EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Saad	**v**	Sevenoaks Leisure Limited

Heard at: **London South (by video)** **On: 2 September 2020**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: **Mr Wildman - representative**
For the Respondent: **Mr Lomas - consultant**

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal and breach of contract in respect of notice pay, fail and are dismissed.

REASONS

Background and Issues

1. By a claim form dated 25 November 2019, the Claimant brought claims of unfair dismissal and breach of contract in respect of notice pay. She had been employed for approximately thirteen years as a finance manager by the Respondent, a charity providing leisure and fitness facilities. Following allegations against her in January 2019 that she had brought the Respondent into disrepute, she was subject to disciplinary proceedings and subsequently dismissed, without notice, for gross misconduct, with effect 18 June 2019. The essence of the charge against her was that she had failed to make payment to a creditor on time, which failure could have had dire consequences for the Respondent.

2. The issues in this claim are as follows (and based on discussion with the parties in respect of a draft statement of issues they had provided).

3. Unfair Dismissal

   3.1. It was not disputed that the reason relied upon by the Respondent was conduct, a potentially fair reason for dismissal.

   3.2. Had the Respondent a genuine belief in the Claimant's 'guilt', based on reasonable grounds, following as much investigation as was reasonable in the circumstances? The Claimant contends that the Respondent acted unreasonably in finding her responsible for the failure to make the payment on time, during a period when she was on leave, during which time a Ms Parish (the CEO) was in fact responsible. The Claimant contends that she did nothing blameworthy.

   3.3. The Claimant attempted, belatedly, at this Hearing, for the first time, to challenge the fairness of the procedure. She asserted that the disciplining officer (Ms Hallam) should not have held that role, as she had previously found the Claimant to have committed an act of misconduct in unrelated disciplinary proceedings. Further, she asserted that Ms Parish should have had no involvement in the appeal proceedings, as she was in fact responsible for the loan payment. Neither of these allegations had been pleaded, referred to in previous correspondence, or set out in the Claimant's witness statement and were first mentioned only in the Claimant's amendment of the Respondent's draft statement of issues. No application having been made to amend the claim, to include such matters, they were not considered in this Hearing.

   3.4. The Claimant contends that dismissal was outside the range of reasonable responses, in that she had not committed gross misconduct, by any minor infringement on her part.

   3.5. In the event of a finding of unfair dismissal, the Respondent contends that the Claimant's actions contributed to her dismissal, which the Claimant does not accept.

   3.6. The Respondent would also seek to rely on the *Polkey* principle, in the event of a finding of procedural unfairness.

4. Breach of Contract. As set out in the case management summary, this issue hinges on the outcome of the unfair dismissal claim and whether or not the Respondent was entitled to summarily dismiss, by way of a finding of gross misconduct.

5. Preliminary Matters. There was some preliminary discussion as to the contents of the hearing bundle and whether some mitigation documents should have been included, or not, or provided in a separate mitigation bundle. It was agreed that such documents could be provided later in the Hearing, if and when required. Some of the documents in the bundle were not particularly legible, but, in the end, their contents were not crucial to my findings.

The Law

6. I reminded myself of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (**Iceland Frozen Foods –v- Jones [1983] ICR 17 EAT)** and the way in which the investigation was conducted (**J Sainsbury Plc –v- Hitt [2003] ICR111 CA)** fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, I am guided by the case of **British Home Stores –v- Burchell [1980] ICR303 EAT** which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.

The Facts

7. I heard evidence from the Claimant and on behalf of the Respondent, I heard evidence from Ms Dawn Hallam, a trustee of the Respondent, who conducted the disciplinary hearing and Mr Alan Peal, the Chairman of the Board of Trustees, who heard the Claimant's appeal.

8. The Respondent is a medium-sized employer (160 employees), with the appropriate managerial and administrative resources.

9. Chronology and the Claimant's and Respondent's account. I set out the following account, upon which I comment as I consider appropriate:

    9.1. March 2017 – the Respondent negotiated a large loan (£600,000), from their local authority, Sevenoaks District Council (SDC), for a gym extension. Quarterly repayments were to commence in June 2018, of £20,486 per payment. The terms of the loan were strict (because, Ms Hallam said, some councillors at SDC had not wanted to approve the loan, but were assuaged by the imposition of strict terms for repayment). These were [50] that SDC could seek to declare the Respondent insolvent and terminate its lease, based on its legal charge over the property, if either any single payment was more than thirty days late, or payments were one or more days late, on three or more occasions. The Claimant accepted that she was fully aware of these terms and had in fact counter-signed the loan agreement. She had also received the repayment schedule [82 & 86A].

    9.2. July 2018 – the Claimant was subject to disciplinary proceedings, having been accused of misrepresenting the Respondent's cash flow forecast to the Board [40-42]. This was conducted by Ms Hallam and the Claimant was found to have committed misconduct and given a final written warning. However, following a subsequent appeal by her that sanction was reduced to a written warning. The Claimant asserted in evidence that in fact her

cash flow predictions had been subsequently found to be correct. Ms Hallam agreed that that was the case, but only because the Claimant provided additional information at the appeal stage.

9.3. 29 September 2018 – the first payment, in June, was made on time, but the one for 29 September was not. The Claimant said that she had arranged the payment for the next working day (1 October), as 29 September was a Saturday and therefore she did not consider that she had done anything incorrect, as she '*saw no point'* in instead making the payment on the 28th, to ensure payment by the 29th and that the '*usual arrangement was to make the payment the next working day'*. She couldn't recall if she informed either the CEO, or SDC of this decision, but said that the spreadsheet subsequently went to the Board, showing the payment on 1 October. SDC did not raise the matter with the Respondent, at the time.

9.4. 18 December 2018 – the Claimant went on Christmas leave. The next payment to SDC was due on 25 December. The Claimant said that she '*had put arrangements in place for the SDC loan repayment to be made by my subordinate, Robert Viner, while I was on annual leave. Robert didn't make the payment and Jane* (the CEO) *failed to follow up with him, despite knowing that she should be authorizing the payment.'* (6. C's WS).

9.5. 27 December 2018 – the Claimant returned to work and discovered, later that day that the payment had not been made to SDC. Mr Viner was on leave himself, at that point. The Claimant did not contact SDC to discuss the late payment and nor did she inform the CEO (because, she said, she was on holiday), or anybody else at the Respondent.

9.6. 31 December 2018 – Mr Viner returned from leave and the Claimant said she had a discussion with him, in which he told her that the payment needed to be made and it was made on that day. In an email exchange that day with the CEO, she stated that '*we are paying out £67.5k for suppliers and £20k for SDC'*, to which the CEO replies '*have we told SDC we would be paying the loan late?'*. The CEO replied stating that '*we cannot assume it is ok to pay it on Thursday that is over a week late, it was due on 25th Dec.'* and instructed the Claimant to say to SDC, as an excuse that due to her (the CEO) being off sick, they had been unable to provide the two necessary signatories [55-57].

9.7. 9 January 2019 (all dates hereafter 2019) – the Chief Finance Officer of SDC wrote to the CEO stating his concern following the late payment. He referred to '*the lengthy process to get the loan approved as SDC members had a range of views but certain conditions were built into the agreement to give Members greater comfort'* and he reiterated those conditions. He then went on to state that in fact this was the second late repayment and that '*as a further 37 payments are due to be made I am extremely concerned about Sencio* (the Respondent's trading name) *being able to make these payments on time and the consequences that may follow. The situation could potentially damage Sencio's reputation with SDC and reduce the likelihood of any future projects being approved, which could impact the*

viability of Sencio. I am sure that you are also concerned about this situation and I hope that you will put procedures in place to ensure that a third late payment is not made.' [52-53].

