Case Number: 3306644/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Helen Broad	**v**	Commission Air Limited

Heard at: Bury St Edmunds (by CVP) **On:** 26 & 27 November 2020

Before: Employment Judge Cassel

Appearances
For the Claimant: Mr T Thompson, Counsel.
For the Respondent: Mr M Magee, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The respondent unfairly dismissed the claimant and her claim of unfair dismissal succeeds.

2. The claim of breach of contract fails and is dismissed.

3. The claim of unpaid holiday fails and is dismissed.

4. By consent the respondent is to pay to the claimant £5,941.16 net.

5. The recoupment provisions do not apply.

RESERVED REASONS

1. The claimant, Mrs Helen Broad brings claims of unfair dismissal, breach of contract and a failure to pay holiday pay.

2. The trial was listed for one day, 26 November 2020. With the assistance of both counsels, to whom I am grateful, an additional hearing day was arranged at short notice so that all matters could be dealt with in one sitting.

3. Evidence was given by the claimant, Mrs Helen Broad, Mrs Gail Richardson, Director of the respondent company, and Mr George Richardson, Managing Director of the respondent company. In addition, I was provided with a bundle of documents and an amended schedule of loss.

4. I make the following findings of fact based on the balance of probabilities having considered those documents to which my attention was drawn.

Findings of Fact

5. The claimant was employed as a sales executive, and referred to as a National Accounts Manager on 8 February 2013.

6. The respondent company was originally set up to take aerial photographs from a helicopter. It diversified into time-lapse photography and is based in their premises in Market Deeping in Peterborough.

7. The claimant was apparently successful in her role, she received a basic salary of £18,000 per annum but would receive £30,000 with commission.

8. During November 2018 the claimant received an enquiry for a relatively small time-lapse job from a competitor Sky Revolution.

9. A quote for the work was provided by her on 13 November 2018, which was acceptable and a Draft Risk and Assessment and Method Statement ("RAMS") was sent to the client for approval.

10. The RAMS document is an important one. It sets out how the job will be completed and demonstrates compliance with health and safety legal obligations.

11. On 16 November 2018 the client asked the claimant to add to the RAMS document their logo, and the names of two employees of Sky Revolution. Two amendments were also requested to operational procedures.

12. The claimant asked a junior member of staff, Sam Croft, to make the amendments requested which were then emailed back to Sky Revolution. Subsequently Sam Croft gave a statement in the disciplinary proceedings. Although the Tribunal did not hear from Mr Croft within his statement he referred to the claimant having a dominant personality and he felt under pressure to complete her request.

13. In any event the amended RAMS came to the attention of Mrs Richardson when the office manager, Ms Bailey, informed her that there was some irregularity with the document. Mrs Richardson investigated further and discovered that the original document had been amended and she learned from their sales and marketing manager, Mr Paul Nixon, who was the claimant's line manager, that he knew nothing about it.

14. Mrs Richardson made further enquiries and spoke to Mr Croft who told her that the instruction had come from the claimant. Mrs Richardson believed that normal procedures had not been followed to forward the amended document for approval from either Mr O'Brien, the author of the original RAMS, or Mr Nixon for approval.

15. Mrs Richardson then contacted her husband who was in Spain outlining what she had ascertained and it was agreed that she would suspend the claimant. She spoke to the claimant who admitted to not seeking or obtaining permission to have the change made and when asked why she thought she could do it said "I didn't think about it".

16. Mr Richardson returned on 23 November and reached the conclusion, having seen the various documents that had been prepared, that the claimant's behaviour was so serious that he had lost trust in her. He looked at the company's contract of employment with the claimant and reached the conclusion that "falsification, being party to falsification of the company document" amounted to serious misconduct which may give rise to summary dismissal. Mr Richardson noted the three alterations, the addition of the Sky Revolution's logo, the removal of some of the respondent's named employees from the list of those responsible for the work and the addition of two employees of Sky Revolution. He also noted that there were additional steps referred to for the work being carried out which in his view suggested that the respondent was taking responsibility for the work of employees of Sky Revolution. I accept Mr Richardson's evidence that he was genuinely shocked at the potential risk to the respondent company by these amendments and alterations.

17. Mr Richardson instructed Mr Nixon to contact the claimant by phone. There is a conflict of evidence and in this regard I prefer the evidence of the claimant. During the telephone conversation with Mr Nixon she was advised that a decision had been made and that she was being dismissed. She asked for an explanation and was told it related to her agreeing to add Sky Revolution's logo to the RAMS documentation.

18. A letter confirming her dismissal was sent to her and she was given the right of appeal. Mr Richardson appointed himself as the appeals officer and there followed correspondence which, in my judgement, show that Mr Richardson had no genuine desire to deal fairly, or at all with the appeal. An appeal hearing never took place and the failure to have a hearing was almost entirely the fault of Mr Richardson.

