EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Fiander**

Respondent: **Acoustiguide Ltd**

Heard at: **Bristol** **On:** **26 October 2020**

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Miss S Murphy, solicitor

JUDGMENT having been sent to the parties on 26 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim and parties

1. By a claim form presented on 11 September 2019, the claimant, who was born on 10 August 1970, brought claims of unfair dismissal contrary to s.98(4) and 111 ERA 1996, unpaid annual leave contrary to Reg 15 the Working Time Regulations 1998 and breach of contract in respect of notice pay. The respondent initially defended all of the claims.

Procedure, hearing, and evidence

2. The respondent entered a response defending the claim for unfair dismissal and raising as further defences the argument that the claimant would have been fairly dismissed had a fair process been followed. Secondly, the respondent argued that the claimant contributed to her dismissal as a consequence of blameworthy or culpable conduct.

3. The latter of those arguments was abandoned by Miss Murphy who appeared for the respondent during the course of this hearing.

4. On 15 September 2020, however, the response was struck out by EJ Livesey because it was not actively pursued. On 21 September 2020 the respondent applied for reconsideration of that decision pursuant to rule 70. That application was dismissed by EJ Livesey on 1 October 2020.

5. On 12 October 2020 the final hearing on 26 October was converted to a remedy hearing which was conduct remotely using the Kinly Cloud Video Platform. The claimant provided a schedule of loss which was agreed by the respondent, subject to the issue of filaure to mitigate and/or any uplift under s.207A TULR(C)A 1992.

6. I permitted the respondent to take part in the proceedings to address those two issue by questioning the claimant and making submissions.

7. I was provided with the following for the hearing: a witness statement from the claimant, and a bundle of documents which contained the majority of the documents relied upon by the parties, including the contemporaneous documents to which I have made reference in the background and conclusion below.

8. I heard evidence from the claimant. The claimant answered questions both from Miss Murphy and from me. I found her to be a truthful, candid and honest witness.

9. I heard concise verbal submissions from each of the parties.

Factual background

10. I make the following findings on the balance of probabilities in relation to the matters that are relevant for the purposes of the remedy hearing:

<u>The claimant's role</u>

11. The claimant was employed by the respondent as a Site Manager and worked at the English heritage site at Stonehenge. The claimant was employed for a total period of 4.7 years, ending with her dismissal by letter dated 8 April 2019.

12. The circumstances of the dismissal are relevant to the determinations that I have to make for the purposes of this remedy hearing and I address them below.

<u>The instruction to remove the claimant from her place of work</u>

13. On 26 January 2019, the claimant received a letter from English Heritage requesting the removal of the claimant from its Stonehenge site in accordance with Clause 10 of the contract which it held with the respondent, citing an irretrievable breakdown of the working relationship between the claimant and

English Heritage. There were ten matters detailed in the letter which were said to have contributed to that breakdown.

14. On 25 January, Mr Gardner, the Managing Director of the respondent, had an informal discussion with the claimant, advising her of the letter and its effect. At the end of the meeting he suspended the claimant, handing the claimant a letter notifying her of her suspension as part of a disciplinary investigation. The letter stated in terms that it was not to be regarded in any way as a disciplinary action but rather as a holding measure. Such letters are relatively common where suspensions take place because suspensions are not of themselves equivalent to any disciplinary sanction.

15. On 30 January Mr Gardner wrote a letter to English Heritage. In that letter, Mr Gardner advised that he had carried out an investigation with the claimant, during which she had refuted the allegations, but he stated that she was very apologetic and remorseful for the problems that she had caused and understood that the problems did not excuse her behaviour. He proposed that the respondent might find its way to reconsidering its instruction to remove the claimant from the Stonehenge site. English Heritage responded to that proposal in a letter on 31 January stating that it could not permit the claimant to return due to the irretrievable breakdown of trust and confidence that had occurred.

16. On 6 February or thereabouts Mr Gardner informed the claimant of the response he had received from English Heritage and he notified her that a formal disciplinary investigation would take place on 8 February.

17. Accordingly, on 8 February the claimant met with Mr Gardner. She was accompanied by a work colleague and at the meeting she was told of each of the ten allegations and given an opportunity to respond to them.

The claimant's grievance

18. On 11 February, the claimant wrote to Mr Gardner requesting that her role should be redesigned and she should be given an increase in salary consequent to their earlier discussion when the claimant had secured the contract with English Heritage for a period of approximately a further three or four years and Mr Gardner had intimated that he might give her a pay rise.

19. On the same day the claimant wrote a grievance letter to the respondent which raised two matters. Firstly, she complained about the letter that Mr Gardner had written to the respondent on 30 January, because she had not agreed that he should convey any apology and there had not been any formal investigation at the point at which Mr Gardner's discussion with her had occurred, rather it was only an informal discussion. Secondly, she raised a grievance in relation to the conduct of English Heritage itself in requesting her removal from the Stonehenge site, which she said was discriminatory. That view was based in part upon historic difficulties at the site and a schism between the full-time employees of English Heritage and those engaged through other parties, such as the respondent, whether on a full-time or part-time basis.

20. On 1 March, a grievance hearing took place. Mr Gardner chaired the meeting and the claimant was again accompanied by a work colleague. It would be unusual for a managing director to chair a grievance meeting where his or her conduct was the subject of the grievance but in the event during the course of the grievance meeting the claimant confirmed that she was restricting her allegations to those directed towards English Heritage and she was not pursuing her complaints relating to Mr Gardner.

21. On 3 March, she wrote a letter to Mr Gardner confirming that reduction in the scope of her grievance.

22. On 6 March, Mr Gardner rejected the claimant's grievance on the basis that English Heritage were entitled to insist upon the removal of any of the respondent's employees from its site and that it did not need to give reasons for that. It was, he pointed out, a matter that derived from its contractual powers and accordingly, the respondent had no choice but to comply.

23. On 8 March however, Mr Gardner wrote to English Heritage detailing the discussions that had occurred during the grievance meeting with the claimant and once again requested that English Heritage should reconsider its refusal to allow the claimant to return to work at the Stonehenge site. They rejected that requested on 11 March.

24. On 8 March, the claimant appealed against the grievance outcome. That letter was acknowledged on 21 March and an appeal was heard on 8 April. It was rejected.

Alternative employment

25. There was a further meeting, referred to as a "some other substantial meeting" on 8 May, as a consequence of English Heritage's continued refusal to allow the claimant to return to her role. Again, that meeting was attended by Mr Gardner and by the claimant. On that occasion the claimant was accompanied by Kimberley Lamb, her daughter, as her Union representative was not available. During the meeting the question of alternative roles was discussed. Mr Gardner made reference to a potential position at the Tower of London and the suggestions that the claimant had made about work she could undertake for the respondent whether on a full or part-time basis. Mr Gardner confirmed that the claimant would be dismissed because the respondent could not find any alternative employment. The claimant was given four weeks' notice of that dismissal.

The dismissal

26. On 8 May, Mr Gardner wrote to the claimant notifying her that as a consequence of English Heritage's request for her to be removed from the site and their failed attempts to persuade English Heritage to revoke its decision, the respondent had no choice but to dismiss her on the grounds of some other substantial reason (third party pressure), as she had failed to accept an alternative role. Mr Gardner wrote:

> "In our second meeting we also discussed alternative employment and I informed you that we had an alternative role in the Tower of London for which you declined our offer of alternative employment. I regret to inform you that your contract of employment is terminated as a result of third party pressure. Your removal from English Heritage and your refusal to accept our offer of alternative work at the Tower of London is some other substantial reason which justifies your dismissal".

The Appeal

27. On 9 May the claimant appealed against her dismissal. An independent contractor was appointed to conduct the appeal. There is some dispute between the parties as to the extent of the independence of the contractor because the individual was employed by Peninsula HR and the respondent is represented in these proceedings by the Peninsula legal team that operates in accordance with what is in effect an insurance policy that is taken out by employers. It seems to me that there nothing material turns upon the nature of the status of the individual who heard the grievance appeal.

28. An investigation was conducted into the matters raised in the claimant's appeal. Mr Gardner was interviewed during the course of that investigation and confirmed that there were no other roles available within the organisation. The conclusion of the appeal officer was that no formal offer in respect of the Tower of London role had been made to the claimant, although the report concluded that part of the reason for that decision was that the claimant had suggested it was too far for her to travel. Consequently, the report concluded that it was reasonable for the respondent to assume that the role was not suitable for alternative employment and to dismiss.

29. There is a dispute between the parties as to whether the claimant had indicated that she would not accept the Tower of London role when the concept was floated by Mr Gardner because it was too far to travel and therefore no formal offer had been made (which was Mr Gardiner's argument during the appeal), or whether Mr Gardner had failed to inform the claimant that it was a real possibility.

30. I prefer the claimant's account for the following reasons: First, at the time of the discussion Mr Gardner remained convinced that he could persuade English Heritage to reconsider its decision and, in consequence, the nature of the discussion about the role never took the form of a formal offer as the questions of salary, travel times or cost was not discussed in any meaningful way. There was nothing to suggest that the role was anything more than a fanciful idea.

31. Critically, however, when Miss Murphy suggested to the claimant that she would have rejected the Tower of London role had a formal offer been made, because it was too far for her to commute, the claimant stated in terms that at that time she had a mortgage offer that had been secured on the basis of her existing income from the respondent combined with her partner's income. The mortgage offer was necessary for her to secure her family home, having sometime previously relocated from Asia with her children. She said that if it were necessary for her to take a role which required her to travel to London to

secure the mortgage offer and the new home she would have accepted that offer even if she did so on the basis that she would have worked for a number of months until she could find another job, but the process of securing the new home and maintaining the mortgage offer were a clear priority.

32. I found that evidence credible, logical and coherent given the claimant's circumstances as a single parent albeit with a partner who was proposing to move into a new family home.

The issues

33. The issues for me to determine were therefore as follows:-

    33.1. What was the percentage chance that the claimant would have been fairly dismissed had a fair process been followed?

    33.2. Did the respondent fail to comply with the ACAS Code of Conduct on disciplinary and grievance?

    33.3. If so, was that failure unreasonable?

    33.4. If so, would it be just an equitable to increase any award to the claimant and if so by what percentage (up to a maximum of 25%)?

Relevant law

34. Section 123(1) ERA 1996 permits a Tribunal to make a reduction to the basic award where it believes it would be just and equitable to do so. It provides as follows:

> Subject to the provisions of this section and [sections 124, 124A 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.

35. It is trite law that the provision entitles the tribunal to make a just and equitable reduction to the compensatory award where a dismissal is procedurally to reflect the percentage that a fair process would have resulted in the claimant's dismissal (Polkey v AE Dayton Services Ltd [1988] ICR 142, HL.)

S.207A TULR(C)A 1992

36. S207A provides in so far as is relevant:

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
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> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%

37. If the reason for dismissal, as found by the tribunal, does not involve a disciplinary offence, then the Acas Code of Practice relating to disciplinaries has no relevance and there can be no basis for awarding an uplift for failure to comply with it (see Holmes v Qinetiq Ltd [2016] ICR 1016, EAT and Phoenix House Ltd v Stockman [2017] ICR 84, EAT).

Discussions and conclusions

38. The first question for me is whether the claimant failed to mitigate her loss and/or had a fair process been followed the claimant would fairly have been dismissed. This requires me to assess firstly the nature of any procedural failing and secondly what the percentage chance of the claimant being fairly dismissed for some other substantial reason had that failing been avoided.

39. It seems to me the nature of the procedural failing here, and I bear in mind that the respondent's response has been struck out, may fairly be summarised in this way. At the time that the respondent dismissed the claimant it was under a duty to consider suitable alternative employment for her. The suitable alternative employment has to be commensurate with the role with which the claimant was employed, namely a site manager, and the skills that she possessed and applied in that role, but at the time the decision to dismiss was made there had been no formal offer of what the respondent accepts was potentially reasonable alternative employment, namely the role at the Tower of London. The claimant was not told that there was no other role available and that if she did not accept it she would be dismissed. That, it seems to me, was a necessary and fair step before the respondent reached the conclusion that the claimant had rejected the particular role which it regarded as being the only suitable alternative role to avoid the claimant's dismissal.

40. In order to be placed in a reasonable position to make that decision the claimant needed to know what the terms of the offer were, and what the salary was. None of those matters were communicated to the claimant; as the respondent concluded at the appeal; there was simply an informal discussion of a potential alternative role.

41. I need to ask what would have happened had the claimant been told that this was the only role that could be offered and (if I adopt Miss Murphy's categorisation of it) that it would be on the same or similar terms as to hours and pay as her prior role.

42. I am persuaded on the basis of the claimant's evidence that she would have made the difficult decision to accept the role because it was necessary in order to preserve the mortgage offer and the new life that she wished to build for her daughter and her family and her new partner. There was no evidence to undermine that account.

43. I conclude, therefore, that had a fair process been followed and had the claimant been informed that this was the only alternative role available and that if she did not accept it she would be dismissed, she would have accepted it. I am persuaded that that was 100% likely to happened, given the power of the claimant's evidence on the point, which was unchallenged. Consequently, there is no reduction to be made on the basis of Polkey

44. I turn then to the claimant's argument that there was a breach of the ACAS Code in relation to either her grievance or the disciplinary process that was followed. The ACAS Code does no more than stipulate the bear minimum steps that are necessary for an employer to act reasonably. Failure to follow the ACAS Code may lead to procedural unfairness and potentially substantive unfairness. In this case the question of the fairness or otherwise of the dismissal is not for me to determine because the claim succeeds as a matter of default. I only have to consider whether the steps set out in the ACAS Code occurred. If I take the grievance firstly, the claimant raised a grievance on 11 February, she restricted that grievance at the grievance meeting that took place to her complaint against English Heritage, she received a grievance outcome following the grievance meeting, she was told of her right to be accompanied and she was offered an appeal which she exercised. There was therefore no breach of the ACAS Code in respect of the grievance.

45. I turn to the disciplinary matters insofar as they may be categorised as such. There was a formal discussion with the claimant on 25 May during which Mr Gardner discussed English Heritage's concerns in a general sense. The detailed allegations in English Heritage's letter were discussed at a formal investigation meeting on 8 February. The claimant was in no doubt what the allegations were or what was at stake because she was informed on 6 February that English Heritage had refused to reconsider their decision to remove her from site.

46. At the investigation meeting the claimant was told of each of the ten allegations. She was notified of her right to be accompanied and exercised it; she was able to respond to each of the allegations in turn. Subsequently a decision was made and that was communicated to her by letter and the claimant was offered the right to appeal against that outcome again, which she exercised.

47. Each of the component elements of the ACAS Code was adhered to. The claimant's challenge to the process is, first, that Mr Gardner wrote to a third party expressing views said to be from the claimant that were inconsistent with her views and which had not been sanctioned by her. Secondly, in the same letter he misrepresented the nature of their discussions, suggesting that there had been a thorough investigation at a time when there had only been an informal discussion.

48. Those are matters that go to the procedural or substantive fairness of the decision to dismiss but they do not evidence a failure to comply with the ACAS Code.

49. Each of the protections encompassed within the ACAS Code was offered to the claimant prior to the decision to dismiss. There was no breach of the ACAS Code in relation to either the disciplinary or grievance processes.

Remedy

50. The parties have agreed the figures for loss, and as there is need no increase or decrease them in accordance with Section 207A or with Polkey, I will simply adopt them for the purposes of the Judgment.

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Employment Judge Midgley

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Date 10 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....11 December 2020.....

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FOR THE TRIBUNAL OFFICE