Case Number: 2401958/2020(V)

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss O Williams-Hulse **v** The Paw Pad Dog Grooming Limited

Heard at: Liverpool (by Cloud Video Platform ('CVP')) **On**: 2 October 2020

Before: Employment Judge Johnson

Appearances
For the First Claimant: in person (supported by her uncle Mr K Mckeon)
For the Respondent: Mr J Heard (counsel)

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed. This means that the claim was unsuccessful.

2. The respondent is required to pay and shortfall in pay and unpaid annual leave entitlement that accrued between the notified date of dismissal of 10 January 2020 and the effective date of termination on 23 January 2020.

3. The parties shall write to the Tribunal before the expiry of 28 days from the date of this judgment being sent to them, confirming:

    (a) whether the outstanding payment has been made by the respondent;
    (b) whether the claimant accepts that this payment is correct; and,
    (c) if not, why this payment has not been made and how each party has calculated the shortfall, (with documentary evidence if appropriate).

4. Upon receiving the parties' submissions concerning the shortfall, Employment Judge Johnson will determine whether the case should be listed for a remedy hearing to determine the amount of the shortfall in wages, or whether the matter can be resolved on the papers without a remedy hearing being required.

REASONS

Background

5. These proceedings arise from the claimant's dismissal on or around 10 January 2020. She commenced employment with the respondent 29 September 2017. Following a period of early conciliation from 13 January 2020 to 27 February 2020, the claimant presented a claim form on 13 March 2020. She claimed unfair dismissal.

6. The respondent presented a response resisting the claim on 21 April 2020. The Tribunal issued a standard unfair dismissal ET2 letter on 29 May 2020, making standard case management orders and listing the case for a final hearing on 2 October 2020. A further notice was sent on 17 September 2020, that due to restrictions placed upon the Employment Tribunals by Covid 19, the hearing was converted to CVP hearing.

7. Although the respondent had raised the issue of the claimant's early conciliation certificate naming the respondent limited company and the claim form naming its two directors as respondents. I noted that while this was contrary to Rule 12(1)(f) of the Employment Tribunal's Rules of Procedure, it appeared to be a minor error and one where it would not be in the interests to reject the claim in accordance with Rule 12(2A). Mr Heard confirmed that his instructing solicitor's understanding of this matter, was that the Tribunal had previously accepted the claim on this basis and I am satisfied that in any event, it involved a minor error protected by Rule 12(2A).

8. The claimant had been continuously employed by the respondent for more than 2 years at the time of her dismissal and was able to bring a complaint of ordinary unfair dismissal in accordance with section 108 Employment Relations Act ('ERA') 1996.

9. The claimant presented her claim with the required time limit provided by section 111 ERA 1996 and the claim could therefore be accepted by the Tribunal.

The Evidence Used in the Hearing

10. A hearing bundle was prepared in advance of the hearing, which was agreed between the parties and made available to the Tribunal in pdf format.

11. Some additional documents were provided at the beginning of the hearing concerning a conversation on WhatsApp and which both parties had

received before the hearing commenced. I was happy to allow these documents to be included in the hearing bundle.

12. This was a hearing which considered a number of discussions between the claimant and others on WhatsApp who worked for the respondent, including its directors. While there was some allowance made for witnesses to show sections of their WhatsApp feed relating to the conversations included in the bundle to the Tribunal by placing their mobile screen to the device camera used in the CVP. I permitted this facility only where it related to directly relevant evidence and where it was suggested that the copied document in the bundle did not accurately reflect the 'live feed' on WhatsApp at the time.

13. The claimant relied upon her witness statement and gave oral evidence. She also produced two witness statements from her former colleagues Emma Scott and Aimee Notley. These witnesses did not attend to give evidence and while I acknowledged that the claimant wished to rely upon these statements, I informed her that they would be given significantly less weight than the evidence of those witnesses who gave oral evidence under oath to the Tribunal.

14. The respondent relied upon the witness evidence of its two directors: Alastair Black and Amy Black. They both gave oral evidence at the hearing.

15. As the respondent's accepted that they dismissed the claimant and argued that the claimant was dismissed for the potentially fair reason of conduct, they gave witness evidence first, as is usual practice. I did consider whether it would be appropriate for the claimant to give her witness evidence first, in order that as an unrepresented party, she could see how cross examination operated and to assist her in understanding how she might cross examine the respondent's witnesses. However, I accepted Mr Heard's concerns about the limited time available for the one-day hearing and the risk that this may adversely affect the time available to hear the respondent's witnesses. Accordingly, the Tribunal heard from Mr Black, then Ms Black and finally the claimant, before hearing final submissions.

16. There was insufficient time to give a decision orally as it was necessary for additional time to be allowed to complete final submissions at the end of the day and I explained that my judgment and reasons would be reserved.

The Issues

Unfair dismissal

17. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

18. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was *a reason relating to the claimant's conduct*.

19. If the claimant was unfairly dismissed and the remedy is compensation:

    b. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
    c. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
    d. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

20. In the event that the claimant was successful, whether in whole or in part, the quantification of remedy would take place at a remedy hearing to be listed to take place on a future date.

Findings of fact

21. The respondent is a dog grooming and dog handling business. Mr Black and Ms Black are co-directors and jointly manage the company. It is understood that the business is not particularly large, but it does have a number of employees involved in the looking after and grooming of dogs. It does not have its own internal Human Resources ('HR') staff, but uses an external provider; 'Total People' to provide employment relations advice.

22. The respondent had employed the claimant since 29 September 2017. The respondent was aware that the claimant had experienced a history of

mental health related issues and Mr Black confirmed that the claimant confided with him on or around 5 April 2019, that she had been experiencing difficulties with her personal life. She mentioned that she had made two suicide attempts and she gave Mr Black permission to share this information with Ms Black and Total People in order that support could be considered. Subsequently, a meeting took place on 7 April 2019, between the claimant, her work colleague Emma Scott, Mr Black and Vicki Mountford at Total People, to discuss what assistance could be given.

23. It is not necessary for me to consider in any detail what information the claimant shared with the respondent concerning her personal life. However, Mr Black said that the claimant did not want any paperwork to be sent to her family home because of concerns that her parents might open her correspondence. The claimant also mentioned that she had made comments to a work colleague Aimee Notley and had upset her. Mr Black said that he told the claimant to apologise to Ms Notley in order that she could '*clear the air'.* The claimant agreed that a further meeting could be arranged with Ms Mountford to explore what support could be given and this took place on 9 April 2019. With the claimant's agreement, Mr Black attended an emergency GP appointment with her later that day, which appeared to leave the claimant feeling much better.

24. On 4 June 2019, Mr and Ms Black were approached by Ms Notley, who was very upset. She said that the claimant was sharing information with their work colleagues around the workplace concerning Ms Notley's relationship with her boyfriend. This included allegations that the claimant suggested Ms Notley was cheating on her boyfriend and was '*a cokehead'.* She also said that the claimant had behaved inappropriately in front of students whom Ms Notley was training, making comments that undermined her. She also said that the claimant had become difficult to manage. Ms Notley explained to Mr and Ms Black that she was distressed by this behaviour.

25. Ms Black and Mr Black met with the claimant on 5 June 2019 and explained to her that Ms Notely had made accusations of bullying and harassment against her. The claimant acknowledged that she *'had taken things too far'* and mentioned that she was struggling with ongoing problems with her mental health. After the meeting took place, Ms Black and Mr Black considered the claimant's previous admission in April 2019 about her comments made to Ms Notley and her acceptance of the allegations made by Ms Notley more recently. They issued her with a *'formal verbal warning'*, which was to remain on her file for 6 months. They also decided to move the claimant permanently from the Grooming department where she was working with Ms Notley, to the Day Care department. The claimant was informed of this decision later that day on 5 June 2019. Ms Mountford from Total People also met with the claimant

the same day in order that she could be given additional guidance concerning respect and tolerance in the workplace.

26. It is understood that the claimant worked without any incident in the Day Care department until October 2019. However, on 14 October 2019, Ms Black was approached by two of the claimant's work colleagues; Abi Dempsey and Lindsey Turner, who alleged that the claimant had made *'underhand comments'* towards them. Ms Black met with the claimant to discuss this matter and she described the claimant as becoming angry, suggesting that Ms Dempsey and Ms Turner were not doing any work. When questioned as to why she had not complained to her about the claimant's colleagues not working, the claimant said that she was *'going to quit anyway'.* Ms Black then asked Mr Black if he could discuss this matter with the claimant as she was concerned that workplace relationships were becoming frayed between the claimant and her colleagues.

27. Mr Black says that he met the claimant and she asserted that Ms Dempsey and Ms Turner were '*lazy'.* Mr Black reminded the claimant of the previous warning from June 2019, which he said was still 'live'. He also reminded the claimant that she was aware that Ms Dempsey had Asperger's Syndrome and that she should take care in the language she used when raising concerns with colleagues. He also advised the claimant that if she had issues concerning the work of colleagues, she should raise these with management at the earliest opportunity. It is understood that the claimant stormed out of this meeting and slammed the door. Mr Black described this behaviour as *'extremely offensive, unprofessional and rude'*, especially as he did not believe he was accusing the claimant of anything. He said that her behaviour was in front of customers and that in storming out of the meeting, she left the external gate open which would have potentially allowed dogs in the respondent's care to have escaped from the premises.

28. In the meantime, Ms Black met with Ms Dempsey who alleged that the claimant and Ms Scott were repeatedly laughing at her and being rude towards her. Ms Black had become concerned about Ms Dempsey's welfare because she told her that she was suffering from panic attacks as a result of her colleagues' behaviour towards her and was becoming visibly upset.

29. The claimant was invited to a disciplinary hearing on 16 October 2019 and was informed that this was connected with the allegations of bullying and her storming out of the meeting with Mr Black. The claimant met with Mr and Ms Black on this date and it is understood that she was not accompanied. She expressed frustration with Ms Dempsey and Ms Turner, whom she felt did not do as much cleaning in the day care area as

she did. She also added that her mental health issues were making her very frustrated and she was finding it difficult to control her emotions. It is noted that the claimant did not dispute the allegations made against her, even though she explained the difficulties that she was experiencing at that time. While Mr and Ms Black confirmed that they were happy to support the claimant and it was suggested that she approach her GP and make enquiries regarding counselling. She was informed at the end of the meeting however, that the disciplinary process in relation to this matter would continue.

30. Mr and Ms Black took into account the claimant's admission of the alleged conduct and the previous written warning that was still live at the time of the incidents now under investigation. They decided to impose a final written warning which would remain on the claimant's employment file for 12 months. The claimant was informed of this decision on 16 October 2019 and that she had breached the respondent's dignity at work and behaviour management policies. She was also warned that if any similar misconduct happened in the future, it would result in instant dismissal. The claimant apologised to her colleagues following this decision.

31. In January 2020, Ms Black was approached by Ms Turner and the manager of daycare, Ms Clarke. They were concerned about Ms Dempsey. Ms Black met with her later on that day. Ms Dempsey was described by Ms Black as becoming upset and tearful, alleging that the claimant was '*bringing everybody down'* and that she dreaded coming into work when she knew the claimant or Ms Scott would be there. She found their behaviour unpredictable and she was suffering from acute anxiety due to the situation. While I did not have an opportunity to hear evidence from Ms Dempsey, taking into account that her having Asperger's Syndrome was generally known in the workplace, it was likely that somebody with this condition would find unpredictable behaviour from colleagues to have a particular adverse effect upon her.

32. Mr Black discussed the matter with the claimant by WhatsApp on a one to one basis and he said that she became angry, made inappropriate statements about the respondent's business, her colleagues and threatened to resign. Mr Black described the claimant's threat of resignation as being a pattern of behaviour and he did not take this seriously given her previous threat in October 2019 that was withdrawn. According to the WhatsApp extract produced in the bundle, he did appear to try and calm her down and encourage her not to resign. While this might be the case, the conversation extract suggests that the claimant was experiencing difficulties in the workplace and she also appeared to feel that she was always the one being accused of poor behaviour.

33. Mr Black said that following this discussion he met with Ms Black and they concluded that the claimant was 'guilty of the current allegations' and that four different colleagues had reported unprofessional behaviour from her. They also noted that the claimant had admitted her previous behaviour in 2019. They were concerned about morale amongst staff in the workplace as a result of these issues. Mr and Ms Black attempted to interview Ms Dempsey and Ms Notley. They said that Ms Notley was about to leave their employment and refused to give any evidence because she believed the claimant could make it difficult for her to find future employment in the dog care business. They suggested that Ms Notely was persuaded by the claimant not to get involved with the investigation. As Ms Notley did not attend the hearing to give oral evidence, it was not possible to put this allegation to her. Her statement produced by the claimant, mentions that Mr Black put her under pressure to give him a statement and that she phoned him to say that she did not wish to do so. However, I noted that the statement produced was unsigned, did not contain anything representing a statement of truth and instead concluded by noting '*Typed for Convenience'.* I am not satisfied that this statement was prepared by Ms Notley and am unable to treat this as a credible or reliable form of evidence in this case.

34. Mr Black and Ms Black decided that the claimant should be required to attend a disciplinary hearing and she was invited to one on 20 January 2020. Mr Black said that they wanted to give her time to prepare her evidence and to arrange for someone to accompany her.

35. What then happened, was somewhat chaotic. However, it can be summarised in the paragraphs below.

36. Ms Black and Mr Black met with the claimant on 10 January 2020 at the 'Clock Tower'. This was a room in a local pub where on one day each week, the Blacks would hold business and HR meetings could take place in private. They wanted to inform her that a disciplinary hearing would take place on 20 January 2020 and The claimant had previously raised concerns with them about letters being sent to her home address and they were also concerned that she might react badly if she was informed about the meeting by letter.

37. The claimant was told about the disciplinary hearing and left before the meeting concluded. It is my finding that she believed she had been dismissed. Ms Scott who was the claimant's work colleague then texted Mr and Ms Black to say that the claimant had become distressed and had attempted to run into traffic on the road.

38. The claimant then returned to the Clock Tower and a further attempt was made to resume the meeting, but the claimant ran off once more. Ms

Scott then informed Mr and Ms Black that the claimant attended the workplace again and proceeded to take a whole pack of prescription tablets in front of colleagues, while informing them that she had been dismissed. The claimant was removed from the premises by Ms Scott and it is understood that she was calmed down and did not suffer any serious ill effects from taking the tablets. There can be no doubt however, that the claimant was in no fit state to discuss the matter any further, but genuinely believed that she had been dismissed.

39. The respondent then sent a letter in to the claimant on 10 January 2020 and which was marked *'Strictly Private & Confidential To be opened by the Addressee only'.* Although the letter was marked '*By hand',* it was posted to the claimant because the meeting on 10 January 2020 because it could not be given to the claimant due to her leaving the meeting early. The letter invited her to a disciplinary hearing on 20 January 2020 and warned her that the respondent was:

'*…considering dismissing you following our verbal warning of 5th June and our written warning issued on 16th October 2019. Dismissal for gross misconduct is being considered with regard to the following circumstances – reports of bullying and intimidation towards your colleagues.'*

40. The claimant denied that she received the letter, but when challenged by Mr Heard this was not mentioned in her witness evidence, she responded by saying that *'no, not in witness statement. If I did read it, can't because dyslexia, unable to read things written down'.*

41. I explained to the parties at this point, that the claimant had not mentioned this potential impairment at an earlier stage during these proceedings and that this was the first mention of dyslexia. Mr McKee apologised and I explained that while I had an obligation to take into account relevant impairments under the Equal Treatment Bench Book, this was a matter which had taken me by surprise and which was not supported by witness statement evidence or documentary evidence. However, while I acknowledged I would take any potential impairment relating to dyslexia into account as to the conduct of the hearing, I did not consider this matter to be relevant to the findings of fact because the claimant had not raised this condition previously.

42. The claimant notified ACAS of a potential claim on 13 January 2020 and the respondent was contacted by ACAS before 20 January 2020.

43. The claimant did not attend the meeting on 20 January 2020. I do find that the claimant received the letter dated 10 January 2020 and knew or could have known that the disciplinary hearing was taking place.

44. Although the claimant did not attend this meeting, Mr and Ms Black considered the statements of her colleagues, representatives from Total People Limited and the terms of the previous warnings that were given. A disciplinary log was produced which contained details of the incidents, who had been spoken to about the matter The allegations related to the verbal warning in June 2019 by reason of bullying and a further written warning in October 2019 following further findings of bullying. The further reports of bullying in January 2020 gave rise to the current disciplinary process. Mr Black confirmed that the January 2020 allegations were the final straw and once they were satisfied that bullying and gross misconduct had occurred, the terms earlier bullying related warnings made dismissal the only reasonable sanction. As he put it in evidence, *'we were running out of ways to manage her'.*

45. They then sent a letter to the claimant on 21 January 2020. The letter confirmed that they had found gross misconduct and that her last day of employment was *10* January 2020, (my emphasis). Although the date of dismissal given in this letter preceded the date of the disciplinary hearing, Ms Black confirmed that the purpose of the meeting on 10 January 2020, was to tell the claimant that disciplinary meeting would take place on 20 January 2020. Although the dismissal letter referred to the application of the earlier warnings, it did not clarify whether it sought to rely upon the earlier June 2019 warning which was to remain on the claimant's record for 6 months.

46. There is clearly a confusion concerning the date when the decision was made to dismiss the claimant and when she was actually notified of the effective date of termination of her employment.

47. The claimant clearly believed that she was dismissed on 10 January 2020 and her notification of ACAS on 13 January 2020 is evidence of that. However, neither Mr or Ms Black had told the claimant that she was dismissed on that date. They were certainly informing her of a disciplinary process relating to serious issues of conduct and where account would be taken of existing warnings. However, the respondent continued with the disciplinary process, the claimant was informed of the disciplinary hearing and the decision to dismiss was not reached until that hearing took place on 20 January 2020.

48. What seems to have happened is that by 20 January 2020, Mr and Ms Black knew that the claimant had not returned to work and had notified ACAS about her belief that she was dismissed. The claimant had not actually resigned on that or before the hearing, but they effectively treated 10 January 2020 as the last day of her employment once they determined that there was gross misconduct justifying dismissal.

49. While this might be the case, the claimant was not told of the decision to dismiss until the dismissal letter was not sent until 21 January 2020. The claimant was not clear as to when she received this letter and assuming normal first-class post, it would have been received by 23 January 2020.

50. This is consistent with the claimant's next action. She was prepared a letter seeking to appeal her dismissal and which was received by the respondent on 5 February 2020. Although the claimant sought to appeal a number of issues which did not play a part in the decision to dismiss, she argued that there was a lack of disciplinary process including a failure to notify her of a right to be accompanied, a failure to provide information in support of the allegations and a failure to give her notice of the disciplinary hearing.

51. The respondent did not hear the appeal and it is noted tha the claimant did not return her notice of appeal by 1 February 2020 as indicated in the dismissal letter. No discretion was exercised to extend this time, but there is no evidence that the claimant asked for an extension either. It is noted that the letter inviting the claimant to the disciplinary hearing dated 10 January 2020, confirmed that the claimant could be accompanied. It notified the claimant that dismissal for misconduct was being considered and that this related to bullying and intimidation. The letter explained that the matters would be discussed at the disciplinary hearing on 20 January 2020, but no documents were enclosed with the letter.

The Law

Unfair Dismissal

52. Under section 97(1)(b) of the Employment Rights Act (ERA) 1996, in relation to an employee whose contract of employment is terminated without notice, the effective date of termination means the date on which the termination takes effect.

53. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

54. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

55. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

56. 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:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. 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.

57. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

58. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. 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.

59. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. 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.

60. Wincanton Group plc v Mr L M Stone and Mr C Gregory UKEAT/0011/12/LA is authority for the proposition that if a Tribunal is not satisfied that a first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning would be valid. The judgment continues to state, inter alia, that where the earlier warning is valid then the Tribunal should take into account the fact of that warning and not to go behind that warning to take account of factual circumstances giving rise to it. The appeal judgment reminds Tribunals that a final written warning always implies, subject only to the individual's terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur. Also see: Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135 in which the Court of Appeal held that only in the exceptional case of bad faith or a manifestly inappropriate warning should a Tribunal conclude that it was unreasonable to rely on it.

61. Indeed, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.

62. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

    (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

    (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

63. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

64. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

65. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Discussion and Analysis

66. Although there was some confusion as to the date of the dismissal, this was a case where the respondent did not actually decide to dismiss the claimant for gross misconduct until 20 January 2020.

67. The claimant did not receive notification of this decision until she received the dismissal letter dated 21 January 2020. As I determined in the findings of fact (above), it is assumed that the claimant did not receive this letter until 23 January 2020. Her decision to request an appeal of the decision was received by the respondent on 5 February 2020. In absence of any information from the claimant to the contrary, the effective date of termination of employment was 23 January 2020 and *not* 10 January 2020 as asserted in the dismissal letter. This is in accordance with section 97(1)(b) in that this is the date when the termination takes effect.

68. This of course means that the calculation of the claimant's final salary payment and accrued annual leave was not correct and will need adjustment even if the dismissal is determined to be fair.

69. The respondent gave the reason for the dismissal in its letter of 21 January 2020 as being gross misconduct. This falls within the potentially fair reason of conduct under section 98(2) ERA.

70. The Tribunal is satisfied that Mr and Ms Black has reasonable grounds to hold the belief that the claimant was guilty of misconduct. There was clearly a history of incidents arising where the claimant had upset other members of staff and the incidents in January 2020 were serious enough to have concerns regarding the claimant's behaviour.

71. As it was a small employer, many of these issues were raised with Mr and Ms Black directly. Nonetheless, it is still an understandable concern for

the respondent that a number of employees on several occasions reported the claimant's poor behaviour because it had reached a point were they were becoming visibly upset, felt intimidated or were considering leaving the business. The documentation on the file and the witness evidence of Mr and Ms Black gave clear and credible evidence that they did investigate this matter before deciding to dismiss the claimant. The claimant's failure to attend the disciplinary hearing was her choice and deprived her of an opportunity to explain her position to management.

72. They did attempt to meet and discuss this matter with the claimant, but her reaction to the meeting on 10 January 2020, made it difficult for them to engage with her. However, there was clearly a great deal of information available to them at the time the disciplinary hearing took place on 20 January 2020, to conclude that serious misconduct had taken place, especially when the earlier bullying related warnings were taken into account.

73. This was clearly a matter where the respondent treated the January 2020 incidents as a final straw and took into account the earlier warnings to reach a point were it felt that the claimant's ongoing bullying behaviour reached a point that she had failed to adjust her behaviour. It is correct that given that the January 2020 incidents took place more than 6 months after the June 2019 warning took place, that warning could not be used in the decision to dismiss.

74. However, this was a case where the pattern of behaviour for the June, October and January incidents had some similarity in that the claimant had behaved in an intimidating way. Even if the first warning could not be relied upon, there was the second warning from October 2019 which remained on the claimant's record for a period of 12 months. This in itself was enough to trigger a dismissal under the handbook.

75. Additionally, while the warning for the first disciplinary matter had expired by January 2020, it had only recently expired and involved the same sort of issues that gave rise to the later treatment. The respondent's handbook describes bullying, intimidation or harassment as being examples of gross misconduct, which could warrant immediate dismissal. Even if the January 2020 conduct in itself did not amount to gross misconduct, the handbook indicates that dismissal is appropriate where an employee's misconduct has persisted, exhausting all other lines of disciplinary procedure. Mr Black by confirming that the January 2020 incidents were the final straw and that the respondent was running out of options to manage her, indicates what was in his mind as dismissing officer when the decision to dismiss was made.

76. Accordingly, not only was it reasonable for the respondent to determine that there had been gross misconduct, but it was within the range of reasonable responses available to them, to dismiss the claimant.

77. There must also be consideration of the fairness of the disciplinary procedure in this case. The respondent had a hand-book that provided details of their disciplinary procedure. This was broadly consistent with the ACAS Code of Practice on Disciplinary and Grievance Procedures. It also had access to external advice.

78. The respondent did seek to establish the facts in this particular case. As this was effectively a small company with Mr and Ms Black as the managers, it was difficult for them to involve different people in the investigation and hearing. Although in theory they could have paid for a representative of Total People Limited to provide an external investigator and hearing officer, I do not consider it a necessary or reasonable step to ensure that the procedure was fair.

79. The claimant was informed of the problem both on 10 January 2020 meeting and by letter sent that day once it was clear she would be unable to finish the meeting. The claimant was informed of his right to be accompanied in the letter dated 10 January 2020. The disciplinary decided upon the action to be taken and the claimant was informed of this reason. It could be argued that the claimant should have been given additional opportunities to attend the hearing given that she failed to attend only one hearing. However, in this case it was understandable that taking into account the claimant's decision to notify ACAS on 13 January 2020, it was unlikely that a further hearing would result in her attendance.

80. The claimant was offered the opportunity to appeal in the dismissal letter dated 21 January 2020. Although the claimant gave notice of her appeal in writing, this was received by the respondent after the deadline of 1 February 2020.

81. For these reasons, I find that the dismissal was procedurally fair and accordingly, there is no need to consider were a fair procedure would have made a difference to the decision in accordance with ***Polkey*** principles. However, for the avoidance of doubt, *had* there been a procedural failure, the application of fair procedure would still have resulted in the claimant's dismissal and would have made no difference to the outcome of the disciplinary process.

82. Similarly, there is no need to consider contributory fault in this case. However, had the complaint of unfair dismissal succeeded, the claimant would have faced a substantial reduction of his compensatory award given the nature of the misconduct which was found to have taken place and

which was effectively a repetition of misconduct which had taken place previously.

83. In reaching my decision, I have taken into account the claimant's personal difficulties and I can see that the respondent had tried to work with the claimant in order that she could remain working for them. Unfortunately, the claimant continued to display difficulties in her relationship with her work colleagues and behaved in a way which caused considerably anguish both to them and the Mr and Ms Black.

84. In deciding this case, I have not substituted my decision as to the reasonableness of the respondent's decision to dismiss. Ultimately, this was a complaint of unfair dismissal and my judgment is that the claimant was dismissed for the potentially fair reason of conduct, that the respondent had reasonable grounds to sustain that belief and that the decision was reached following the respondent carrying out a reasonable investigation which was appropriate to its size and the resources available to it.

Conclusion

85. The complaint of unfair dismissal is not well founded and is dismissed. This means that the claim was unsuccessful.

86. The respondent failed to correctly identify the effective date of termination when it determined that the date of dismissal was 10 January 2020 in its dismissal letter dated 21 January 2020.

87. The effective date of termination of the claimant's employment was 23 January 2020.

88. The respondent is therefore required to pay and shortfall in her normal pay and unpaid annual leave entitlement that accrued between 10 January 2020 and 23 January 2020.

89. The parties shall write to the Tribunal before the expiry of 28 days from the date of this judgment being sent to them, confirming:

    (a) whether the outstanding payment has been made by the respondent;
    (b) whether the claimant accepts that this payment is correct; and,
    (c) if not, why this payment has not been made and how each party has calculated the shortfall, (with documentary evidence if appropriate).

90. Upon receiving the parties' submissions described in paragraph (84), I will determine whether the case should be listed for a remedy hearing to determine the amount of the shortfall in wages, or whether the matter can be resolved on the papers without a remedy hearing being required.

_____
Employment Judge Johnson

Date: 2 December 2020

Sent to the parties on:

4 December 2020

For the Tribunal Office