Case Number: 2300571/2019V

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Opoku**

Respondent: **Associated Continuity Teams Ltd**

Heard at: Croydon (by cloud video platform) **On:** 19 and 20 January 2021

Before: Employment Judge Nash (sitting alone)

Appearances
For the claimant: Mr Beyebenwo, solicitor
For the respondent: Ms Hall, consultant

JUDGMENT having been sent to the parties 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

1. Following ACAS Early Conciliation from 10 January to 10 February 2019, the Claimant presented his claim to the Employment Tribunal on 15 February 2019. There was a case management hearing on 19 June 2020.

2. The matter was listed before a Judge and members. The Tribunal ascertained that there was, in fact, no discrimination claim, as had been set out in the case management order of 19 June 2020. The Tribunal canvassed the parties' views on the make-up of the Tribunal. The Claimant had no views and the Respondent contended that the hearing should proceed Judge sitting alone. The Tribunal adjourned to obtain a copy of the case management order and to decide on Tribunal composition. The Tribunal determined that, as there was no application from either party for a full tribunal, the members would be dismissed, and the case would proceed with a Judge sitting alone.

3. The tribunal had sight of an agreed bundle and additional documents. All references are to the bundle, unless otherwise stated.

4. In respect of witnesses, the Tribunal heard from the Claimant on his own behalf. From the Respondent, it heard from:-

   Ms Peters, HR and Resourcing Manager;
   Ms Swidzinska, Financial Manager; and
   Ms Thompson, Chief Operating Officer (COO)

The Claims

5. The only claim before the Tribunal was for unfair dismissal under Section 98 Employment Rights Act 1996.

6. A claim for notice pay had been satisfied prior to this hearing.

The Issues

7. The Tribunal had sight of a list of issues prepared following the case management hearing. However, this list was amended with consent at this hearing.

8. The only dispute as to the issues was whether the Tribunal should consider a potential Polkey deduction. Polkey was not included in the agreed list of issues but was pleaded in the ET3. The Respondent wanted to rely on Polkey but the Claimant objected.

9. The Tribunal determined that, as the Polkey point had been pleaded in the ET3, the Tribunal was revisiting the list of issues in any event, and Polkey is an issue which is live in the majority of unfair dismissal claims, the Respondent had not made an irrevocable concession on the Polkey point in the list of issues. The tribunal accordingly would consider Polkey.

10. The issues as to liability before the Tribunal were accordingly: -

    i. What was the reason for dismissal? The Respondent relied on conduct, a potentially fair reason.

    ii. Was there a fair procedure, in particular, did the Respondent have a reasonable and genuine belief in the Claimant's culpability following a reasonable investigation?

    iii. Should there be any so-called Polkey deduction?

    iv. Sanction

    v. To what, if any, extent had the Claimant contributed to his own dismissal?

The Facts

11. The respondent business provides contract staff to hotels and restaurants in Central London. It employs about 1,200 people.

12. The Claimant started work as a cleaner on either 5th or 13th November 2013. Nothing turns on this difference. He was promoted to a site manager on 23 June 2017. He worked at the Savoy until the Respondent lost this contract on 25 July 2018, whereupon most staff transferred to the in-coming contractor, the transferee.

13. The Claimant gave unchallenged evidence that he had an unblemished record and had received awards for performance. The COO gave evidence that he was a very good performer and a valued employee. By way of an email on 27 June 2018 in respect of the potential transfer, she stated that the Respondent would really like the Claimant to stay. She suggested a job in HR or his potentially going down to supervisor (a demotion).

14. The Claimant had discussions with Mr Asante, his line-manager, about his various options, including transferring to the transferee and the proposed role in HR. Mr Asante emailed the Respondent on 29 June saying that the Claimant was considering his options but did not mind a supervisor role. The Claimant agreed that this was an accurate summary of their discussion.

15. On 4 July 2018 Ms Peters wrote a reference for the Claimant containing his new address at Blake Avenue. Ms Peters did not recall why she had written this reference. The Claimant said he had obtained the reference for Home Office immigration reasons and had visited the respondent's Head Office to obtain this.

