EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Mace**

Respondent: **Mount Pleasant Practice**

Heard at: **Cardiff** **On: 6 January 2020**

Before: **Employment Judge Ward**

Representation:
Claimant: In person
Respondent: Mr James (counsel)

RESERVED JUDGMENT

1. The claim is dismissed.

2. The dismissal of the claimant on 11 April 2019 was fair.

REASONS

The issues

1. The claimant contends that she was unfairly dismissed on 11 April 2019. It was accepted that the claimant was an employee with the requisite service and had presented her claim in time. The sole issue for the Tribunal to determine, therefore, was whether the respondent unfairly dismissed the claimant. The respondent resisted the claim and contended that the dismissal was fair and reasonable in all the circumstances. The matter came before the Tribunal for a one-day Hearing.

The applicable law

2. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent

states that the claimant was dismissed by reason of conduct; see Section 98(2)(b) ERA. If the respondent persuades the tribunal that the claimant was dismissed for a potentially fair reason, the tribunal must go on to consider the general reasonableness of the dismissal under Section 98(4) ERA.

3. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

4. The well-known decision of the EAT in *British Home Stores Limited v. Burchell* [1980] ICR 303 gives guidance on these matters.

5. The tribunal is mindful that it must not put itself in the position of the respondent and assess the reasonableness of its actions by reference to what the tribunal would have done in the circumstances. It is not for the tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss and substitute the tribunal's own conclusions as if it were conducting the disciplinary procedures. Employers have at their disposal a range of reasonable responses to the alleged misconduct of an employee and it is instead the tribunals function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that range.

The evidence

6. The tribunal heard evidence from Ms S Fuller, the respondent's assistant practice manger, Dr A Holtam one of the partners at the practice, and Dr R Davies the senior partner at the practice. A written statement was also provided by Dr E Ashley who was unable to attend the hearing due to work commitments. The tribunal admitted this evidence as the claimant had no objection. The tribunal heard evidence from the claimant and a former colleague Mrs S Hunt .The parties provided an agreed bundle of documents of 205 pages.

The relevant facts

7. The claimant was employed as medical receptionist at the respondent's general practice in 2014. The practice had two surgeries and employed 30 members of staff all who worked part time. She loved her job and was a good employee. She was however having some problems at work, she had been incorrectly paid for a number of years and was often short staffed which had increased the pressure of the job and the timing of breaks. Although she was trying to resolve these issues, she was increasingly feeling like she was not being listened to and was feeling more and more stressed and undervalued.

8. On 15th November 2018 the claimant had a difficult patient who became angry and intimidating following a misunderstanding about how he could pay and the price of a medical examination. The next day the patient's behaviour was discussed and the claimant understood a letter would be sent to the patient to warn him of his behaviour.

9. On the 21 November when working at Portskewett surgery the same patient was intimidating in his manner towards the claimant. The claimant felt frightened and unsafe being at work.

10. The claimant saw her GP the next day as she was *"a bag of nerves"*. The claimant was signed of sick for three weeks for stress.

11. The letter warning the patient about this behaviour was sent from the practice on 3 December 2018.

12. The claimant returned to work but the job was getting more and more stressful with working long shifts, often on her own, due to the practice being understaffed.

13. On 25 March 2019 the claimant went to the practice managers office to provide a brochure a rep had dropped off in reception. When she showed the practice manager the brochure she was subject to swearing.

14. The claimant was upset and went straight to Ms Fullers room in tears to recount the incident.

15. The claimant went home that evening and was signed off work for four weeks sick leave for work related stress.

16. On the 28th March the claimant felt she had no alternative but to write to the partners to help resolve some of the workplace problems she was facing. The email (pages 79-80) detailed concerns about lone working, her experience of swearing by the practice manager, underpayment of wages, lack of appraisals, incorrect employment contracts and a failure of the practice manager to address the concerns.

17. On receipt of the email Dr Holtam considered the content and invited the claimant to a grievance meeting, which the tribunal agrees was the correct approach.

18. Dr Holtam invited the claimant to a grievance meeting 4th April to discuss her complaints. Ms Fuller did check with the claimant on the 1st April whether she was Ok to attend given her sickness absence which the claimant confirmed she was *"quite happy to attend"* (page 83).

19. On 3rd April as the claimant was off sick and did not have any evidence of her complaint, given everything was on her computer at work, she attended the Portskewett surgery. This was around 6.45 at night, the cleaners were there so the door was open. She then logged onto a computer and printed out emails evidencing the issues she was having at work.

20. The grievance meeting was held on 4th April with Dr Holtam, Ms Fuller and a note taker. The claimant was accompanied by Mrs Hunt and went through all the issues in her email.

21. When Dr Holtam asked the claimant if she had any evidence the claimant showed copies of printed out emails. Dr Holtam asked if there was anything confidential and was shown an email (page 69) dated 17 December 2019 about the patient with the intimidating behaviour. Dr Holtam took a photograph of this email and advised the claimant that the patient's name should have been redacted.

22. The notes of the grievance meeting were initialled by all present as a correct record and the meeting finished with Dr Holtam needing to investigate the matters raised and for the claimant to return to work once well.

23. Dr Holtam was however concerned how the claimant had a printed email in her possession which had a patient's name included. She asked Mrs Fuller to investigate.

24. Mrs Fuller found that the claimant had logged into the respondent's computer system on 3 April between 18.44 and 19.42 (page 87). This was highly irregular and so Dr Holtam suspended the claimant on 5 April 2019. This telephone call was a shock for the claimant and Dr Holtam had a script prepared which she read out.