19. The claimant was dismissed and the effective date of termination of the contract of employment was 23 November 2018.

Conclusions

20. The right not to be unfairly dismissed is provided for under section 94 of the Employment Rights Act 1996.

21. The question of fairness is provided for under section 98 of the Employment Rights Act 1996 in which we are told:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> …..
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) 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
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

22. There can be little doubt that the dismissal was procedurally unfair at both the dismissal and appeal stages. There had been absolutely no regard to the ACAS Code of Practice and the respondent had failed singularly to deal with the matter fairly at every stage. Apart from briefly confronting the claimant with the allegation, there had been no attempt to give her any reasonable opportunity of explaining her actions. In giving evidence Mr Richardson was adamant that in effect there was nothing she could say that would have him change his mind, but he still considered it of some value, for reasons best known to himself, to go through the charade of an appeal process. There was no disciplinary meeting, and again, I was unclear as to why Mr Richardson asked a more junior member of staff to convey the news of her dismissal rather than to do it himself.

23. Having made the decision to dismiss her, and that is what he had done, he then appointed himself as the appeals manager. The correspondence, in my judgement, demonstrates quite clearly that he had no genuine desire to hear the appeal.

24. The parties were agreed that should the claimant succeed, the basic award is £3,810. I considered the provisions of section 122(2) of the Employment Rights Act 1996 in which there is a power for a Tribunal to reduce a basic award where a Tribunal considers that any conduct before the dismissal was such that it would be just and equitable to reduce the amount of any such award. It is clear that in reducing such an award it is for a Tribunal to identify the conduct, decide whether it is culpable or blameworthy and then decide whether it is just and equitable to reduce such an award.

25. I do not consider it appropriate to reduce the basic award. There was a single act of misconduct. It was a serious act on any view, however there were no aggravating features. The claimant readily admitted the wrongdoing although she clearly did not consider that she had done anything wrong. In dealing with section 122(2) the Tribunal is specifically directed to consider the behaviour before dismissal. I therefore ignore the events thereafter. Mr Magee pointed to the claimant's continuing failure to accept any responsibility for the wrongdoing. That was apparent from the evidence that she gave but it must be disregarded for the purposes of this section.

26. Section 98 places the burden of showing the reason for dismissal on the respondent. In the circumstances as described that it was a conduct dismissal, and on this there is no dispute, section 98(2)(b) refers simply to "relates to the conduct of the employee".

27. Mr Thompson submits that the single act which led to her dismissal was not one of gross misconduct. He submitted that in effect no reasonable employer would have dismissed for such an act.

28. It is generally accepted that the act or acts must be of such a nature which fundamentally undermine the employment contract. In this regard I prefer the evidence of Mr Richardson. Apart from issues relating to the change of the logo itself and the alleged motivation behind the claimant's willingness to have the changes affected to ensure that she earned commission, and on these two matters I make no findings of fact, the changes were of such a significant nature that they fundamentally undermined the employment contract. I do accept that the addition of the names of two Sky Revolution employees without the opportunity of the respondent checking their credentials to conform with due diligence requirements and the addition of further steps to be the installation process were very serious breaches. These breaches were considered by Mr Richardson, and in my judgement with some justification, to amount to a fundamental breach of contract and that this placed the respondent at risk.

29. The Risk Assessment and Method Statements are very important pieces of documentation and it is common knowledge that in the event of an accident these are one of the starting points in an investigation.

30. However, the process followed by the respondent in dismissing the claimant was so deficient and showed a complete disregard to any reasonable process. It was remarkable that Mr Richardson instructed a more junior employee to contact the claimant to relay the news to the claimant that she had been dismissed. As I indicated above there was no demonstration of any real intention to engage in the appeal process. At one stage he suggested the claimant take legal advice and on another occasion that she pay for the cost of accommodation for an appeal away from her place of work.

31. Having stated that I do accept that the claimant's dismissal would have occurred at a later time and given all the circumstances a delay of three weeks seems the appropriate period likely to have resulted in a fair dismissal.

32. Within section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 there is provision for an uplift in any compensatory award. To do so there are essentially three matters that the Tribunal has to consider: whether the code applies; whether there was a failure to comply with the code; whether the failure was unreasonable. I indicated that in my judgement the breaches were so fundamental at every stage that an uplift 25% would be appropriate.

33. For a claim of breach of contract to succeed, and in this case it is the claimant who alleges a breach of contract took place such that her contract of employment should not be summary terminated, it is for the Tribunal to be satisfied on the balance of probabilities that a breach has been made out. To amount to a repudiatory breach the claimant's behaviour must disclose a deliberate intention to disregard essential requirements of the contract under which she worked. It is a question of

fact for the Tribunal to decide what degree of misconduct is necessary to amount to a repudiatory breach. I do find that such a breach has been made out and therefore this claim is dismissed.

34. There is also a claim of unpaid holiday pay. There is an express term of the contract which relates to holiday and payment for it and I have to be satisfied for this claim to succeed that the term was varied by agreement. There is a dispute of fact relating to a single conversation that took place many years ago. I am not satisfied that such a variation was in fact made and I dismiss this claim.

35. Following an invitation from both representatives to do so, the parties were able to reach agreement on financial settlement, which I understand is a payment net of tax and national insurance, and I simply record the terms that they agreed.

36. The recoupment provisions do not apply.

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Employment Judge Cassel

Date: 15 December 2020
18 December 2020
Sent to the parties on: .....

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For the Tribunal Office