9.8. 21 January – the CEO met with the Claimant to discuss these late payments and she was suspended. The notes of the meeting (subsequently amended by the Claimant) [90] record her saying in response to the warning received from SDC that '*the Council will not put us in liquidation for a few days delay'.* When asked why the loan had not been paid on time, she said that '*I thought RV* (Mr Viner) *would be paying it'* and when further asked if she was saying it was his responsibility said '*I'm not saying it was his responsibility. I'm saying we spoke about it and he should pay it …'*. In respect of the delay in eventual payment she said that '*we had many things to do'* and that '*I don't think paying late is big issue, we do delay payment all the time and they don't come back to us'*.

9.9. 25 January – the CEO met with Mr Viner [93-95], whose title was 'finance assistant' and who reported directly to the Claimant, who herself reported to the CEO [42a]. He was asked if the Claimant had discussed with him about the 25 December payment and he said '*no, the loan was not discussed for weeks prior to it. I was aware of it as it was on the cash flows. We had discussions informally, nothing agreed or set in stone regarding payment, which I found strange.* He went on to say that he '*assumed that it would be done when VS* (the Claimant) *back after Christmas.'* He agreed that there was no system in place to ensure the loan payments were made on time and that none had been discussed. In this respect, he went on to say that '*possible the wrong attitude towards the loan, the same as towards the suppliers, advised 'wrong philosophy'*.

9.10. 7 February – an investigatory meeting was conducted by the CEO [109-115, notes as amended by the Claimant]. When asked whose responsibility it was to pay the loan, she said that it was Mr Viner's '*job to send payment and I authorise it'* and that she did not make the payment before she went on holiday because she '*trusted RV to do it'*. When challenged that she could have set up a direct debit to ensure the loan was paid on time, she said that the CEO had told her that SDC '*did not give this option'* and when it was suggested that she could have asked them, she said that it was not her role to contact the Council, but the CEO's. She also said that she had previously suggested using a direct debit. When further challenged as to why, when she discovered on the 27th (28th?) that the loan had not been paid, she had further delayed in paying until the 31st, she said that '*I thought already late by one day, so not going to make a difference.'* and went on to blame the CEO and Mr Viner for not making the payment. When the CEO referred to the risk to the relationship with SDC, the Claimant said '*we didn't have good relationship with SDC anyway.'*

9.11. 20 February to 8 May – Claimant on sick leave.

9.12. 15 May – Disciplinary hearing, conducted by Ms Hallam. During the hearing, the Claimant again referred to speaking to Mr Viner about him

paying the loan, prior to her going on leave and therefore, following the hearing, Ms Hallam spoke to Mr Viner. He reiterated what he had previously told the CEO and said that he was unaware of any penalties for late payment [158-160].

9.13. 18 June – Ms Hallam wrote to the Claimant setting out her decision to dismiss her, on the following grounds. Firstly, the Claimant was aware of the loan terms and the consequences of not keeping to them. Secondly, as Finance Manager, she was responsible for the Respondent's finances and therefore final accountability rested with her, even if she had had some discussion or other with Mr Viner (which he denied). Thirdly, there no systems in place to ensure that payment would be made, come what may. Fourthly, even when she became aware of the non-payment, she further delayed payment. Fifthly, the Claimant did not seem to understand the gravity of the situation, in particular the damage to the Respondent's reputation with SDC [161-164].

9.14. 24 June – the Claimant appealed. Her grounds of appeal were that the evidence had not been properly considered; dismissal was outside the range of reasonable responses; the Respondent failed to support her in not implementing an improvement plan; that the Respondent could not have had a reasonable belief in her guilt, as Mr Viner's account was not challenged; she had been on annual leave at the time and that both Mr Viner and the CEO were aware that the payment was due [164A].

9.15. 18 July – the appeal was heard. The Respondent decided to engage a consultant from the company who advised them on HR matters, to chair the meeting, who would then, in turn, provide a report, with recommendations to Mr Peal, who would also attend the hearing and he would then take the final decision. He concluded that the Claimant, as a senior member of management, knew her responsibilities in this respect, but sought to shift them to a more junior member of staff, while taking no responsibility herself. As Chairman of the Trustees, he had lost confidence in her as a finance manager and was not convinced that a similar situation would not happen again, in the future, with enormous repercussions for the Respondent. He therefore rejected her appeal [186].

10. <u>The Claimant's Case and the Respondent's response in cross-examination</u>. In summary, both from her evidence and from her representative's submissions, the Claimant's case was as follows:

10.1. Mr Viner knew about the payment and should have made it in time. She had put everything in place before she went on leave and the CEO and Mr Viner '*needed to play their part'*. The Respondent witnesses disagreed. They were satisfied that no discussion had taken place with Mr Viner and in any event, the Claimant had put no procedures in place, as a 'back up', in the eventuality, for example that Mr Viner might have been absent on sick leave. It was not, they said, either the CEO's or Mr Viner's responsibility to ensure the payment was made, but the Claimant's, as finance manager and as set out in her job description [33A]. When asked as to what exactly she had said to Mr Viner

on the 31st, when he told that the loan had to be paid, she said that she had agreed that it must be. When further challenged as to why, if she genuinely felt that Mr Viner had failed to carry out her instructions in this respect, she had not upbraided him for this failure, or even considered disciplinary action, she said that '*we talked about it. He said he'd had to change the computer* (by way of explanation for failing to remember to make the payment) *and I didn't feel I should* (take disciplinary action).' When it was put to her by the Tribunal that there was no prior record of her ever having mentioned this conversation before, she said that she'd not been asked about it. When challenged that she had had ample opportunity, in a suspension meeting, an investigatory meeting, disciplinary and appeal hearings, her claim form or her witness statement, to provide this detail, she had no satisfactory answer.

10.2. The Respondent had ongoing cash-flow problems, which she had to juggle at the end of each month, needing, in December, to ensure, for example that staff wages were paid. To achieve this, she had had to approach the Respondent's bank to negotiate a sizeable informal overdraft. This explained the post 27th delay in payment, as to make the payment, there had to be the money in the account to do so. Insufficient account was taken of this fact and had it been, it would not have been reasonable to consider her actions to be misconduct. The Respondent agreed that cash flow was a problem and that juggling was required, on occasion, but that the Claimant should have understood and realised that the loan payment, in view of the possible adverse consequences, took absolute priority over all other payments, even, if necessary, staff salaries. However, short of that extreme action, the Respondent pointed out that routine payments were being made to suppliers, which could have been delayed, without anything like the serious consequences for delaying the loan payment. When the Claimant challenged that failing to pay staff wages would have been very serious, Ms Hallam agreed, but countered that when balancing the seriousness of such steps, how much more consequential it would have been for those staff to lose their jobs in the event of insolvency, rather than have one month's salary delayed.

10.3. There was an overreliance by the Respondent on the alleged lack of standing operating procedures, to avoid such events, but the simple fact was that Mr Viner knew he had to make the payment, which is all that a written procedure would have set out. Again, Ms Hallam countered that the Claimant needed to ensure that if, for example, Mr Viner fell sick that nonetheless, alert systems, diary reminders etc. would be in place to ensure payment. She also did not consider that the Claimant had made sufficient effort to explore the possibility of either standing orders or direct debits.

10.4. She had been unaware, until January 2019 that the September payment was regarded by SDC as late.

10.5. The appeal was flawed, as Mr Peal did not understand the grounds of appeal (referring to 'reasonable employee', rather than 'reasonable employer', in his consideration of the range of reasonable responses test. He also left the appeal in the hands of the HR company, who, as contractors of the Respondent, cannot have been impartial. He also underplayed Mr Viner's

admission of responsibility, when he said that he '*should have made the payment'*. The Respondent countered that any such assertions about the conduct of the appeal had not been pleaded by the Claimant and that in any event, Mr Peal had made it clear that if he felt it appropriate, he would have disagreed with the consultant's conclusion and upheld the appeal, but he did not.

10.6. Dismissal was outside the range of reasonable responses test, as she had not known of the previous late payment and in view of her lengthy service. However, Ms Hallam stated that while she did consider a final written warning, she did not considerate it appropriate in this case, bearing in mind the fact that the Claimant was already on a warning, had stated throughout (and including at this hearing) that she took '*no responsibility'* for these events and finally she and Mr Peal had no confidence that there would not be a repeat of this failure in the future, with, in view of the already two late payments, would have enormous repercussions for the Respondent.

11. Conclusions. I come to the following conclusions:

11.1. It is not in dispute that the reason for dismissal was misconduct, a potentially fair reason.

11.2. I find that the Respondent did have a genuine belief in the Claimant's misconduct, on reasonable grounds, following as much investigation as was reasonable in the circumstances, for the following reasons:

11.2.1. There was no doubt that both the September and December payments had been made late.

11.2.2. The Respondent had no reason to doubt the evidence of Mr Viner as to the lack of instructions he had received from the Claimant. He and the Claimant had, she accepted, a good working relationship and it is clear from his comments that he felt an unwarranted responsibility for not having made the payment, out of some misplaced loyalty to her, but nonetheless had not been instructed to do so. I considered that her belated evidence about her apparent discussion with Mr Viner on the 31st indicated that she gave such evidence, for the first time, 'off the top of her head', in an effort to come up with some answer to a difficult question and which reflects poorly on her credibility.

11.2.3. The whole tone of the Claimant's responses to the issue of the seriousness of missing the payment dates was dismissive. She simply did not see the loan payments as taking any priority over other payments and without any basis, did not believe that SDC would follow through on the terms of the agreement. She had no grounds to take this view and it was not for her to come to such decisions. With that background, it is entirely plausible that she made no arrangements about the loan, considering that she could make it on her return from leave, at a point of her choosing, because, wrongly, she believed that SDC were unconcerned about payments late by a few days.

11.2.4. While it is the case that she routinely had to juggle cash-flow at the end of the month, she should have nonetheless prioritised payment of the loan, to the detriment, if necessary, of other creditors, or, in extremis, the employees. Had such a decision been necessary, she could no doubt have sought the CEO's approval, but chose not to inform her of these matters.

11.2.5. Despite her denial, it was her responsibility and nobody else's, to ensure the payment was made. Her attempts to shift blame in this respect reflect poorly on her.

11.3. No complaints of procedural fairness were pleaded and indeed it appears from the chronology that the Respondent followed a thorough and lengthy procedure in this case. I don't view Mr Peal's confusion of 'employee' and 'employer' as a serious error, as he clearly, in cross-examination, understood the principle. Nor it is a breach of the ACAS Code to involve external consultants, particularly in organisations with a limited management structure and in the end, I am confident, from Mr Peal's evidence that having attended the appeal hearing, he would, if he felt it appropriate, have come to a different conclusion, but, on entirely reasonable grounds, he did not.

11.4. Finally, I find that dismissal was within the range of responses of the reasonable employer in this case, for the following reasons:

11.4.1. The test is a broad, objective one. Simply because one employer, in these circumstances, may not have dismissed, does not mean that another employer, who does, was incorrect to do so.

11.4.2. I cannot substitute my opinion for that of the employer.

11.4.3. The Claimant was already on a written warning.

11.4.4. The Respondent was entirely correct to conclude that there was little prospect of the Claimant avoiding repetition of her misconduct, as she gave no indication that she felt any responsibility for the events and was unable, or unwilling to recognise the seriousness of the consequences of such failure.

11.4.5. Her length of service and level of experience did not mitigate against that conclusion and indeed, to the contrary, indicate that she should, with the benefit of that experience have been better organised in her management and more receptive to the Respondent's concerns.

12. Breach of Contract. Having found that the dismissal was fair and that therefore, on the balance of probabilities, the Claimant committed the misconduct of which she was accused, this claim must fail.

13. Conclusion. For these reasons, therefore the Claimant's claims of unfair dismissal and breach of contract fail and are dismissed.

Employment Judge O'Rourke
London South
Dated 4 September 2020