25. The claimant denies that the content of the script was read out but the tribunal would find it difficult for the claimant to recall the whole conversation given she was being suspended which she was not in anyway anticipating. The script (page 133) is signed and dated with the time of the call by Dr Holtam and by Ms Fuller who was in the office when Dr Holtam made the call.

26. The claimant was emailed on 8 April and invited to a disciplinary hearing (page 135). The email states that the claimant may have accessed the premises outside of normal working hours and may have removed information from the practice computer system and removed it from site.

27. The disciplinary hearing took place on 11 April. The claimant was accompanied by Mrs Hunt. It was explained to the claimant that the meeting was to discuss the allegation that she had accessed the Portskewett surgery outside of normal working hours on 3 April, logged onto the computer for 50 mins, and that she

had in her possession documents downloaded from the computer system documents that included patient sensitive data that she removed from the premises, all without permission. The claimant accepted that she had been at Portskewett surgery and had logged on to the computer and printed emails. She explained that she didn't think she had done anything wrong and had printed them to substantiate the issues raised. The notes of the disciplinary meeting were initialled by all present as a correct record (pages 137-146).

28. As the claimant admitted she had attended the surgery and printed out the emails. Dr Holtam spoke to another partner Dr Ashley and they decided given the serious breach of patient confidentiality that they had no alternative but to dismiss.

29. The claimant was advised of her dismissal for gross misconduct at the hearing and this was confirmed in writing on 11 April (page 147)

30. Although the letter did not contain the details about how to appeal, the claimant appealed on 24 April.

31. The appeal hearing was held on 2 May with Dr Richards. Notes were taken of the hearing and signed by the claimant (pages 163-178). The claimant explained in the hearing how upset she was in being treated in this way. She did not deny the fact that she entered the building after normal hours, but felt she needed to gain evidence. She only took emails and gave them to Dr Holtam the following day.

32. Dr Richards considered the appeal and wrote to the claimant on 7 May (pages 179 –180). He replied to each of the claimants grounds of appeal and upheld the decision to dismiss.

Conclusions

33. The facts in this case were not in dispute until the tribunal hearing. The claimant did not raise at the disciplinary hearing or the appeal hearing that the email of the 17 December had not been printed out at Portskewett surgery on 3 April. The claimant said in evidence at the tribunal when cross examined that the email was in her tray of papers at the surgery and that Mrs Hunt passed them to her when she arrived for the grievance meeting. Whether this is true or not the Tribunal cannot take this into account. What the tribunal has to review is the facts known to the respondent at the time of the dismissal.

34. The respondent undertook an investigation which showed that the claimant had logged onto the computer between 18.44 and 19.42 (page 87). Although this evidence was not provided to the claimant before the disciplinary hearing she did not deny that that was the case. As to what she printed she did not say

at the grievance meeting or the disciplinary hearing that the email of 17 December was not printed on the 3 April nor had not left the practice.

35. The respondent has therefore proved, on a balance of probabilities, that the claimant was dismissed for conduct as set out in Section 98(2)(b) of the Employment Rights Act 1996 (ERA).

36. In light of the claimant admitting these facts the tribunal finds that the respondent did have a genuine belief that the claimant had committed an act of gross misconduct and that this was the reason it dismissed the claimant.

37. Did the respondent carry out a reasonable investigation upon which to sustain that belief? It did. The tribunal is satisfied having regard to the fact that the claimant admitted that she printed the email at Portskewett surgery the night before the grievance hearing, that there was little scope for any further investigation.

38. The evidence before the Tribunal about the unfairness of the process related to; the claimant being on sick leave at the time of the disciplinary, the short time the process took, the lack of details about the complaint, the absence of a right of appeal and no warning that the disciplinary process could result in dismissal.

39. The claimant was already away from work on stress related sickness absence and there is no doubt the significant stress and worry these turn of events had on claimant. The respondent did check whether the claimant wanted to proceed with the disciplinary process during the meeting. As the claimant said she was fit to attend the hearing it was not unreasonable for the respondent to proceed.

40. The claimant states that she did not know what she was agreeing to and did not know the case against her. Although it is noted that the precise email causing concern is not quoted in the letter inviting the claimant to a disciplinary meeting (page 135). There is no doubt that the claimant knew the email that was causing concern as it had been discussed in the grievance meeting only a week before and was the only topic of conversation in the disciplinary meeting. The letter although could have included another sentence quoting the email, and warning that dismissal could be an outcome, this absence does not make the procedure unreasonable. The claimant was warned when suspended that the allegations were potentially gross misconduct. Further the claimants job description (page 37 records that "*all employment with Mount Pleasant Practice is subject to a duty of patient confidentiality. You should be aware that any breach of this duty of confidentiality might lead to your immediate dismissal"* This is in accordance with the staff acceptable use charter (page 53) which the claimant signed in June 2014. This provides details

of the confidential duty and again warned that a breach of the charter may be considered to constitute an act of gross misconduct.

41. The absence of the right of appeal in the dismissal letter was unfortunate but did not make the process unreasonable. The terms and conditions refer to the right and the claimant exercised this right and appealed against the decision. Sending the email to staff advising that the claimant was no longer working at the practice did not jeopardise a fair appeal. A further email could have been sent if the claimant had been reinstated.

42. The respondent found that the only option available was to dismiss, Dr Holtam found that the evidence of a breach of data protection was irrefutable and any warning would have been totally inappropriate because patient confidentiality is critical to the integrity of patient care. This is a reasonable response. It is not for the tribunal to assess whether this was a harsh reaction. The question is whether it was reasonable.

43. The tribunal concludes that the dismissal fell inside the range of reasonable responses that an employer can take and that therefore the respondent fairly dismissed the claimant.

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Employment Judge Ward
Dated 3 February 2020

REASONS SENT TO THE PARTIES ON 3 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS