EMPLOYMENT TRIBUNALS

Claimant: Ms G Newman

Respondent: HM Land Registry

Heard at: Bristol (by video) **On:** 28 October 2020

Before: Employment Judge C H O'Rourke

Representation

Claimant: Mr G Parsons - friend
Respondent: Ms S Hornblower - counsel

PRELIMINARY HEARING JUDGMENT

1. The Claimant's claims of unfair dismissal, breach of contract in respect of pay in lieu of notice and arrears of holiday pay are struck out, subject to Rule 37(1) of the Tribunal's Rules of Procedure, as having no reasonable prospects of success.

2. The Respondent's application for costs is refused.

REASONS

Background, Issues and Procedure at this Hearing

1. This matter was listed for an Open Preliminary Hearing, to determine, subject to Rules 37(1), or 39(1) of the Employment Tribunal's Rules of Procedure 2013, whether the Claimant's claim of unfair dismissal, arrears of holiday pay and breach of contract in respect of pay in lieu of notice (PILON) should be struck out, as having no reasonable prospects of success, or, in the alternative, have a deposit order made in respect of them, as they have little reasonable prospects of success.

2. The Claimant was employed by the Respondent as a Developer Caseworker, at their Plymouth office, for approximately three years, until her summary dismissal for alleged gross misconduct, with effect 7 January

2020. The Respondent considered that the Claimant had presented fraudulent time recording of her hours of work, resulting in her receiving pay she was not entitled to.

3. As a consequence, the Claimant brought claims of unfair dismissal, arrears of holiday pay and breach of contract, in respect of failure to pay PILON. In respect of those latter two claims, firstly for holiday pay, the Claimant has completely failed to particularise that claim, blaming the Respondent for delay in providing pay details. The Respondent states that in respect of such holiday pay as the Claimant was entitled to, at the point of termination of her employment, it was deducted from those sums she had been overpaid (as the Respondent was entitled to do under the contract). Secondly, in respect of PILON, Mr Parsons, on behalf of the Claimant, accepted that any such claim was dependent on the success, or otherwise of the unfair dismissal claim, as, if the Claimant was correctly summarily dismissed for gross misconduct, then she would not, under the contract, have any entitlement to notice, or PILON. Mr Parsons is a trade union representative, who had acted as such, for the Claimant, in the disciplinary procedure, but was, in this hearing, not in such official capacity, but representing the Claimant as a friend.

4. Ms Hornblower had provided a skeleton argument and I heard submissions from both representatives. I was provided with a bundle of documents, which included the disciplinary investigation report and the disciplinary and appeal decisions.

The Law

5. I note Rules 37(1) and 39(1).

6. Ms Hornblower referred me to the following authorities:

    a. **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**, as to strike out being a draconian power, not to be readily exercised.

    b. Unlike in **Balls v Downham Market High School & College [2011] UKEAT IRLR 217**, no findings of fact are necessary at this hearing.

    c. **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, as to the test for 'no reasonable prospects of success'.

Submissions

7. In essence, the Respondent made the following submissions:

    a. The disciplinary procedure concluded that the Claimant had fraudulently recorded approximately 124 hours, for which she was paid, over a five-month period. This was gross misconduct under the disciplinary policy, namely falsification of records and

theft/fraud, entitling the Respondent to summarily dismiss the Claimant.

b. The Claimant's position, as a civil servant, required integrity and honesty.

c. The Claimant accepted that her time recording, on a system called Fusion, was incorrect, but stated that it was due to mistakes on her part and not fraudulent, which explanation the disciplinary officer did not accept.

d. There was not, either at the time, or now (Mr Parsons confirmed) any complaint of procedural unfairness.

e. Applying the **Burchell** test, dismissal, in these circumstances, was within the range of reasonable responses.

f. It would not be in accordance with the Overriding Objective (Reg. 2 of the Employment Tribunal's Rules of Procedure) to permit this claim to proceed to hearing.

g. If the Tribunal does not consider it appropriate to strike out the claim, then a deposit order should be made.

8. Mr Parsons responded as follows:

a. The Claimant is aggrieved by her dismissal, which she considers was due to an innocent mistake on her part.

b. She was micro-managed at work and her time recording was not challenged by her line manager, for a lengthy period of time, thus leading the Claimant to believe that she was recording correctly on the Fusion system, with which she was not very familiar, it being relatively new, having replaced a previous system.

c. She made obvious errors, including recording time when she was on leave, which clearly indicated no intent to defraud on her part.

d. Account was not taken of the pressures she was under, at the time, both at work and in her private life.

e. Other employees, who had committed similar acts of misconduct, had not been dismissed.

Discussion

9. I discussed the following issues with the parties (and Mr Parsons in particular):

a. Had the Respondent 'shown' the reason for dismissal, i.e. misconduct? Mr Parsons accepted that this was not in dispute and that it was not alleged that there had been some ulterior motive or unfair reason for dismissal.

b. Did the Respondent have a genuine belief, following as much investigation as was reasonable in the circumstances, in the Claimant's 'guilt'? The Claimant did not dispute the thoroughness of the investigation and indeed admitted the mis-recording, rendering any further investigation unnecessary. She simply argued that she had recorded incorrectly, by mistake. This argument was advanced at both the disciplinary and appeal hearings, but not accepted. The disciplining officer set out her detailed rationale in her decision letter [51-52], with reasons as to why she did not believe the recording to be in error.

c. As stated above, the Claimant had no complaint as to procedural fairness, the correct meetings were held, she was given an opportunity to put her case, was allowed a companion and an opportunity to appeal.

d. Finally, was dismissal within the range of reasonable responses test? This is actually the nub of the Claimant's case. She asserted, in her appeal, the following:

    i. That, as she was not suspended, during the process, the Respondent could not have considered, as they stated that there had been an '*irretrievable breakdown of trust'.* The appeal officer did not accept this assertion, stating that the Claimant was not suspended, as to do so was unnecessary, as she was monitored during this period and not permitted to do overtime and there were no safeguarding issues. The decision that there had been a breakdown in trust was only reached at the conclusion of the disciplinary procedures [59].

    ii. That insufficient account was taken of both the pressures upon her at work and in her private life, to include her caring role for her parents and their ill-health and her partner being on active service with the Armed Forces. However, both the disciplining and appeal officers took full account of these matters, but did not consider, in the circumstances that they sufficiently mitigated the misconduct, to reduce the sanction from dismissal, to a warning. There are numerous references to these matters, in some considerable detail, in the investigation report [42-45], to include consideration of her parents' situation and her own medical condition. The disciplining officer also considered these matters, referring to the report [52 & 53], but, as stated, not considering them sufficient to reduce the sanction, when weighed against the strict expectation that the Claimant show integrity and honesty. The appeal officer saw no reason to differ from that conclusion.

    iii. That others who had committed similar acts had not been dismissed. The appeal officer dealt with this assertion in his decision letter [60], but did not consider that the two examples relied upon by the Claimant were true comparators to her situation. They related, he said, to inaccurate

recording of smoke breaks and were, accordingly, much less serious than her '*significantly higher level of hours, overtime and leave days discrepancies'*.

Findings

10. I find that this claim has no reasonable prospects of success and should therefore be struck out, for the following reasons:

    a. The only real argument raised by the Claimant is that she considers that she should not have been dismissed, due to her errors being innocent ones, her problems at work and at home and others not being dismissed for similar offences and that therefore dismissal was outside the range of reasonable responses available to the Respondent in this case.

    b. However, I believe that the Claimant has fundamentally misunderstood the Tribunal's role in hearing her case. It is not, as I think she considers, to 're-hear' her disciplinary proceedings, considering the evidence afresh and, if necessary, to come to different decision than the Respondent did. Instead, it is to 'review' the Respondent's decision, based on the evidence it had before it, at the time and to consider, not substituting its view for that of the Respondent, but instead, applying the Burchell test, whether the decision to dismiss was within the range of responses open to the reasonable employer. This is a broad test, allowing for a wide range of actions by employers in this case, when confronted with the evidence before them. Simply because one employer, in similar circumstances, *might* not have dismissed the Claimant, does not mean that another employer, who did, was incorrect to do so.

    c. I am entirely confident, based on the undisputed evidence before this employer that a Tribunal, at final hearing, would conclude that the decision fell within the range of reasonable responses test. This is because the Claimant admitted the mis-recording, but her explanation that is was an innocent mistake was, following thorough investigation, not accepted by the disciplining or appeal officers. I see no prospect of the Tribunal second-guessing those officers' decisions. Despite her assertions to the contrary, her personal circumstances and her allegations as to more favourable treatment of other employees, were taken into account by both officers, but again were not considered sufficient to outweigh her misconduct. Finally, the Respondent is a public body and the Claimant was a civil servant and accordingly a greater duty fell upon her to ensure that public money was not misused, or that she behaved in a fraudulent manner. While, in any event, many non-civil service employers would have also dismissed in similar circumstances, this matter will have been of even greater significance for them.

    d. The PILON claim is dependent on the unfair dismissal claim and as that has been struck out, so too must this claim.

e. Finally, the holiday claim is completely unparticularised and therefore, in the absence of any evidence or even submissions in respect of this claim, that too must have no reasonable prospects of success and also be struck out.

Costs Application

11. Following my giving of judgment, Ms Hornblower applied, on the Respondent's behalf, for a costs order, in the approximate sum of £4000, based both on the Claimant (as has been found) having pursued a claim that had no reasonable prospects of success and also having received a costs-warning letter to that effect.

The Law

12. Rule 76(1) provides that:

(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that:
a. a party … has acted vexatiously … or otherwise unreasonably in either the bringing of the proceedings … or the way in which the proceedings … have been conducted; or
b. any claim or response had no reasonable prospect of success; ..
c. ….

13. I referred myself to the case of **Yerrakalva v Barnsley Metropolitan Borough Council [2012] EWCA ICR** 420, which set out the following principles:

a. It was important not to lose sight of the totality of the circumstances and it was vital when exercising discretion to order costs to look at the whole picture.

b. The unreasonable conduct must be identified, what was unreasonable about it decided and what effect it had considered.

c. Costs orders are the exception rather than the rule.

The Facts

14. I heard submissions from both parties.

15. The Respondent's application may be summarised as follows:

a. The claim has been shown to have had no reasonable prospects of success.

b. Despite being sent a costs-warning letter on 25 August 2020 [not in bundle], she did not withdraw her claim.

16. Mr Parsons submitted, on the Claimant's behalf that she had believed, until today's hearing that her claim had reasonable prospects of success and that

therefore she should proceed to this Hearing.

17. I considered the following facts to be of relevance:

    a. The Claimant was not formally legally represented throughout.

    b. The Respondent solicitors wrote to the Claimant, on 25 August 2020, inviting her to withdraw her claim and putting her on notice of their intention to make a costs application at this Hearing. The letter does set out some of the issues canvassed today (and contained in Ms Hornblower's skeleton argument), such as the Respondent's genuine belief in the Claimant's 'guilt', following as much investigation as was reasonable in the circumstances and also the lack of any allegation of procedural unfairness. However, it does not, crucially, in my view, particularly to an unrepresented claimant, spell out the Burchell test, with emphasis (as I have set out in this Judgment) on a tribunal's role not being the 're-hearing' of the disciplinary proceedings, or the substitution of its view for that of the employer. Nor is the 'range of reasonable responses' test mentioned. A careful explanation of these issues may have put the Claimant at more effective notice of the weaknesses of her case. Nor, again importantly, does the letter set out what actual costs figure has been so far expended, or what is likely to be, by the time of this Hearing, without which information the Claimant would be unable to come to a 'cash-value' judgment of proceeding with her claim.

Findings

18. I consider that until issue of today's Judgment, the Claimant will not have been fully aware of her claim having no reasonable prospects of success, for the following reasons:

    a. She has not been formally legally represented throughout this matter. While she has had the benefit of Mr Parsons' trade union experience, he could not necessarily be expected to understand the legal issues in such a claim.

    b. The costs-warning letter (particularly when sent to an unrepresented claimant) is defective.

    c. It is quite common for unrepresented claimants to believe that a tribunal will 're-hear' the disciplinary proceedings and potentially reverse their ex-employer's decision and therefore, based on her, to this point, reasonable misapprehension as to the merits of her claim, she cannot be blamed for declining to withdraw it and proceed to this Hearing.

19. The whole point of Rules 37 and 39 (strike out/deposit) proceedings is, as Underhill LJ identified in his 2012 review of the Tribunal Rules, to provide an effective way of managing weaker cases, while still ensuring access to justice. This is just what has occurred in this case: the Respondent identified that the claim was weak and requested a preliminary hearing to determine the issue, which resulted, in due course, in the claim being struck

out, bringing the Respondent's cost expenditure to an end.

20. Conclusion. For these reasons, therefore, the Respondent's application for costs is refused.

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Employment Judge O'Rourke

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Date: 28 October 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
13th November 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE