Case Number: 1600465/2018
1600808/2018

EMPLOYMENT TRIBUNALS

Claimants:	**Mrs Rhian Halliwell** **Miss Michelle Rowlands**	
Respondent:	**Gekko UK Ltd**	
Heard at:	**Llandudno**	**On: 9 and 10 March 2020**
Before:	**Employment Judge R Powell (sitting alone)**	

Representation:

Claimant 1:	In person
Claimant 2:	Ms Kingsley (Solicitor)
Respondent:	Mr Thornsby (Counsel)

JUDGMENT having been sent to the parties on 17 March 2020 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. Before dealing with any of the detail of the disputed matters I first record that the Claimants withdrew their respective claims for holiday pay and, by consent, those claims are dismissed upon withdrawal.

2. This case centres on events which took place in the Respondent's office between 10.30 and 13.30 on 22 February 2018 when an email was sent to a large number of the Respondent's clients. Erroneously, that email had attached to it a document which listed the email addresses and other details of all the recipients.

3. This disclosure had a substantial adverse effect on the Respondent's business reputation and profitability. Consequently, the two members of staff who were employed in the Respondent's office were dismissed the following day for their alleged gross misconduct in allowing the said document to be sent as an attachment to the email.

4. Those two employees are the Claimants in these proceedings they presented claims to the employment tribunal alleging unfair dismissal and breach of contract arising from their dismissal without notice.

<u>The character of the claims of unfair dismissal</u>

5. It is common ground between the parties that the Claimants were dismissed within the meaning of Section 95(1)(a) of the Employment Rights Act 1996 and the principal reason for the dismissal was a potentially fair one for the purposes of Section 98(1) and (2) of the same Act, misconduct.

6. The character of that misconduct has been pleaded as gross negligence.

7. The disputed issues are the elements of Section 98(4) of the ERA 1996; the reasonableness of the investigation, alleged procedural failings, the reasonableness of the conclusion that either Claimant was culpable and the reasonableness of the conclusion that the Claimants' conduct amounted to gross misconduct. There is no dispute before me that, if all of the matters above were found in the Respondent's favour, that it would be within the band of reasonable responses to dismiss for such conduct.

<u>The character of the claims of breach of contract</u>

8. The breach of contract claim is entirely centred on an assertion that the Claimants were entitled to contractual notice. The parties agree that if the Claimants' conduct amounted to repudiatory breach of the contract of employment then the Respondent was not under an obligation to pay notice. The Claimants deny their conduct was repudiatory.

<u>The evidence</u>

9. I heard from all four members of staff who were employed by the Respondent at the time. Firstly, Mr. Flynn, founder and Director of the Respondent who managed the business day to day and was responsible for the investigation of the alleged misconduct and the decision to dismiss the Claimants,

10. Ms. Tsai, Director of the Respondent who also managed the business and was involved in the management of the Claimants.

11. Ms. Rowlands, the Second Claimant, who had been employed by the Respondent as an Office Manager since 2013 and later became Supervisor of the only other employee; Mrs. Halliwell.

12. Mrs. Halliwell, the First Claimant who joined the Respondent in 2015 as an Administrative Assistant.

13. All witnesses produced statements which were taken as their evidence in chief and all were cross-examined.

14. I considered those documents which were withing the agreed bundle which were brought to my attention either by references in the witness statements, cross-examination or in the parties closing submissions.

Findings of Fact

15. I will now deal with my findings of fact. These are principally findings relevant to the issues of unfair dismissal. I have set out ancillary findings of fact relevant to the wrongful dismissal claims and the Respondent's submission on *Polkey -v- A E Dayton* Services ltd and culpable conduct by the Claimants in my discussion and conclusions.

16. I have reached these findings of fact on the balance of probabilities. I have considered and applied the relevant burden of proof depending on the pertinent element of the Employment Rights Act (sections 98(4) and 122) and the contractual claim, brought under Article 5 of the Employment Tribunal (Extension of Jurisdiction Order (England & Wales) 1994 for wrongful dismissal.

17. The Respondent is a small business which at the relevant time employed only four persons all of whom I have noted above.

18. The evidence before me about the conduct of the Claimants prior to 22 February 2018 suggests that both were more than satisfactory employees.

19. The Respondent's business sells products used in thermal printing; printing heads, tapes and thermal films and other related products. Its business at that time was spread across many countries around the world.

20. The Respondent marketed its products directly to users of the product and also to distributors who would then re-sell the same items onto their own "end users". The market appears to have been very competitive and margins of profit, as described by Mr. Flynn, were modest.

21. In this environment the Respondent sold its products to businesses who were in direct competition with each other, but without those businesses being aware that the Respondent was doing so.

22. Similarly, the Respondent was engaged in marketing its products to business who were clients of the Respondent's distribution customers. Again, the Respondent was able to keep this information from its distribution customers.

23. Lastly the Respondent was aware that its pricing was in some respects less competitive than some of its rivals. It was important that rivals did not have knowledge of the businesses which the Respondent supplied because that would make them prime targets for the Respondent's competitors and was either likely to lead to a loss of business or the Respondent's need to reduce its prices to remain competitive in the face of more informed competition.

24. For these reasons. details of about 1400 businesses or individuals who were past, present or hoped for customers was information which the Respondent guarded.

25. The Respondent had occasion to communicate to all, or large portions of its customer base, by email. Prior to 2017 that had been done through Microsoft Outlook programme, but that system proved cumbersome for commercial large-scale use.

26. A solution was found through a business called Phoenix Web Development. It offered the Respondent a web-based service called Mailshot which enabled large-scale emails to be quickly distributed to many recipients.

27. I have no documentary evidence or witness evidence which gives me comprehensive explanation of the function of Mailshot. I did obtain an explanation of its function from the evidence from the First Claimant along with emails between the First Claimant and Phoenix Web Development staff, for instance pages 182 – 184 of the bundles. This evidence persuaded me that the essence of the Respondent's use of Mailshot was as follows:

28. A user of Mailshot can create a list of recipients and their email addresses in a document. The document can be converted into a CSV format file which the user can import into the web-based system called the Mailshot.

29. The user imports the CSV file by following the direction displayed in on-screen dialogue boxes. The user is directed to make choices and decide where the data in the CSV file should be stored. That data can then be

extracted from the file by Mailshot and used to populate the list of recipients of an email.

30. Various versions of such lists can be uploaded, each list of recipients being tailored to the purposes of any particular large-scale mailshot. Each of the lists can be uploaded and stored on line and then selected as appropriate.

31. The user first prepares the content of the Mailshot email to be distributed to the intended recipients.

32. The user then selects from the files stored in Mailshot the appropriate recipient list for the subject of the draft email.

33. At the time of the selection of such a list the Mailshot system does not show the recipients in the “to” “cc” or “bcc” part of the draft email.

34. The system populates the “to” section of the draft email after the user presses “send”.

35. Mailshot applies the same approach to any attachments to the draft email; the attachment is not visible on the screen at the time the user presses “send”.

36. It is evident from the emails between Mrs. Halliwell and Phoenix Web Development that some training had been offered to the Claimants in November 2017, some assistance by email exchanges had been provided in November 2017. It is agreed by the parties that prior to 22 February 2018 the First Claimant had successfully sent 6 emails via Mailshot without any incident.

37. In early 2018 the Respondent’s carrier of goods raised its prices and the Respondent was no longer in a position to absorb the increased cost. It decided to pass some of that increased cost on to its clients. For this reason, the Claimants were instructed to prepare a mailshot notifying the relevant customers of the imminent price increase. That instruction is recorded in the minutes of a meeting which took place on 15 February 2018 (pages 83-84 of the bundle).

38. The content of the proposed email was derived from an earlier and similar notice of price increase. The First Claimant prepared a recipient list tailored to the content of this notice.

39. On 22 February the First Claimant sent the proposed list to Mr. Flynn and Ms. Tsai (page 114 of the bundle). The last two emails in that trail are pertinent to the issues before me in that; it was said by Ms. Tsai; *“Pete (Mr. Flynn) seems to think the way it’s set up it’s all hidden*” that is a reference

to the intended email recipients were not able to see other recipients' email addresses, to which the First Claimant replied; "*Yes, it's been set up so others can't see emails"* so both parties to this dispute were of the understanding that at that time (11.28 on 22 February) that the Mailshot system prevented one recipient from viewing the identities of other recipients of the same email.

40. Sometime after 11.30 the First Claimant uploaded the bespoke recipient list which had been approved by the Respondent. It was uploaded to Mailshot and on her evidence, she followed the same process as she had done previously i.e. on the instances when her conduct had led to no difficulty.

41. The First Claimant states, and the Second Claimant confirms, that a test email was sent out to the claimants and Ms. Tsai. Ms. Tsai said she did not receive it. The test email did not include the recipients, its purpose was to check the content, layout and format of the draft email was satisfactory. That being done, the First Claimant copied and pasted the content into a blank email within Mailshot and she pressed "send" on that Mailshot email at 12.35 (see page 85 of the bundle).

42. The First Claimant's evidence, as noted above, was that when she had pressed "send" the attachment was not present and nor was the recipient list. The email was distributed to approximately 1,300 recipients (pages 86-113 of the bundle).

43. At 13.03 Mr. Flynn received an email from a customer in France (page 131) which stated; "*we received your email about the cost increase. But you also attached your customer database".*

44. At 13.27 Mr. Flynn sent a WhatsApp to the Claimants (page 134) which in he indicated that the provision of the customer list to competitors was a very "challenging" event because competitors could now identify many potential clients which they might try to take from the Respondent and that there had been a number of instances of forwarding and hundreds of views of the Respondent's client list.

45. Mr. Flynn stated; "*this is about the worst thing that can happen to a business with sensitive data*" he then went on to say; "*I am sorry to say that I need to suspend you both until further notice while I try to understand what this situation means to the company. The damage of this situation is enormous. Ten years work building the database" he then concludes "I'll be in touch next week*".

46. The same customer to whom I have referred above, sent a further email (at page 132). The customer based in France had identified that two of its

own customers in Brazil, which had no longer been sending orders to the French business, were on the Respondent's customer list and for that reason wrote to Mr. Flynn stating; *"I guess we will have less print heads to buy from you now".* In essence, the French company was reacting to the belief that the Respondent had been undermining its sales by dealing directly with its customers and was going to withdraw, or at least reduce, the orders it made to the Respondent as a consequence.

47. The same day the Respondent became aware, from an email from Mr. Bevans, an employee of Phoenix Web Development, that the attachment of the document containing the 1300 customers contact details was, in his opinion, an act of user error rather than some error in the system (page 131).

48. During the same afternoon there were discussions between the Second Respondent and Mr. Flynn about how the disclosure had occurred and how to inhibit, if possible, further viewings of emails which had not yet been opened or to inhibit or mitigate the effects of emails which had been opened and potential for forwarding of the customer list to third parties. None of this was possible so no mitigation was effective.

49. It has been raised that the Second Claimant failed to set out in her witness statement the existence of telephone discussions on the afternoon of the 22nd. I note that this evidence was also absent from Mr. Flynn's witness statement. Nevertheless, both witnesses in their oral evidence had a degree of consistency with each other; that there was discussion between them by telephone. Insofar as I am asked to consider the absence of these references as a reason for doubting the reliability of the witnesses I do not, I find both of the absences innocent and the content is not something which either would have cause to hide.

50. After the aforesaid contact, the next matter which I am specifically aware is that Mr. Flynn, in consultation with Ms. Tsai, decided "sleep on the issue".

51. At 12.14 on Friday 23 February (page 140) the Claimants received a further WhatsApp from Mr. Flynn which stated; *"I'm really sorry but we need to make Thursday your last day of employment. I have now had time to think about it and I see no way forward from this situation that is remotely workable. It's the same for Rhian. I'm totally gutted but I cannot avoid it*." The Claimants were told on Friday that their employment had been terminated on Thursday and, as is common ground between the parties, that termination was without notice.

52. The Claimants did not appeal against the decision to dismiss them.

<u>Discussion and conclusions on the unfair dismissal claim</u>

53. Turning then to the issues under Section 98(4). The Claimants' assertions in this respect are largely the same; that the procedure adopted by the Respondent was flawed in its investigation and so was its conduct of a disciplinary process. Consequently, whilst the Respondent held a genuine belief in their misconduct that was not a reasonable conclusion open to any reasonable employer in all the circumstances of this case.

54. Both assert that the Respondent failed to comply with the ACAS Code relating to disciplinary procedures. The Claimants were suspended and dismissed within 24 hours of the incident, they were not informed of the accusations, they were not informed of any evidence not even Mr. Bevan's opinion that had been communicated to Mr. Flynn (that the disclosure was an act of user error), there was no investigation of their conduct, nor were they allowed an opportunity to respond, nor were they invited to a disciplinary meeting or allowed the opportunity to be represented or allowed to question or challenge any of the evidence.

55. Each of these alleged failures to which I have been referred correspond to elements within the ACAS Code in respect of disciplinary matters, which I am bound to consider in my assessment the fairness or unfairness in such a case as this.