16. By 9 July Ms Peters was becoming somewhat impatient to know whether or not the Claimant was interested in the HR role, as she had staff absences approaching and needed to arrange staffing to ensure these were covered.

17. The Claimant made a further visit to the Head Office on 11 July to discuss the HR role. He expressed his concerns about what he felt was his lack technical knowledge. Ms Peters offered him training. Further, he also had annual leave coming up, and the dates would not fit with the HR department's schedule. It was unclear to the Tribunal how this discussion ended but it did appear that the Claimant would go away and get back to the Respondent.

18. Nevertheless, the Respondent's case was that the Claimant was expected to turn up to start work for HR on 13 July although the contemporary document at page 80 suggest that it was, in fact, 16 July.

19. In any event, the Claimant did not attend, and the Respondent chased him. According to an email to Head Office from Mr Asante dated 18 July, at page 81, the claimant said that he did not want the HR role, or to transfer and would be okay to drop down to a supervisor. The Claimant accepted that this was accurate record of their discussion.

20. The Chief Operating Officer suggested telling the Claimant about an up-coming opportunity at the Mandarin site for a site manager. Mr Asante said the Claimant would let them know. The Claimant agreed that he knew of the Mandarin site opportunity. However, it was not yet available, and he knew that he would have to work as a supervisor before he could, it was assumed, take up the role of site manager at the new site.

21. The Claimant stated that his line-manager had told him that his salary would not be reduced during this interregnum. However, this was not stated in either his ET1 or his witness statement. In his witness statement he referred to his refusing the HR role and a temporary demotion to supervisor. He went on to say that the offer provided by the Respondent was not the best offer but it was accepted. However, he did not mention, what might be expected to be the most significant point - a cut in salary. The ET1 detailed why the Claimant later became frustrated with, as he saw it, the Respondent going back on its word but, again, did not refer to a salary deduction. There was nothing in any other document including the Respondent's contemporaneous documents, save for a reference stating that the Claimant's salary had been cut. There was no oral evidence led on this.

22. Accordingly, on the balance of probabilities, the Tribunal found that there was no such agreement as to the Claimant's salary being protected during this supervisor interregnum.

23. On 18 July 2018, the Respondent again reported that the Claimant was okay with dropping down to the supervisor role on a temporary basis. On 19 July 2018, the Claimant signed a form to say that he would not transfer to the in-coming transferee. He then went on annual leave until 22 July.

24. The Respondent stated that it had to transfer the Claimant from its management pay process (monthly salary) to its hourly staff pay process (biweekly salary) because he was going down to a supervisor. In effect, this automatically, but mistakenly, issued the Claimant with a P45 with a leaving date of 21 August 2018. This was provided to the Claimant and he accepted that it was received by post.

25. The Claimant had not been warned about this and was understandably upset when he received the P45. He rang his line-manager to complain on 23 August 2018. Mr Asante's account, according to the contemporaneous documents, was that he spoke to the Claimant on the phone, who was very upset to get the P45 and missing wages. The Claimant said that Mr Asante told him that he would lose his continuity of his employment and, in effect, have to apply for the new job.

26. There was inconsistent evidence from the Respondent about what had happened when the Claimant had been promoted to site manager and, in effect, moved from the bi-weekly to the monthly pay system. Due to this inconsistency, the Tribunal found on the balance of probabilities, that the Claimant had not been issued with a previous P45. This made it more likely that the P45 issued in August 2018 would have come as a surprise.

27. On 23 August 2018, the Head of Finance emailed the Claimant's work email and Mr Asante to explain that the P45 was "void". The Claimant needed to attend the office to re-register on the system, that is the bi-weekly system. This was despite the fact that he had been previously registered on both the bi-weekly and the monthly systems. The Claimant agreed that he saw this email on the I-pad that he had been given as part of his site manager role. That day the Head of Night Operations stated by email that she did not think that it was the right thing to force the Claimant to re-register as he was a long-

serving employee. She asked if something could be done to avoid him having to come into the office again.

28. The Head of Finance emailed, copied to the Claimant on his work email, to say that it was the standard procedure and stated in terms that the Claimant's continuity of employment would be protected. Ms Peters also emailed Mr Asante asking him to reassure the Claimant that the Claimant would not lose his continuity of employment. Mr Asante acknowledged receipt of this.

29. The Claimant, on the other hand, stated that he was told by Mr Asante that he would lose his continuity of employment.

30. The Tribunal considered the evidence and found that it was unlikely on the balance of probabilities that Mr Asante told the Claimant that he would lose continuity. Mr Asante was told, in terms, to tell the Claimant otherwise and, further, the Claimant saw the email from the Head of Finance on 23 August stating, again in terms, that his continuity would be protected.

31. The Claimant said that he became angry that as a long-serving employee he was dismissed, as he saw it, and then told that if he wanted to get a job, he must go in again to re-register. He felt that his line-manager had lied to him. He decided, he told the Tribunal, that the Respondent and his line-manager were playing games with him and tricking him. They had decided that they wanted him out. He, at that point, lost trust and confidence in the Respondent and did not see any point in engaging further with them.

32. Ms Peters emailed the Claimant's personal yahoo email on 5 September to confirm again that he was not losing the continuity of employment and that he was being subjected to a standard process. The re-registration could be done automatically but he needed to come in for a new photograph. She stated that he was a valued employee and she referred to the potential up-coming Mandarin role. She then told him that payroll was keeping him on-hold until he re-registered and that there was a deadline, and he must come into the office that week.

33. The Claimant said that he did not receive this or any other messages from the Respondent on his personal email. This was despite the fact that the Respondent's emails showed his personal email address in full.

34. The Claimant's evidence was inconsistent in that he said both that he did not receive the emails and that he had received the emails but chose not to read them. He said that there were some issues with his personal email account, but there was no corroborating evidence or details of that. He did not refer to examples of any other emails not received at this time. He said that he did not check his personal email regularly.

35. The documents showed that the claimant had provided his personal email address with his old postal address to the Respondent and was recorded on their system with that email address. The employee handbook required employees to keep their contact details, including email, up to date for the express purpose of the Respondent contacting them in an emergency. In the view of the Tribunal, in the modern world it is rare for a person to provide an

email address to their employer and then deliberately choose not to check it. This would be more likely the case for an employee with supervisory and management responsibilities. The Tribunal found on the balance of probabilities that, because the Claimant chose not to engage with the Respondent after 23 August, he did receive and was aware of emails sent to his private email account but chose to ignore them.

36. The claimant did not contact the Respondent again after 23 August.

37. The Respondent continued to try to contact the Claimant on his work email, his personal email and by phone. All witnesses gave confused evidence about when the Claimant lost his access to his work email account. He said that he no longer had access after 23 August but later said it was not until he had contacted ACAS in January. In the view of the tribunal, it was only too likely that, because the Tribunal heard this case two and a half years after material events, the parties' recall was not as good as it would have been earlier on such matters.

38. On 10 September Ms Peters WhatsApped the Claimant on his personal phone asking him to come into the office the next day to discuss matters. He was staying as a Respondent employee and therefore they needed to decide when and where he was working. She stated, 'your lines are off'. Two days later, on the 12th, she asked him to reply and said that he was showing a lack of maturity and was ignoring their messages. The Claimant gave inconsistent evidence as to whether he had seen these WhatsApp messages. The Tribunal found on the balance of probability, it was likely that he had received these messages because the WhatsApp messages were "ticked", indicating that they had been accessed.

39. Ms Peters again asked Mr Asante to chase the Claimant on 10 September. There were a number of attempts by the Respondent to call the Claimant on the telephone, and the Claimant failed to pick up. He explained that he did not recognize the telephone numbers. When it was put to him that he should have recognized Mr Asante's messages or telephone number, he said that he was deliberately not accepting calls from Mr Asante.

40. On 13 September the Respondent started to consider treating this as a disciplinary matter. On 14 September Ms Peters emailed the Claimant's personal email address saying that he must get in contact and if he did not, he would have to be considered absent without authorisation.

41. She then turned the matter over to a manager, a Mr Dolgovas. He listed a disciplinary hearing for 24 September 2018 and sent a letter on 20 September. However, he sent it to the Claimant's old address, not the address that the Respondent had been given on the 4 July (and which was the address on the P45). This was sent by ordinary post, by registered post and also by email. However, it was unclear whether the emails reached the Claimant. This is because, according to the Respondent's documents, the email address was "Jeffrey Alex Opoku". This was not the Claimant's yahoo email address, nor did it appear to be his work email address, to which it was unclear, in any event, if he had access.

42. The Claimant did not attend the meeting on the 24th, and the Respondent invited him again on 25 September to a re-scheduled disciplinary meeting on 28 September using the same delivery methods. The Claimant again said that he did not receive the letter.

43. After over two years, it was not straightforward for the Tribunal to reconstruct what had happened. However, the Tribunal considered that there was no good evidence that the letters were sent to the personal email address. The address in the 'to' box on the email was simply unclear. Without further evidence, the Tribunal could not find that the letters were sent to the correct email address. It was a matter of record that the letters were sent to the incorrect postal address. The person who might have been able to assist, Mr Dolgovas, who was running the disciplinary was not before the Tribunal.

44. On the balance of probabilities, it was more likely than not that the Claimant did not receive these invitations to the disciplinary hearings.

45. Unaware of this, the Respondent determined to dismiss the Claimant on the basis that he had been unauthorisedly absent since 22 August and had failed to respond to a reasonable management instruction to get in contact. This decision was confirmed by another letter sent by the same methods of delivery. The letter offered the Claimant an appeal.

46. The Claimant was unclear when he received these letters. He only saw these when he bumped into his former landlady and she told him that there were letters which had arrived for him after he had moved out. He could not remember when this happened. Nevertheless, he accepted that he finally received the dismissal letter and decided not to appeal because he said that he had lost trust and confidence in his employer.

47. The effective date of determination was agreed to be 15 September 2018.

The Applicable Law

48. The applicable law is found at Section 98 of the Employment Rights Act 1996 as follows: -

> **98 General.**
>
> (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—
>
> …
>
> (b)relates to the conduct of the employee,
>
> **…**
>
> (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.

Submissions

49. Both sides made brief oral submissions.

Applying the law to the facts

50. The first issue for the Tribunal was - what was the reason for the dismissal?

51. The Respondent in its submissions attempted for the first time to rely on some other substantial reason as a reason for dismissal, in the alternative to conduct. Whilst this reason had been pleaded in the ET3, the Tribunal did not permit the Respondent to rely on a second reason for dismissal at this late stage. The list of issues had been discussed with the parties at the beginning of the hearing and one change to the list of issues - to include Polkey - had been expressly permitted. The parties had closed their cases and permitting such a late change would have been prejudicial to the claimant.

52. Nevertheless, the Tribunal accepted that the reason in the Respondent's mind for dismissal was conduct. The Tribunal did not accept the Claimant's case that this was, in effect, a set-up and that there was a pre-determined decision to dismiss him.

53. The reasons for this were as follows: -

    a. The contemporaneous evidence was that the Respondent was keen to keep the Claimant. If not, why would the respondent have offered him the opportunity to stay on post-transfer?

    b. There was unchallenged evidence that the Respondent had given the Claimant awards and that he had an unblemished record.

    c. The respondent was actively considering him for the HR role even thought, on his own evidence, he was unsuited for this.

    d. He consistently failed to get into contact with the Respondent and the Respondent had made many attempts to contact him before moving to the disciplinary process.

54. Accordingly, on the balance of probabilities, the Respondent discharged the burden upon it of showing that conduct was the reason for the dismissal. Accordingly, the Tribunal went on to consider reasonableness.

