex sister in law of Loraine Wells. It was Loraine Wells who had seen the children in the client suite and expressed her concern for their welfare, thus beginning the process which lead to the claimant being part of a disciplinary process. Loraine Wells was the Head of Facilities.

9 On 28 November, the day before, there had been an argument between Penelope and the claimant about covering an evening event. Penelope admitted to being cross and shouting. Lea Tennant heard her and noted that the claimant remained calm. At that stage no complaint was made either by Penelope or the claimant.

10 The claimant wrongly believed that Penelope had made a complaint to Ms Ivatt about the argument on 29 November, and this was why she had just been called to a private meeting.

11 The claimant lost her temper with Penelope and shouted at her. The exact words are unclear because Penelope's English was not good enough to understand them. The allegation was that she had used the word 'twat' and 'disgusting'.

12 The claimant gave an account to the Tribunal that she had been a good friend to Penelope, and had taken the blame for the internet useage when she had been searching sites on Penelope's behalf. She accepted that this was not an explanation she gave to the respondent at any time and that she sought to cover up for Penelope's sake, which seems unlikely after they had fallen out so badly.

13 Penelope sent an email on 5 December complaining about the claimant's conduct during the argument and explaining she was finding it increasingly difficult to work with the claimant as they had hardly spoken since.

14 Ms Ivatt interviewed Ana Martinez, a concierge employed by the respondent for almost 30 years. She saw and heard Penelope come out of an office leading to the front desk,visibly agitated and upset, and saying that the claimant was saying bad words to her which she did not understand. Ana alleged that there was tension between Penelope and the claimant, and that the claimant had described Penelope as 'thick'.

15 On 7 January 2019 Zoe Kay, another concierge, who was working with Ana at the time of the incident was interviewed. She was able to corroborate the evidence of Ana.

16 The claimant was sent the minutes of the meeting with Penelope and replied with comments, which were taken into account by Ms Howitt.

17 On 9 January 2019 the claimant as invited to a disciplinary hearing with three allegations of misconduct – concerns around her family's presence on 23 October; non work related internet usage and her behaviour towards Penelope. She was advised of her right to be accompanied, and chose to take her husband, she was warned that she may be dismissed of it was concluded that her conduct amounted to misconduct.

18 Ms Howitt was appointed as disciplinary officer. She is a partner in the firm. During the disciplinary interview the claimant accepted that for a short period she had left her family in Arthurs whilst she went back to work, and that there had been an incident with the sliding door in the Client Suite. She did not accept that the respondent had any reason to be concerned about her family being on site. She was very suspicious of the respondent's actions in 'losing' or 'deleting' the cctv which would have covered the incident, before she had had a chance to see it. She had been offered the opportunity to view it, but had not done so.

19 The respondent was unable to provide an explanation for the loss to the Tribunal other than to say that an attempt to save it led to it's corruption.

20 The claimant maintained her view of internet usage that her use during working times was not such as should raise a legitimate concern.

21 She did not mention at this stage or any other that she had been searching on behalf of Penelope, and in evidence to the Tribunal accepted that the first time she had mentioned this was in her evidence in the Tribunal under cross examination when she alleged that she was asked to search on behalf of Penelope and did so, but did not say so directly in the investigative, grievance or disciplinary hearings, because she was covering up for Penelope.

22 The claimant asserted that she had not used abusive language towards Penelope on 29 November, and that the argument on the previous day had been caused by Penelope's aggression. She cited Lee Tenant as a potential witness.

She asserted that Penelope had been aggressive towards her on 29 November and she had told her to 'shut your gob' in response.
She denied calling Penelope 'thick' despite knowing that the 2 concierges both said that they had heard her say it.

23 She expected the witnesses to be present at the hearing to enable her to challenge their evidence. The respondent's disciplinary policy did not make such provision. She was given the chance instead to comment on the evidence.

24 Lee Tenant it transpired was not present at the second argument on 29 November about which the respondent had received the complaint form Penelope. He did say however that Penelope was the aggressor on 28 November. When interviewed much later, Penelope did admit to being cross on the 28th.

25 Ms Howitt considered that Penelope's account was the more credible, and that the use of expletives by the claimant justified a finding of gross misconduct. She noted that the claimant had long service and a clean disciplinary record.

26 The respondent stressed their requirement for all employees to treat each other with courtesy, dignity and respect at all times no matter what the circumstances. She considered the claimants conduct towards Penelope to be a fundamental breach of the peoples' policies, and unacceptable in their business.

27 She also concluded that the substantial level of none business related internet usage in October 2018 amounted to gross misconduct because it showed contempt for the trust placed in the claimant. Ms Howitt considered the claimant's explanation to be untruthful. She felt there was a gross breach of trust in the claimant's conduct in allowing her family members to be onsite unsupervised when she should have been working.

28 On 21 January 2019 Ms Howitt wrote to the claimant confirming her dismissal without notice citing the reasons above.

29 In the meantime the claimant had lodged a grievance against Penelope's conduct towards her on 28 November 2018. It was heard by Amanda Buckley, HR manager and rejected.

30 The claimant appealed the decision to dismiss and to reject her grievance. The appeal was handled by Mr Jones, a partner in the firm.

31 Whereas there had been some failures to supply all of the evidence or carry out a thorough investigation before dismissal, Mr Jones began again by way of rehearing. He carried out a fresh investigation having heard from the claimant first in a meeting dated 14 February 2019. He went through the points of her dismissal appeal and by the end of the meeting had an agreed list with the

claimant, of actions and steps he would take as well as further investigations, including re-interviewing some of the witnesses interviewed at the outset.

32 On 26 February 2019 the claimant received a pack of evidence relating to her dismissal, grievance and the investigations into the missing cctv evidence.

33 On 25th March 2019 the respondent sent her the outcome of all of the new investigations, email exchanges and witness statements, the appeal hearing minutes, and examples of her internet usage. She was invited to attend a further hearing eventually listed for 8 April 2019.

34 During that meeting Mr Jones agreed to look into further points raised by the claimant, including interviewing Theresa Murphy, a facilities assistant. The interview notes were subsequently sent to the claimant.

35 Mr Jones concluded that the incident with the family had not been deliberate and only justified a final written warning. He downgraded the outcome accordingly.

36 However he found that the misuse of the internet and the claimant's refusal to accept responsibility in the face of experts saying it went far beyond clicking to unsubscribe or delete, and that it showed evidence of extensive web surfing during working hours, led him to the conclusion that he could not believe the claimant.

37 This was reinforced by her explanations for the incident with Penelope. He no longer found he could trust her, and believed the accounts of the in house IT experts on the internet issues, and Penelope on the incident of the 29 November, as supported by the two concierges.

38 He concluded therefore that whilst he reduced the penalty on the first allegation he upheld the decision to summarily dismiss on the latter two.

The Law

39 Section 98 Employment Rights Act 1996 provides:-

> (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."

(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."

40 It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

41 In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

a) the starting point should always be the words of section 98(4) themselves
b) in applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair
c) in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer
d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another
e) the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

42 The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

43 The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures.

Conclusions

44 Did the respondent hold a reasonable belief in the claimant's misconduct?
Mr Jones in particular undertook a thorough investigation. Every query raised by the claimant in the appeal was investigated by him and an answer supplied. It was unfortunate that the cctv was deleted/ corrupted or lost, but in reality the penalty for that allegation was reduced to a final written warning in any event, and on its own it would not therefore have led to the claimant's dismissal.

45 Having witnesses attend to be cross examined is not within the respondent's written disciplinary policy, and not within ACAS guidelines either, but Mr Jones offered a solution by asking what the claimant challenged, and then interviewing the witnesses, whether for the first time or again, to deal with those issues.

46 Mr Jones had clear hard evidence of the claimant's internet usage, which was at odds with her explanation. He did not know of her assertion that she was covering for Penelope. The Tribunal did not find her credible in that regard in any event. She had no reason to cover for Penelope, against whom she had lodged a grievance and whom she blamed at that time for her perilous employment situation.

47 Mr Jones also had corroborative evidence supporting the claimant's abusive language towards Penelope in the form of two trusted longstanding employees with no apparent reason to lie or conspire about it.

48 It was therefore reasonable of him to form a belief in the claimant's misconduct.
He further described how the tenor of the claimant's explanations had seemed to him to be dishonest, and so he had lost trust in her. It was therefore reasonable for him to believe that her conduct amounted to gross misconduct for which he was entitled to dismiss her summarily.

49 The procedure followed at least at the appeal, was text book. The claimant was accompanied through the entire procedure by her husband, an experienced trade union official albeit not acting in that capacity. She knew from the first invitation letter that she was at risk of dismissal. She knew the allegations against

her. Every meeting was minuted. She was not provided with all of the evidence at the dismissal stage but by the appeal she had all of the evidence and was able to challenge it, agreeing a list of outstanding issues with Mr Jones, who ensured that every issue raised by her was fully investigated. Both Mr Jones and Ms Howitt took account of her clear long service record. She was made aware of the outcome with supporting paperwork and given a final chance to comment before the final decision was taken.

50 The procedure followed was fair and generally within ACAS guidelines, and the decision to dismiss was within the range of reasonable responses. The claim of unfair dismissal thus fails.

Employment Judge Warren

Signed on 23 December 2019

Judgment sent to Parties on

3 January 2020