56. I also note that the Claimants were not informed of a right to appeal. Whereas the Second Claimant had received a contract of employment and a notice of terms and conditions which alerted her to the Respondent's policy on discipline, that cannot be said to be borne out by the evidence in the First Claimant's case.

57. I take into account that the Respondent is of course a small employer and that Mr. Flynn and Ms. Tsai were faced with the task of trying to mitigate the adverse effects of the disclosure; trying to retain customers and rebuild damaged commercial relationships. I also note that as of the WhatsApp of 22 February Mr. Flynn's initial intention was to take some time to consider what action was to be taken and that he intended to communicate with the Claimants "next week". It is also clear that the Respondent had adopted a detailed policy of the conduct of disciplinary proceedings which mirrored the expectations of the ACAS Code.

58. The Respondent asserts that some investigation was undertaken. I accept on the evidence of the email exchange between Mr. Flynn and Mr. Bevans that there was an explanation to identify the cause of the email attachment and the opinion of Mr. Bevans was that it was a "user error". There is no other indication of any effort to investigate the conduct of the Claimants as to, for instance, which of them was the "user" who made the error identified

by Mr. Bevans, the cause of that error or the extent to which the Second Claimant, as the first Claimant's supervisor, was guilty of negligence.

Unfair dismissal; the Legal Matrix

59. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

60. The employer must show that he believed the employee was guilty of misconduct;

61. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

62. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

63. The first element of the test is not in dispute in this case.

64. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

65. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

66. In British Leyland UK Ltd v Swift [1981] IRLR 91 Lord Denning MR stated: The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair.

67. It must be remembered in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably takes a different view.

The Quality of the Respondent's Investigation

68. I accept the Claimants' assertions that the Respondent made no effort to conduct a disciplinary meeting or any investigation with either Claimant of

the events which preceded the dispatch of the email. Both employees were dismissed without any examination of their individual behaviour or their part in the cause of the error.

69. There may, in principle, be cases where it is reasonable for an employer to dispense with investigation or even a hearing. I have been referred to the unreported case of Ellis v Hammond & Hammond EAT 1257/95, a case in which the respondent had witnessed most of the claimant's misconduct. In my judgment this was not such a case. The circumstances of incident were not known to the Respondent and the degree of involvement and culpability of the two Claimants were very different.

70. Allowing for the small scale of the Respondent's enterprise and the very small number of employees the respondent had still adopted a clear disciplinary policy which indicated it was sufficiently conversant with the expected standards set out in the ACAS code and had an intention to comply with those standards.

71. The Respondent has persuaded me that, following the disclosure of its client list its primary concern was to limit the damage to its business. That is an entirely reasonable course of conduct. That however is not a satisfactory answer to the failure to conduct a reasonable investigation in circumstances where there was no evident further risk to the business caused by retaining the employees, on suspension, for a time sufficient to speak to each one about the relevant events and then meet with them formally to make a decision about their future.

72. I remind myself that the "band of reasonable responses" test is pertinent to the evaluation of the Respondent's conduct of any investigation and that the burden of proof in this respect is neutral.

73. I have reached the conclusion that the Respondent's lack of investigation and dismissal without a hearing was, in all the circumstances of this case, not open to any reasonable employer.

74. For these reasons, I find that both Claimants were unfairly dismissed.

75. In respect of both Claimants, the Respondent asserts that, had it acted in a reasonable manner, both would have been dismissed fairly and, that each claimant was guilty of culpable conduct.

76. Whilst I have dealt with the procedural matters in tandem there is a substantial factual divergence in respect of these arguments and I address each case in turn.

The Legal Matrix- sections 123(say 1) and 123(6) ERA 1996

123. *- (1) Subject to the provisions of this section and sections 124 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 complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*

> *(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*
>
> *(6) 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 finding.*

122(2) *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

77. In Polkey v AE Dayton Services [1987] IRLR 503 is engaged where there is a finding that there has been a procedural defect and also in circumstances where:
    a. the dismissal would have occurred in any event, or;
    b. on a sliding scale for the allocation of a percentage chance.

78. In Andrews v Software 2000 [2007] IRLR 568 at paragraph 54, Elias J (as he then was) summarised the law in this way:

> "54. The following principles emerge from these cases:
>
> (1) In assessing compensation, the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have

continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct it properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) ….

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. …..

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

79. Section 123(6) states:

If, by his actions, the claimant caused or contributed to his own dismissal a tribunal:

a. Must reduce any compensatory award which it is inclined to make by such proportion as it considers "just & equitable".

b. May reduce any basic award.

80. It is the conduct of the employee alone which should be considered here, not that of any other employee - see Parker Foundry Limited v Slack 1992 ICR 302 CA. In Parker the court held that while consistency of treatment was relevant to the fairness of the dismissal it was not a matter for the tribunal to consider when assessing contributory fault. Further, the court held that once a tribunal has found, on the evidence that an employee has to some extent caused or contributed to his dismissal, it *'shall', (i.e. must) reduce the award*. The only discretion left to it is by how much.

81. In Nelson v BBC (No2) 1980 *ICR* the Court of Appeal said three factors must be satisfied if the tribunal is to find contributory conduct:
a. the relevant action must be culpable or blameworthy;
b. it must have caused or contributed to the dismissal; and;
c. it must be just and equitable to reduce the award.

82. For there to be a deduction for contributory conduct the claimant's conduct must actually contribute to the decision to dismiss, see *Nelson above.* It is obvious that Second Claimant's conduct contributed to her.

83. Guidance on contribution can be found in the case of *Hollier v Plysu 1983 IRLR 26*0:

Employee wholly to blame	100%
Employee largely to blame	75%
Employer and employee equally to blame	50%
Employee slightly to blame	25%

84. A 100% contribution is permissible as per W Devis & Sons v Atkins 1977 *IRLR 314*.

Discussion- The Second Claimant's case

85. The Respondent's pleaded rationale for the dismissal of the Second Claimant [paragraph 31 of the relevant Grounds fo Resistance] was her responsibility, as office manager, to supervise the First Claimant. As the Frist claimant had sent the email with the attached list of clients, the Second Claimant was responsible for that conduct and had been negligent in her management of the First Claimant.

86. The second Claimant was cross examined by the Respondent and the First Claimant. She accepted she was, in the absence of a more senior employee (Mr. Flynn or Ms. Tsai), responsible for The First Claimant's standards of work.

87. It was also clear that the First Claimant had uploaded the client list to Mailshot and that it was more than likely that she had saved the file incorrectly.

88. It is not evident how the Second Claimant was negligent in the performance of her supervisory duty. She had engaged with the First Claimant on the content and format of the email and she had reviewed a draft with her.

89. On the evidence before me, there was no visible indication on the draft email, present on the First Claimant's computer screen prior to pressing "send", to indicate that the recipient list would be automatically attached to the email by the Mailshot programme as a file *after*, "send" had been pressed. The First Claimant did not intend any document to be attached to the email and consequently the Second Claimant was unaware of any possible risk of a file being attached.

90. There has been no evidence before me of any process which could have been undertaken to scutinise a draft Mailshot email for unintentional attachments.

91. On the evidence before me the Respondent had not required the Second Claimant to undertake any specific training to enable her to be competent to check the Frist Claimant's operation of Mailshot or required the Second Claimant to personally use the Mailshot programme. Indeed, on the evidence before me it was the First Claimant who was the only person who had sent Mailshot emails, she was the more experienced of the two.

92. On the evidence before me there was no specific act that the Second Claimant failed to undertake which could have detected the error by the First Claimant.

93. I therefore do not consider that, had Mr. Flynn acted fairly and taken a reasonable approach to the evidence which would have been before him after a reasonable investigation, he could have considered dismissal to be a reasonable sanction for the Second Claimant.

94. It follows from my findings of fact that the Respondent has not identified any specific act or omission by the Second Claimant which could be classed as culpable conduct.

95. I therefore make no deduction in respect of the Respondent's argument asserting contributory fault nor do I make a *Polkey* deduction.

The Second Claimant - Wrongful Dismissal

96. I then turn to wrongful dismissal. I have alerted the parties to the *Ashkan -v- Sainsburys* case to which both have referred. In this aspect of my jurisdiction, it is my own decision on the facts, not the band of reasonable responses, which is relevant.

97. In my Judgment on the balance of probabilities, for the reasons set out above, the Second Claimant committed no act or omission which was culpable, still less amounting to culpability which could amount to a repudiatory breach of either the implied term of trust and confidence or any express terms of negligence or gross negligence in the Respondent's disciplinary code.

98. In short, she had no reason to be on notice of any default in the conduct of the First Claimant. Even if she had "sat on the shoulder" of the First Claimant before the email was sent, she would have had no indication of any error by the First Claimant or any indication of risk to the Respondent. Neither the First Claimant or the Respondent have identified any specific action that the Second Claimant should have taken.