55. The first issue for the Tribunal was whether the Respondent had carried out a fair procedure. As both parties submitted, the Tribunal must follow the test set out in **Burchill v British Home Stores** [1978] IRLR 379, according to

which a Respondent must have a reasonable and genuine belief in the culpability of the Claimant based upon a fair investigation.

56. There is a further important point about the reasonable investigation and reasonable belief. A Tribunal may not substitute its view for what it considers is a reasonable investigation or a reasonable belief. This is impermissible. What a Tribunal must do is consider the investigation carried out by this particular employer in these particular circumstances and decide if it comes within a range of investigations available to a reasonable employer in the circumstances. The same approach applies to the reasonableness of the employer's belief.

57. The Tribunal concluded that the Respondent's investigation did not come within this reasonable range for the following reasons: -

    a. The main reason was that the Claimant did not know about the investigation. This was because, once the Respondent started the disciplinary process, it used the wrong postal address to correspond with him, and there was no good evidence the Respondent had used the correct email address. The Respondent was aware of the correct address. It used the correct address in the 4 July reference (at page 77) and the Claimant said he received his P45 at the correct address.

    b. Whatever the reason for this failure - and the Dismissing Officer was not before the Tribunal to assist - an employer who sends an invite to a disciplinary hearing to the wrong address when there is no evidence that it was successfully sent to the correct email address, cannot have carried out a reasonable investigation. This is because the employee had no real opportunity to have his say, before the employer reached its belief as to his culpability.

58. Accordingly, the Respondent failed the **Burchell** test because its investigation fell outside of a reasonable range. The Tribunal did not find that the Respondent's use of the wrong address was deliberate. The Tribunal found on the balance of probabilities that it was human error. The Respondent was genuinely trying to contact the Claimant, it did not go about it correctly.

59. The Tribunal accepted the Respondent's belief in the Claimant's culpability was genuine because it had dismissed the claimant for failing to get in touch when he failed to attend the hearing. However, it did not find that the belief was on reasonable grounds because the claimant was not given the opportunity to put his case.

60. As the dismissal was procedurally unfair, the tribunal went on to consider the Polkey point. Following **Polkey v AE Dayton Services Ltd** [1987] UKHL 8, in a procedurally unfair dismissal, a Tribunal must consider whether the Respondent could and would have dismissed the Claimant fairly if it had followed a fair procedure. The leading case remains **Software 2000 Limited v Andrews and others** (EAT/0533/06) and the approach was set out by the then-President, Elias P. The EAT explains that a Tribunal should look to reconstruct what might have been. However, it must not

embark upon a sea of speculation. It must base its determination as to what might have been on the evidence before it.

61. In this case, the Tribunal had firsthand evidence from the Claimant as to what might have happened. The Tribunal reminded itself that the Claimant was giving evidence about what he might have done, a good two years after the events. However, his evidence was robust and clear. He stated that he would have ignored the letters of 20 and 25 September if he had received them, because he considered himself already dismissed and had lost faith in his employer. The Tribunal also found the Claimant's evidence on this point to be plausible because there was a clear track record of the Claimant ignoring emails, WhatsApp messages and telephone calls from the respondent.

62. Accordingly, had the Respondent carried out a fair procedure and sent its letters to the correct address and the Claimant had received them, the outcome would have been identical. He would not have engaged. He would not have attended the hearings and he would have been dismissed on the same grounds at the same time.

63. The Tribunal then turned to the issue of sanction. In respect of sanction, the tribunal again applied a reasonable responses test. When determining whether the decision to dismiss is fair, the Tribunal may not substitute its view for that of the Respondent. A Tribunal may not find that a dismissal is unfair because it would not have dismissed in the circumstances. A Tribunal must decide whether or not the decision to dismiss comes within a range of responses to the Claimant's conduct available to a reasonable employer in the circumstances.

64. The Tribunal considered, therefore, whether - had the Respondent followed a fair procedure - would it and could it have dismissed fairly in any event?

65. The Respondent's case as to why the claimant had to attend their offices was confused. There was reference in oral evidence to the claimant being required to re-register for immigration reasons, but there was no evidence on this and no reference in the ET3. Accordingly, the Tribunal did not attach any weight to this contention, particularly as the Claimant was an EU citizen.

66. The Tribunal's view was that the respondent did not deal with this matter as well as it could have done. The respondent did not warn the Claimant that he was about to receive a P45. Employment lawyers might know that the receipt of a P45 in and of itself does not constitute a dismissal, but many lay people will think that it does. The claimant's upset and distress were predictable and understandable in the view of the Tribunal.

67. However, once the Respondent realised what had happened, it tried to sort it out. It sent emails which the Claimant was copied into and also contacted him directly explaining the situation. It explained in terms that he was not dismissed, his continuity would be protected, but that he needed to re-register.

68. However, the Claimant, on his own account, dis-engaged with the Respondent at that point. He said in evidence that after 23 August, he had determined that he had been dismissed and the Respondent was, henceforth, in his own words, only playing games with him. He said that he had not checked his emails, because he was dismissed. Nevertheless, the tribunal had found that the Claimant knew that the Respondent was trying to get in contact with him.

69. In the view of the Tribunal, the Respondent was far from hasty in starting the disciplinary procedure. It made attempts to contact the Claimant and, in effect, warned him that it was considering moving to a disciplinary procedure, thus giving him one final chance, before actually doing so.

70. In such circumstances, the Tribunal could not find that a decision to dismiss would be outside of the reasonable range. The claimant would have knowingly ignored the disciplinary procedures. The respondent, faced with a claimant alleged to have failed to get in contact, who then ignored the disciplinary process, would have been able to dismiss within the reasonable range of responses.

71. The Tribunal must accordingly make a 100% Polkey deduction because the Respondent would and could have dismissed fairly if it had carried out a fair procedure.

72. The final issue was that of contribution. This was not relevant for the compensatory award because that was extinguished by the Polkey deduction. The Tribunal, accordingly, only went on to consider the basic award.

73. Under Section 122(2) Employment Rights Act a tribunal must reduce a basic award on the ground of the employee's conduct when it considers that any pre-dismissal conduct was such that it would be just and equitable to reduce the amount of the basic award.

74. The case law tells us that the Tribunal must concentrate on the employee's acts and not those of the employer, and that the Tribunal must only deduct if it can identify culpable or blame-worthy conduct. The leading case is **Steen v ASP Packaging Limited 2014 ICR56** where the EAT held that the Tribunal must: -

    a. identify the conduct which is said to give rise to potential contributory fault,
    b. decide if that conduct is blame-worthy or culpable, and
    c. decide whether it is just and equitable to reduce the amount of the basic award.

75. In respect of conduct, the Tribunal identified the conduct as the Claimant's failures to respond to the respondent's successful attempts to get in contact with him. This was blame-worthy or culpable conduct, despite the fact that he had been badly treated by the Respondent in respect of the P45 and told to visit the office again to re-register. The claimant simply dis-engaged and refused to try to sort the problem out. Further he had refused to inform the

Respondent that he had dis-engaged, leaving the respondent to continue chasing him.

76. The final question was whether it was just and equitable to reduce the amount of the basic award. In the view of the Tribunal, the blameworthiness of the Claimant's conduct was mitigated by the understandable distress that he suffered when receiving the P45 and being asked to re-register.

77. Accordingly, the Tribunal did not think it just and equitable to reduce by 100%. The Tribunal reduced the basic award by 75% to reflect the Claimant's dis-engaging and not informing his employer that he had done so. If the claimant had not wanted to continue working for the respondent or had considered himself dismissed, he could simply have told the employer so.

Remedy

78. It was agreed with the parties that the applicable remedy was 25% of the basic award.

79. By consent, 25% of the basic award came to £864.94. Accordingly, the Respondent was ordered to pay the Claimant the sum of £864.94 under this Judgment.

Employment Judge Nash

Dated: 21 February 2021