



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs N Fisher

**Respondent:** Connect Medical Systems Ltd

**Heard at:** Manchester Via CVP

**On:** 27 January 2021

**Before:** Employment Judge Serr

## **Representation**

Claimant: Mrs Fisher in Person

Respondent: Mrs Peckham, Solicitor

# JUDGMENT

1. The Claimant's Claim for Unfair Dismissal is not well founded and is dismissed.
2. The Respondent was in breach of contract by dismissing the Claimant without notice.
3. The Parties should request a date for a remedy hearing in writing to the Tribunal within 21 days of receipt of this judgment if necessary.

# REASONS

This is the claim of Mrs Fisher against Connect Medical Systems Limited. By an employment Tribunal claim dated The 14th of July 2020 the Claimant brought a claim against her former employer for unfair dismissal and wrongful dismissal. In addition, within the claim was mentioned a claim for outstanding wages set to arise from her employment.

Issues

At the outset of the hearing the Tribunal endeavoured to clarify and identify the issues in the claim.

1. The Claimant confirmed there was only a Complaint of Unfair Dismissal and wrongful dismissal. It was confirmed that there was no outstanding claim for wages.
2. Reason for dismissal: The Respondent says conduct is the reason for dismissal or in the alternative Some Other Substantial Reason (SOSR). The Respondent says the Claimant sent out medical components without appropriate documentation. The Respondent says dispatch with documentation was the responsibility of the Claimant. The Claimant accepts that that this is the genuine reason for dismissal.
3. Complaint of unfair dismissal Claimant's case: The Claimant says dismissal was unfair because (i) the conduct complained of had been done by others in the past without any disciplinary sanction i.e. components had been sent out in the past without documentation in a similar way, (ii) the Respondent's investigation was unfair in that there was insufficient time to prepare for fact finding meeting and disciplinary meetings. The Claimant accepts this criticism does not apply to the appeal; the fact finding and disciplinary meeting were both conducted by Paul Todd. The Claimant states that the ACAS code requires that they should be dealt with by different people; (iii) the dismissal was an excessive sanction in the circumstances- a warning would have been sufficient.
4. Wrongful Dismissal Claimant's case: The Claimant says that the conduct for which she was dismissed did not justify summary termination and should have been given notice. It did not in other words constitute a repudiatory breach of contract.
5. Unfair Dismissal and Wrongful Dismissal Respondent's Case: The Respondent says this conduct has not happened before as alleged. This was a serious breach of procedures by the Claimant. It constituted a repudiatory breach of her contract. The Claimant is the person in charge when the Todd's are out of the business. It is a small company, the issue occurred during the COVID crisis and it was not practicable to allocate the investigation and disciplinary process to different people. In the alternative if the Claimant was unfairly dismissed (which is denied) she has contributed to her own dismissal and/or there should be a Polkey deduction. The

Respondent accepts that if the reason for dismissal is SOSR then the Claimant is entitled to notice.

6. It was agreed that liability, including Polkey and Contributory fault, would be dealt with at the hearing. Remedy, if necessary, would be considered at a later date.

### The Facts

7. The Tribunal had before it a bundle of documents running to some 175 pages. The Tribunal heard from Mr Philip Todd and Mr Adrian Todd on behalf of the Respondent who respectively dismissed the Claimant and dealt with the Claimant's appeal. The Tribunal also heard from the Claimant herself. All witnesses provided written witness statements.
8. The Tribunal makes the following findings of fact on the balance of probabilities.
9. The Claimant was employed from the 3/9/12 until her eventual dismissal with effect from 6/5/20. Her job title was that of PA to the company director although by the incident in question the Claimant did no personal assistant work and was primarily involved in sales.
10. The Respondent is a leading manufacturer of medical pipes gas systems and life support components. The equipment that it manufactures is highly specialised and the Respondent is required to meet stringent health and safety as well as legal compliance standards. The Tribunal was told and accepts that the Respondent operates in a highly regulated environment. Most of the equipment which is manufactured by the Respondent is for use in hospitals and by the medical profession. It is therefore essential that all regulatory requirements in relation to the Respondent's business are strictly adhered to. The Respondent is also a relatively small business. It has 14 employees. It is owned by Mr Adrian Todd.
11. The Claimant had a contract of employment dated the 31/8/12 and in addition there was a company Handbook which was updated from time to time which included rules covering the Claimant's employment. In particular the Tribunal notes that in respect of rules covering gross misconduct the Handbook stated that while it was not possible to provide an exhaustive list of examples of gross misconduct any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. One particular example included "a breach of health and safety rules that endangers the lives of or may cause serious injury to employees or any other person".

12. The Respondent conducts regular audits of every aspect of its business including whether appropriate paperwork has been satisfactorily completed on the components it supplies. On 20/3/20 the Claimant was involved in one such audit exercise. The Claimant was fully aware of the requirements in respect of documentation that needed to be generated with each piece of equipment that was sent out to customers.
13. On the 8/4/20 a Client of the Respondent's, K&H medical Ltd, reported that several items were missing from a delivery. They requested replacement parts in respect of a number of items of equipment including an AVSU box, which is a specialist gas valve and is installed to control the gas going through to a ward or a hospital treatment area, and a twin manifold assembly pressure switch, which is part of the alarm system to monitor the pressure of the oxygen. Both of these components are safety critical for the safe supply of oxygen in a medical environment. The intended destination of the equipment was a COVID ward.
14. The Claimant spoke to the client on 8/4 and the following day on 9/4 at just before 8am. Steps were then put in place first thing in the morning of 9/4/20 to produce the AVSU box and the twin manifold.
15. Two other people involved on the day in question were Mr Paul Thrower who was head of production and Mr Dave Cairns who was the production operative responsible for actually manufacturing and putting together these components on the Respondent's factory floor. What should have occurred if the Respondent's processes were being correctly adhered to is the following. The order should have come into the sales Department who should have then performed a 'contract review'- that is a review to check whether the Respondent could provide the goods in question, on time etc. Following that the sales Department is responsible for inputting the 'works order' onto the Respondents computer system. The works order contains information such as the part number, the description, the quantity etc. Following that a 'job pack' is then generated by the sales team which includes the works order as well as other documents like a check sheet, user manual, instruction for the equipment being provided, labels and most importantly certificates certifying that the part(s) have been subject to the appropriate testing. The test certificates come partly prepopulated, but it is the responsibility of the person putting the equipment together on the factory floor to complete those test certificates once the relevant tests are run and undertaken. The job pack which is generated by the sales team is then usually passed out to production and it is the head of production, Mr Thrower, who usually then passes out the job to the person on the factory floor. The production operative builds the components, completes the test records and other documentation and that is then inspected by a second member of staff. The job pack with the now completed documentation then goes back to the sales staff. Sales then do a document check to check that

all the documents have been completed and then book a Courier. At the end of the process the Courier collects the equipment and transports it to the client.

16. The Claimant did not generate a works order or a job pack. Mr Cairns was verbally instructed to produce the components. The Claimant booked a courier and the AVSU box and twin manifold assembly were shipped out at 8.31am seemingly without any documentation.
17. On 14/4/20 the Claimant completed a delivery note for the components going to K&H. An order number was assigned as 603525. The note states they are replacements for 603522.
18. On the 21/4/20 the Claimant received a letter from Mr Paul Todd inviting her to a meeting to take place the following day. The letter stated inter alia

*I am writing to advise you that you are required to attend an investigation meeting on 22/04/2020 at 10AM in the boardroom. The meeting is to discuss the following allegation(s):*

*Alleged serious breach of company procedures. Specifically, it is alleged that you have directly overridden production Control measures and management staff in order to effect the manufacture and dispatch of materials in a manner which is not in compliance with the law within the United Kingdom.*

19. There were 2 other allegations contained in the letter but they were not subsequently pursued.
20. The Claimant attended the meeting on 22/4/20. She did not indicate that she was unhappy in attending or required more time to prepare herself. It was immediately clear that the issue was in respect of 9/4/20 dispatch of the AVSU box and twin manifold. The Claimant raised various matters in the meeting.
  - She understood the equipment was made new by Dave Cairns not taken off another job
  - She could not understand why the matter was being raised now
  - Dave Cairns was instructed to make the components by Paul Thrower
  - The Claimant had asked her colleague Sharon to book the courier
  - There was no job pack done
  - She was under the impression that she had to get it straight out to K&H because he needed them to open a covid-19 ward that day.

- when it's a normal job pack it all comes back to as a full job pack including test certificates- this was a complete one off as it didn't

21. On 22/4/20 Paul Todd obtained 3 witness statements. One from Paul Thrower, one from Sharon Pieroni and one from Dave Cairns. Paul Thrower said he spoke to Glenn from K&H on 9/4 and was therefore aware of the need for the components to be shipped. He said to the Claimant to "do the paperwork" and we will sort it. He told Dave Cairns not to begin work until he had a job pack. The Claimant however instructed Dave Cairns to manufacture the components anyway and this was done without a job pack and was given to the courier. The statement states "*Alarm bells were ringing for me now — there's no test cert, no identification, no documents, no collection. I asked Dave how he stickered it — and he said he didn't. So I said just leave it at that and came back into the office*".

22. Dave Cairns states that Paul Thrower passed the job on to him. He does not mention the Claimant. He confirms there was no job pack. The equipment had been taken from another job no.603443 and was not built from new. He tested the equipment. He had no documentation to re sticker the goods for a new job number.

23. The Tribunal accepts that Dave Cairns told the Claimant he had physically tested the product for safety.

24. On 23/4/20 the Claimant was temporarily moved from her role as PA to sales administration. The reason given by Paul Todd was that the allegations against the Claimant involved the use of authority to act as a representative of an officer of the company to perform activities which have contravened process and law and that as a precautionary measure it would be a good idea to not communicate directly with shop floor staff, and to instead operate via their supervisor (and the job pack board) as per normal procedure. The move did not involve a reduction in pay.

25. Also on 23/4/20 the Claimant was invited to a disciplinary hearing for 10am on 24/4/20 to be chaired by Paul Todd. The allegation was

*Alleged gross negligence in permitting and participating in serious breach of company procedures. Specifically, it is alleged that you have directly overridden production control measures and management staff in order to effect the manufacture and dispatch of materials in a manner which is not in compliance with the law within the United Kingdom.*

26. The letter enclosed minutes of the previous meeting, the witness statements that had been gathered and various additional documents set out in the letter. The Claimant was told she could be accompanied if she so chose. The allegation was said to constitute potential gross misconduct and one possible outcome was dismissal.

27. The Claimant attended the meeting on her own. She did not ask for it to be adjourned or for any additional time to prepare. At the hearing

- The Claimant agreed the components had come from another job 603443
- The Claimant accepted she booked the courier
- The contract review was done on 10/4
- It was confirmed there was no test certificate for 603525
- While there was a test certificate for 603443 (the job that the components had been taken off) it was essentially blank
- The Claimant went to see Dave Cairns and said we've got to get this job out and he said don't worry, Pauls already spoke to me, I'm on it. That's how she left it.
- The Claimant accepted the job pack wasn't done when the job went out on 9/4. This was because she was in a rush and wanted to get it sorted for the customer
- She denied that Paul Thrower told her to do the paperwork
- The Claimant said she didn't set out to deliberately send equipment out without it being tested and she was sorry it went that way. She was trying to safeguard the Respondent's reputation by sending the goods out quickly but had probably gone about it the wrong way
- It was agreed that previously a VAC plant had been sent out to Malaysia that had not been tested. However it had not been tested because Adrian Todd explicitly authorised it with the knowledge that he was then going to go on site and test it in place. It had been agreed with the customer.

28. The disciplinary hearing was adjourned and eventually reconvened on 4/5/20. By an invite letter on 1/5/20 the Claimant was provided with some additional documentation. At the hearing, the Claimant read out a preprepared letter. She denied manufacturing the AVSU or instructing Dave Cairns to manufacture the components. Paul Thrower should have reported the fact that there was no job pack. The breach in procedure was letting the job out of the factory without the correct paperwork.

29. The Claimant was dismissed by Paul Todd by letter dated 6/5/20 with immediate effect. The reasoning in the letter is extensive but in summary Mr Todd did not find that the Claimant manufactured the components, that she reasonably believed that the products had been physically tested and that she did not act with malice. Nevertheless, the sole responsibility for the dispatch procedure lay with the Claimant. She physically arranged the transport, and one responsibility of the sales role within the organization was to ensure that this did not happen without adequate documentation. The Claimant failed to generate a job pack and then dispatched the goods without the relevant documentation, including crucially a valid test certificate. The failure to generate and complete this documentation meant that the Respondent was in breach of legal requirements under the Medical Device Directive 93/42/EEC. Mr Todd had undertaken an audit following the suggestion that similar breaches had happened in the past and did not come across any job which had documents kept so inadequately that it suggests

the release of product in contravention of medical device legislation. The Tribunal accepts that to be the case.

30. The letter concluded:

*There are significant risks in providing our products, untested, which is why there is such heavy regulation on the industry. The risk is not only damaging to the business however, as we provide medical equipment, this could affect the lives of others, meaning failing to follow the procedures poses a massive health and safety risk to our clients and their patients. The fact that nobody has been injured by these decisions on this instance in no way exonerates the risk posed by the actions taken.*

31. The Claimant appealed against her dismissal and the appeal was heard by Adrian Todd on 22/5/20. The Claimant complained about various aspects of her dismissal including a lack of time to prepare, the fact that the investigation and the disciplinary hearing was conducted by the same person (Paul Todd), the amount of time between the incident and the investigation and the fact that she did not actually send the goods out to the courier so was not responsible for the dispatch.

32. By a letter dated 4/6/20 the Claimant's appeal was dismissed.

#### The Law

33. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

34. The potentially fair reasons in Section 98(2) include a reason which (b) relates to the conduct of the employee. The reference to conduct is in general terms; it does not have to amount to gross misconduct. It does not need to be wilful or deliberate conduct. It does, however, have to relate to the particular employee - it imports a notion of personal culpability and blameworthiness- *Burdis v Dorset County Council* (2018) UKEAT/0084/18/JOJ per Eady J.

35. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "...the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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". the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band.

36. The starting point in most cases where misconduct is found to have been the reason for dismissal is the approach formulated by Arnold J in *British Home Stores Ltd v Burchell* [1978] IRLR 379. At 304 he stated:

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

37. In *Boys and Girls Welfare Society v McDonald* [1997] ICR 693, the EAT pointed out that *Burchell* had been decided when the burden of proving reasonableness rested with the employer, rather than neutrally as is the position today.

38. An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant: all the Tribunal has to consider is whether the employment contract has been breached. If it has, and dismissal is the result, then it is wrongful *Enable Care and Home Support Ltd v Pearson* EAT 0366/09.

## Conclusions

Unfair Dismissal

39. Dealing logically with the first question the Tribunal is satisfied that the reason for dismissal in this case was misconduct. The Respondent accepted that the Claimant did not act out of malice towards the employer and in fact was well intentioned, in the sense that she was trying to assist a customer which she believed would in turn enhance the reputation of her employer. That said, the Tribunal reminds itself that a dismissal on this ground is not limited to wilful misconduct but could also encompass serious neglect, omission or carelessness. The Respondent took the view that the failure to generate the documentation for the equipment, including crucially the test certificate, and then to allow the goods to be sent out without confirming the existence of that completed documentation was in the circumstances a serious failing that fell far below the standard of work that could be expected of the Claimant and fell within the meaning of misconduct.
40. Having established the reason under s.98 (2) the Tribunal turns to the *Burchell* guidance. Did the Respondent genuinely believe that the Claimant was guilty of the misconduct identified? There is no question in this case that it did. The Claimant essentially accepted that there was a breach of the Respondent's procedures in that the job pack, including the test certificate, should have been generated prior to the equipment being manufactured and then should have been completed prior to dispatch. The Claimant accepted that she was at least in part responsible for the failure to generate the documentation and the failure to verify it had been completed prior to dispatch.
41. Did the Respondent have reasonable grounds upon which to sustain that belief? Again, the Respondent clearly had grounds to sustain its view as to the misconduct for which the Claimant was dismissed. The Claimant was an employee of eight years standing. She was very experienced in the role of sales which encompassed the 'paper work' side of the Respondent's business. As recently as 20/3/20 she had been involved in a comprehensive audit of such documentation, demonstrating her familiarity with the Respondent's procedures as well reinforcing to the Claimant the importance placed upon the completion of such documentation by the Respondent. While there remained some factual disputes between the Claimant and some of the witnesses interviewed (for example whether Mr Thrower had said 'you do the paperwork', who had actually instructed Mr Cairns to begin the job and who physically handed the equipment to the courier for dispatch) there was no dispute as to the central allegation. It was the Claimant's role to generate the job pack and to confirm the paperwork completion, prior to release to the client, and this had not been done.
42. Had the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case? Examining the matters raised by the Claimant in respect of the procedure adopted, firstly the Claimant states that she did not have sufficient time to prepare for disciplinary meetings. There were two occasions where invite letters were

sent a day before the meeting was due to take place (albeit one of those was an investigation meeting). Usually, an employee would be expected to be given more time to prepare and consider matters. That said, the Claimant did not ask for more time or for an adjournment and had she asked she would have been afforded it. The Tribunal notes that the first invite letter was received on 21/4/20 and the dismissal did not take place until 6/5 with an appeal taking place on 22/5. There was also an adjournment in the disciplinary hearing from 24/4-4/5. In totality, it cannot be said that the process was unreasonable in this respect.

43. The Claimant also says that the Respondent should have appointed a different person to hear the disciplinary meeting from the person who had investigated the matter. The ACAS code of practice on Disciplinary and Grievance Procedures (2015) states “In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing”. The Tribunal notes that this is a very small employer with only 14 staff. An explanation was given by Adrian Todd in the appeal decision dated 4/6 as to why it was not practicable for another member of staff to have undertaken the investigation and this is accepted by the Tribunal. The decision to have the same person deal with the investigation and disciplinary was not unreasonable.
44. The Claimant did raise the fact that equipment had been sent out in the past without proper paperwork being completed. She only gave two examples during the disciplinary process. The Tribunal accepted the evidence of the employer that there was no previous case of equipment being sent out without a completed job pack including test certificates as happened in this case.
45. Finally, the Tribunal turns to whether dismissal fell in the circumstances within a band of reasonable responses. There is no doubt in the Tribunal’s view that this dismissal was harsh. Given the fact that it was a first offence, the underlying intention of the Claimant was to assist a customer and therefore in turn her employer, the fact that the Claimant felt under time pressure and this was during the Pandemic, many employers may have dealt with this in a more lenient manner. That said the context is important. This is a highly regulated environment. The equipment is safety critical and this particular equipment was due to be provided to a ward of seriously ill patients. Had any issue arisen in respect of the equipment, the absence of a valid completed test certificate could have had very serious consequences for the Respondent and its Officers. Indeed, the provision of such equipment without a certificate was unlawful. The Claimant was experienced and fully aware of the Respondent’s processes and the importance of having a completed test certificate. Ultimately, the Tribunal cannot say that no reasonable employer would have dismissed in these circumstances.
46. For the aforesaid reasons the Claimant’s dismissal was not unfair.

Wrongful Dismissal

47. The Tribunal reminds itself of the different test for an action for wrongful dismissal. It is for the Tribunal to determine whether in fact the Claimant is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract. While extreme carelessness can justify summary termination it is rare and usually it will be conduct amounting to gross misconduct i.e. a deliberate and inexcusable failure to comply with lawful instructions.
48. In the present case there were a number of allegations investigated in the investigation stage but only one was taken to a disciplinary hearing. The employer itself rightfully concluded that the Claimant was not responsible for manufacturing the product. She reasonably believed that the product had been physically tested and in this respect the Tribunal finds that Dave Cairns had undertaken the tests and constructed the product to an appropriate standard. Her actions were done without malice and with the intention of assisting a customer. She did not override any instructions given by Paul Thrower. The Tribunal notes the findings in the dismissal letter which it agrees with

*I find some of your explanations satisfactory in their sphere. Specifically, it seems clear from the statements and your account of the events of the morning of 09/04/2020 that you are correct to object to allegations of having effected the manufacture of product. It is less clear whether or not any production control measures or management staff were overridden, but the preponderance of the evidence does not lean strongly in the direction that this occurred.*

*Further, I find your belief that this product was physically tested to be a reasonable belief, held by all participants in the investigative process so far. I also accept that the motivation you have ascribed to your actions appears to be honest and legitimate, and have no reason to believe otherwise.*

49. Serious as it was to send this equipment out without a completed test certificate, the Tribunal is not of the view that it was a breach of health and safety rules that endangered the life of others or may have caused serious injury to others. This was a one-off act of carelessness by an employee with an otherwise blameless record. It did not constitute a repudiatory breach of contract entitling the Respondent to dismiss without notice.

Disposal

50. The Tribunal anticipates that the Claimant's Claim will be limited to unpaid notice pay which is calculated in the schedule at £3 365.39. As the Tribunal

agreed not to deal with remedy the Parties are invited to apply to the Tribunal for a hearing to determine remedy if agreement cannot be reached within 21 days of receipt of this judgment.

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Employment Judge Serr

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Date: 29 January 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 February 2021

FOR THE TRIBUNAL OFFICE