99. For these reasons, I have concluded that her claim for wrongful dismissal claim is well-founded and succeeds.

The First Claimant – Contributory Fault & "Polkey" deduction

100. I make some additional findings in relation to the First Claimant's case. On the balance of probabilities, it is more likely than not that:

101. It was the First Claimant who uploaded the recipient list to the Mailshot website on 22 February.

102. It is the First Claimant who saved the CSV document within the Mailshot site.

103. The First Claimant does not dispute that the document she uploaded was the document that was eventually attached to the Mailshot.

104. There is no evidence of any other person being involved in the upload of the document.

105. Although the First Claimant denies that she made any error there is no evidence before me to explain the presence of the attachment other than some error having taken place. That to some extent corroborates the untested opinion of Mr. Bevans in the email he sent to Mr. Flynn; "user error".

106. That the First Claimant had managed on six previous occasions to complete the Mailshot process of uploading or selecting the correct list of recipients without the difficulty which occurred on 22 February.

107. That she had some guidance from Phoenix Web Development in November and had been present in a 20 or 30 minute telephone training session in 2017.

108. That she did not feel confident that she fully understood the Mailshot system. That she had not been tested on her knowledge or her ability.

109. That on 22nd February, to the best of her ability and knowledge, she consciously followed the same process she had undertaken previously.

110. That she acted within her competence and did so diligently as she was able.

111. Based on the above, I have concluded on the balance of probabilities it is more likely than not that Mrs. Halliwell made the error that led to the file being inadvertently attached to the mailshot which was then delivered to the 1300 recipients.

112. There is no allegation that the First Claimant has been deceitful or misleading in her evidence before this Tribunal. I consider that, had a reasonable investigation or disciplinary hearing taken place, the account she has given to this Tribunal would have given to Mr. Flynn.

113. Clearly Mr. Flynn could have come to a conclusion that Mrs. Halliwell made the error. It is highly unlikely that he would have considered that the error was anything but accidental; that there was nothing on the system which alerted her to her error.

Contributory Fault

114. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue Swallow Security Services Ltd v Millicent [2009] ALL ER (D) 299, EAT).

115. The tribunal has a discretion to apply such a reduction to the basic award undersection 122(2) which states that 'where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

116. I note that, the case law tells me that culpable conduct does not have to be intentional; it may involve inadvertent but incompetent conduct.

117. In my Judgment it is more than likely than not that the First Claimant's inadvertent error caused substantial damage to the Respondent's business.

118. In this case I find that the First Claimant's conduct was, on the balance of probabilities, culpable and causally connected to her dismissal.

119. A third element is the degree to which it is just and equitable in all the circumstances of the case to make any reduction in her award of compensation.

120. I take into account all of the factors noted above and weigh them against the degree of damage done to the Respondent's business, the Respondent's failure to ensure that its staff were sufficiently trained for the task or competent in the task before allowing them to use the system without any expert or qualified supervision. In this case I find there is a degree of fault by both parties.

121. Taking into account the guidance in Hollier v Plysu 1983 IRLR 260, in my judgment a reduction of 60% is a just and equitable reflection of the

degree of the First Claimant's culpability, the Respondent's own failings and the degree of damage to the Respondent's business.

122. In this case I also consider it to be just to apply the 60% deduction to the basic award under section 122(2).

123. I then turn to the "*Polkey*" deduction. For the purpose of this decision I bear in mind I am considering the hypothetical conduct of Mr. Flynn.

124. I have no doubt that, if Mr. Flynn had been thorough in his investigation and complied with the respondent's disciplinary procedure, he would have dismissed the Claimant in any event. I am of the opinion that Mr. Flynn was so influenced by the consequence of the error that other factors; that the error was unintentional, that the error was not apparent to the First Claimant or the Second Claimant before the Mailshot email was sent and the Respondent's own failing to ensure that the First Claimant was competent so as to avoid the error, would not have influenced his response.

125. In my judgment, it would not have been a reasonable response open to a reasonable employer in the circumstances of this case to have dismissed the First Respondent in all of the above circumstances

126. I would not make any further reduction than that which I have made for two reasons.

127. Firstly, I do not consider that this respondent has established that it is more likely than not that a procedurally fair process would have led to a fair dismissal.

128. Secondly, I look at the three elements of the averred deductions and consider whether sure the reductions are cumulatively proportionate. I do not consider that it would be just or equitable to make a further deduction to the 60% deduction I have already made.

<u>The First Claimant - Wrongful dismissal</u>

129. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

130. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross

misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct.

131. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case.

132. In this case the conduct of the claimant is alleged to be her negligence in preparing and dispatching the Mailshot email. It is not alleged that her conduct was deliberate.

133. It is well established that gross negligence can amount to gross misconduct and a repudiatory breach of contract: Neary v Dean of Westminster IRLR [1999] 288 (para 22 - 23):

"The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence."
"…it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

134. In Sandwell v West Birmingham Hospitals NHS Trust UKEAT/0039/09, at paragraph 111, the EAT stated:

"Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee… So, the conduct must be a deliberate and willful contradiction of the contractual terms."

135. The common law definition of negligence, in its simplest form can be stated thus: behaviour or inaction of a person which in the circumstances did not meet the standard of care which a reasonable person would meet in those circumstances.

136. As noted in Harveys on Industrial Relations and Employment Law:

"What, however, about an act of simple negligence as understood in the law of tort? The assumption might be that that would not be sufficient, being instead a textbook example in the modern law of unfair dismissal of the need for warnings and any eventual dismissal being with notice. However, that assumption could well be difficult to maintain in one particular type of case – what about an act of simple negligence (possibly a one-off, momentary failure) which led to catastrophic damage, injuries or deaths? An obvious example would be momentary negligence by a train driver leading to a major rail crash causing deaths. In one old case (Savage v British India Steam Navigation Co Ltd (1930) 46 TLR 294) it was said

that in a negligence case the emphasis should be on the nature and seriousness [o]f the negligent act, not on the consequences, because to do otherwise would be to misuse hindsight and could be unfair on the individual employee because the extent of the damage could be fortuitous and unforeseeable. Arguably, this is entirely logical but is it the way it would work in practice? If the damage was extreme and newsworthy, the employer could be under considerable pressure to be seen to take steps commensurate with the damage and to make sure that 'heads roll' (or, as it might alternatively be put, to ensure that there is a scapegoat).

Unfortunately, the ACAS guide is ambiguous on this; its reference to 'serious negligence' could attach the seriousness to either the act or the consequences. The case law is little more help. One of very few cases to mention the issue is Jackson v Invicta Plastics Ltd [1987] BCLC 329, QBD in which Pain J held wrongful the summary dismissal of a chief executive for inter alia incompetence in some of his business decisions which had incurred losses. The case did not raise the act/consequences problem and, moreover, arguably incompetence is not exactly the same as negligence. However, the judge (a notable employment lawyer of his day) did comment that, while summary dismissal for incompetence (and so arguably for negligence proper?) could not be ruled out, the general trend of the common law has been to make it increasingly unlikely on the facts, the more so since the inception of the law of unfair dismissal: 'The employer would have to show that [the employee's] continued employment would be quite impractical because of the harm he was likely to do to the company'. Helpful though this is in the absence of any other authority, it would not resolve the most difficult case, namely a one-off catastrophic act of momentary negligence by an employee who is never likely to repeat it."

137. Neary was considered more recently by the Court of Appeal in Adesokan v Sainsbury's Supermarkets Ltd [2017 I.C.R. 590. At paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that dishonesty and other deliberate actions which poison the relationship obviously fall into the category of gross misconduct but so, in an appropriate case, can an act of gross negligence.

138. The question in any particular case will be whether a negligent dereliction of duty is so grave and weighty as to amount to a justification for summary dismissal. This involves an evaluation of the primary facts and an exercise of judgment. Whist the exercise is one of judgment, in paragraph 24 Elias LJ cautioned that the parameters of the exercise are not boundless and that;

"it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

139. The relevant considerations pertinent to the exercise of my judgment are set out in Williams v Leeds United Football Club [2015] IRLR 383 Lewis J summarised the approach as follows (at paragraph 53):

> "In general terms, in assessing the seriousness of any breach, it is necessary to consider all the relevant circumstances including the nature of the contract and the relationship it creates, the nature of the contractual term that has been breached, the nature and degree of the breach and the consequences of the breach … In the context of contracts of employment, relevant circumstances include 'the nature of the business and the position held by the employee': see Jupiter General Insurance Co Ltd v Shroff [1937] 3 All ER 67 per Lord Maugham. The opinion of the Privy Council in that case recognises that immediate dismissal is, as Lord Maugham expressed it, a 'strong measure' and there needs to be careful consideration of the evidence to determine whether the conduct is such as to amount to a repudiatory breach entitling the employer to dismiss the employee without notice."

Discussion and Conclusions

140. The first Claimant was the Respondent's most junior employee. She worked under managerial supervision of the Second Claimant, Ms. Tsai and Mr. Flynn.

141. The First Claimant was, following her receipt of guidance on the use of Mailshot, of the belief that the Mailshot program hid the identity of recipients from one another; a belief shared by Mr. Flynn.

142. The foreseeable consequences of disclosure of the identity of multiple recipients was significant financial loss to the Respondent. It was the Respondent's managers who chose the manner in which the data was protected, the degree to which staff were trained (by its website developers) and the methods by which staff competence was evaluated.

143. The First Claimant had notified the Respondent's website developers that she did not feel fully confident or fully trained in the use of Mailshot. On the evidence before me the training provided by the Respondent amounted to less than an hour and there had been no evaluation of the Frist Claimant's competence or the degree to which she understood the program.

144. The First Claimant had asked questions, by email, about the system on an ad hoc basis and she had sent six previous Mailshot emails without incident.

145. In my Judgment, based on my own findings of fact, the First Claimant made an error, probably in following the pathway to uploading the CSV file, but that was not deliberate and it was apparent.

146. The First and Second Claimants reviewed the Mailshot email in draft format before it was sent and the Mailshot system gave no indication of the error and neither of them was aware of the error.

147. I have accepted the First Claimant's evidence that before she sent the email it was not evident that the CSV file was to be attached or that the Mailshot program would attach it. In every respect her preparation of the Mailshot email was diligent and she was careful in her work.

148. Given her level of training, her request for more training and the absence of any evaluation of her understanding of the Mailshot program, I do not find that her default of Mrs. Halliwell could be described as negligent; her conduct was not below the standards which could be reasonably expected of a person in the First Claimant's particular circumstances.

149. In closing submissions, the respondent asserted that the conduct, if not negligent, was nevertheless in breach of the Respondent's disciplinary code. Particular emphasis was placed on; "*a serious breach of confidentiality including unauthorised access to computer and personnel records and communicating or leaking trade secrets or confidential information about the company or its employees, clients or customers to third parties"* [page 149 in the bundle].

150. It is correct that the CSV file contained confidential information and it was disclosed to third party recipients.

151. The Respondent argues that there is no "mens rea" necessary for the offence and that the Claimants were both in breach of this term whether they were negligent or not.

152. It is difficult for me to accept that submission when I look at the character of the examples of gross misconduct set out in the disciplinary policy [pages -149] all refer to, or imply, deliberate behaviour, gross negligence or serious carelessness. The particular clause, inter alia, refers to "leaking" information and "unauthorised "access to personnel records. I do not interpret the clause as one which indicates to an employee that conduct which is neither intentional, nor negligent nor even conscious could warrant summary dismissal.

153. I take into account the damage caused to the Respondent, valued at least £30,450.00 in the Respondent's letter before action, sent to the First Claimant on 7th May 2010 [pages 142-44 of the bundle].

154. In all of the above circumstances, I have concluded, on the balance of probabilities, that the First Claimant was consciously trying to do her best, given her understanding of the task. However, her best efforts in performing the task were not, in the context of her experience and training, sufficient to avoid an unknown error. Her conduct was not below the standard which would be reasonably expected of a person in her circumstances nor was its character in breach of the Respondent's disciplinary code.

155. For the above reasons, despite the impact upon the Respondent, I conclude that the conduct of the Frist Claimant did not amount to a repudiatory breach of the contract and her claim for notice pay is well founded.

156. The last issue I have to consider is the application of 207(A) of the Trade Union Labour Relations (Consolidation) Act 1992 and the assertion by the Claimants that any award of compensation should be subject to an uplift in respect of unreasonable failure by the Respondent to comply with the ACAS code on discipline.

157. This gives the Tribunal a discretion to award a percentage uplift between zero and 25% depending on the circumstances of the case.

158. The degree of an uplift should properly be considered in the context of the assessment of amount of compensation which has been made. The quantum of any remedy will be considered at a separate hearing and it seems to me that I would fall into error if I were to determine the application of Section 207A without first taking into account any amounts of compensation which maybe awarded at the remedy hearing.

Employment Judge R Powell
Dated: 28th April 2020

REASONS SENT TO THE PARTIES ON 6 May 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS