EMPLOYMENT TRIBUNALS

Claimant: **Miss J Crank**

Respondent: **Bangor & District Women's Aid LLP (in creditors voluntary liquidation)**

Heard at: **Llandudno (via CVP)** **On: 18 December 2020**

Before: **Employment Judge R Powell (sitting alone)**

Representation:
Claimant: In person
Respondent: Did not attend and was not represented

Detailed oral judgment having been given at the hearing, upon a written request I set out those reasons:

REASONS

1. This case concerns a claim presented on 13 February 2019 by Miss Crank in relation to her dismissal, without notice, by the Respondent on 16 November 2018.

2. The Respondent in these proceedings was actively engaged and represented until it went into voluntary liquidation in September of this year and for those reasons the Respondent has not produced any witness evidence nor is it represented or otherwise in attendance today.

3. The Claimant has produced a witness statement which she confirmed on oath and a bundle of some 628 pages. In the course of the Claimant's evidence, I asked her a considerable number of questions to improve my understanding of her case and to make sure that she has had an opportunity, across the 2.5 hours of the oral hearing, to express her position fully.

Dismissal

4. It is not in dispute between the parties that the Respondent dismissed the Claimant within the meaning of Section 95(1)(a) of the Employment Rights Act 1996.

A potentially fair reason

5. The burden lies upon the respondent to establish a potentially fair reason for dismissal.

6. The Claimant has not disputed the Respondent's pleaded case; that the principal reason for her dismissal was misconduct. That reason is consistent with the reason expressed in the contemporaneous correspondence and disciplinary process records and is consistent with the character of the disciplinary allegations. On the balance of probabilities, I find that the reason for dismissal the respondent's belief in the claimant's misconduct; a potentially fair reason for the purposes of section98(4) of the Employment Rights Act 1996.

A reasonable investigation and a reasonable belief

7. The Claimant makes substantial criticisms of the quality of the conclusions reached by the Respondent and some criticisms of the procedure adopted by the Respondent.

8. I now set out my findings of fact and conclusions in respect of these two issues. As the reasonableness of the sanction of dismissal is not a matter that it in dispute, my judgment on these aspects of the case will determine the case.

9. The Respondent was a limited company, but a charity by nature, which provided a refuge and wider support for women in the Bangor area. The Respondent was managed by the Claimant in her capacity as Service Manager; a role which she had held since 16 July 2015. She supervised a small team of staff who worked in the refuge providing support to the resident women and their children and the claimant performed some administrative support tasks associated with their roles.

10. Senior to the Claimant were a Board of Trustees. At all material times there were only two trustees; Miss Grant and Miss Stewart, a third who joined later, played no material part in either the events which led to the disciplinary allegations or in the process of investigating or determining those allegations. The Trustees were the line manager of the claimant.

11. The claimant had a good deal of independence and practical control of day to day matters and the Trustees depended on the claimant's honesty and integrity in her reports and recommendations to the Board

12. It is convenient at this point I set out that the Claimant faced a disciplinary investigation process which contained 4 allegations of gross misconduct and 4 further allegations of poor or negligent performance.

13. It is not said that those lesser allegations formed part of the decision to dismiss. That was expressly stated by the respondent (see page 548) and, in my Judgment, those 4 allegations were not the reason, nor part of the reason, for dismissal.

14. The four allegations of gross misconduct allegations are conveniently stated in paragraph 12 of the Grounds of Resistance.

15. The first was the failure to renew the respondent's insurance by the due date; 16 May 2018.

16. The second was the alleged failure to respond to a grant allocation document from Gwynedd County Council for a sum of £135,814.00 which should have been signed on headed paper following receipt of, as it said in the allegation, an email on 4 May and further reminder on 24 May.

17. The other two allegations relate to contracts, the first is that the Claimant "embarked on a new IT contract despite the fact the Respondent was only 2 years into a 5 year contract for similar services with another company and that that contract or arrangement had caused the Respondent to incur substantial additional costs and similarly that the Claimant had embarked on a new contract with a telephone company whilst the old mobile phone contract was not due to come to an end until November/December 2018 and again alleging that the Respondent was therefore put to additional costs.

18. The true character of those allegations deserves some brief attention.

19. The first two are assertions, in keeping with the terms of the Respondent's disciplinary procedure, of gross negligence.

20. The allegations relating to contracts entail assertions that the claimant had misled the Trustees by act or omission. They are the more serious allegations in the sense that the claimant was alleged to have abused the trust of her managers and entailed a substantial dispute of fact between the parties.

21. It is uncontentious that in March to early May of 2018 the Claimant engaged in the process of obtaining quotations for a new IT system for the Respondent; a system which involved data security, some new software, continued use of Microsoft 365, new hardware and an IT support provision for difficulties which might occur.

22. The Claimant has taken me to documents which show her interaction with employees of a company called OES. It is also common ground that at the time the claimant was seeking proposals from OES the respondent was contractually bound to its existing provider of IT.

23. In order to encourage the claimant to buy the OES services, OES invited the Claimant to send it an invoice so that the OES business might pay to the Respondent the costs it would incur on breaking its contract with its subsisting provider. I am also told by the Claimant, that she was aware of a break clause in the OES contract which she could have implemented within the first 31 days of the contract: 13 April and 14 May 2018.

24. It is also uncontentious that the Claimant entered into a contract for the provision of a new mobile phones whilst other contracts subsisted. It is the Claimant's case before me, albeit I did not find documentary evidence to confirm it, that a similar "payback" provision, (by that I mean that the new provider would compensate the Respondent for any fees it incurred by breaking or ending the other contract early) was available.

A reasonable procedure

25. I will first deal with the procedural issues on which Miss Crank has addressed me. The first is the degree to which Miss Crank was given reasonable notice of events. She has rightly pointed out to me that on 18 June 2018 she was given one days' notice of an investigation hearing which she declined to attend. Similarly, when she received notice of the intended disciplinary hearing on 30 July, she was effectively allowed 3 days' notice of that hearing.

26. Whilst I fully accept that those proposed periods of notice were inadequate and would have been unreasonable, I must also recognise that consequent to Miss Crank raising a grievance, the disciplinary process slowed; the investigation meeting for the disciplinary matter took place on 28 June, the disciplinary hearing took place on 6 November and the appeal hearing took place on 19 December 2018. The timeframes, although not as intended by the Respondent were more generous than would be typically expected in a case of this sort Although it is accidental nevertheless the actual response of the employer in terms of the dates on which the hearings took place was within the band of reasonable responses.

27. Elements of Ms Crank's grievance related to concerns about the conduct of the Trustees, some of which related to matters which were pertinent to the disciplinary offences alleged against her.

28. The grievance was investigated by an employee of an external business called Face2Face which I understand is associated with Peninsula Business Services who were, throughout this time, the Respondent's legal advisers.

29. The respondent instructed Face2Face to conduct the disciplinary investigations, the grievance hearing and the grievance appeal. In all, the five different Consultants were engaged to deal with different stages of the two procedures. Miss Crank states, and I accept, that it cannot really be said that the Face2Face business was entirely independent. However, the respondent made a consistent effort to distance the investigations from the influence of the Trustees.

30. The respondent was a small organisation with only two people senior to the claimant. The ACAS Code recognises that a small employer which has few tiers of management might find it necessary to allow an employee's Line Manager to deal with a disciplinary issue of his or her immediate subordinate and it might be reasonable for that manager to hear both the disciplinary and the appeal stages of a disciplinary allegation. Whilst I recognise the logic of Miss Crank's argument nevertheless, in my judgment the respondent's decision to instruct external Consultants at each of the disciplinary and grievance stages was a reasonable response in all the circumstances of this case.

31. Miss Crank's argues that Miss Stewart and Miss Grant the two Trustees, were not in any sense independent and indeed they had a conflict of interest. I note that two of the Face2Face reports find that there was no conflict of interest between the role of the Trustees in the disciplinary process and their part in matters which preceded the allegations. On this point I agree with Miss Crank, there was a clear conflict of interest. It is one thing for a Trustee to become aware of an allegation and then require it to be investigated and determined and it is another for the two Trustees in this case to be witnesses in relation to the two contractual dispute matters and to some extent, witnesses to some of the mitigation that Miss Crank put forward in relation to her health and anxiety, especially on the two contract matters, it is the Trustees that essentially assert that Miss Crank either failed to notify them or perhaps through that same failure misled them as to the character of the contracts. They certainly were in conflict.

32. On the evidence before me the character of the Trustee's decision making was their willingness to accept the conclusions of the grievance and disciplinary reports. The reports' recommendations are unambiguously worded and akin to decisions in waiting; simply requiring ratification by the Trustees. The external reports recommended that the grievance should not be upheld on the initial hearing or the appeal. The reports similarly concluded that the disciplinary allegations were all upheld to some degree. It is unsurprising that the Trustees accepted those recommendations.

33. Ms Crank was clearly able to demonstrate that the instruction of a different external body might have afforded her an independent assessment. That said, there is insufficient evidence to warrant a conclusion that the consultants were consciously biased and, by and in large, their conclusions were based on a foundation of evidence and expressed a tenable logic.

The reasonableness of the decisions

34. It is imperative that I point out and direct myself in law that I must decide this case by that which was known to the employer at the time of the decision or that which it ought to have known following a reasonable investigation.

35. It is also important that I remind myself that it is not my role to make my own decision as whether or not Miss Crank was in any way culpable; to do so would be an error of law. What I must do is look at the all the circumstances of this case and consider it in the context of Section 98(4) of the Employment Rights Act 1996.

36. I must then decide whether the decisions made by the Respondent were those which were open to a reasonable employer in all the circumstances of this case.

37. A reasonable employer is one whose response fall within a range which, as has been colloquially described as from "the firm but fair to the paternalistic". In essence the law recognises that, on any given set of facts, different reasonable employers might come to different decisions and decide different penalties. I must be wary of overstepping the mark and substituting my own view for that of any reasonable employer.

38. Miss Crank has taken me is an email trail between two of Miss Crank's junior employees dated 25 May 2018 wherein at the bottom of page 233 it was noted that the Zurich Insurance had not lapsed after 16 May. This contradicted the disciplinary report and was not disclosed to her in time for her submissions to the disciplinary hearing> However, it was disclosed

before the appeal hearing and it is a document upon which Miss Crank relied for her appeal.

39. It is also apparent from the outcome of the appeal hearing held by Miss Moore, that she reached a decision that the Respondent had suffered a substantial risk because it was uninsured for some days following the 16th and that consequently it not only faced a risk of meeting an insurance claim without the benefit of insurance protection but also it might have been fined by the Health and Safety Executive.

40. That finding is inexplicable in light of the Respondent's evidence contained in the email trial to which I have referred. I accept Miss Crank's submission and find that Ms Moore's decision with respect to the failure to arrange insurance was outwith the band of reasonable responses open to an employer.

41. Turning then to the allegation relating to the IT contract. I will first note that I have been taken to the notes of the March 2018 meeting between the Claimant and the Trustees and I have been taken to the note of 18 April minute of the Trustees meeting with the Claimant. I have also seen the email in which the Claimant asked one of the Trustees to print out the email (which had a few lines of text on it) and sign it. The essential characteristic of the text was an authority from the Trustees signed to warrant that the Claimant could enter into a contract with OES on the Respondents behalf.

42. The Claimant's case before me, and before the Respondent, was that she had discussed the contract proposed contract with OES during the two meetings and consequently the Trustees were aware of the contract and its character.

43. It was not evident, on a plain reading of the notes that there was discussion about the terms of the OES contract and whilst the Claimant has indicated to me that she believes there are emails which would evidence that the Trustees were on notice of the character of the contract those emails were not before the disciplinary or appeal panel and they were not referenced.

44. I have concluded that the Claimant's case before her employer was contained in her own evidence as set out in writing and the three documents noted above.

45. None of the three documents directly evidenced that the Trustees had been put on notice of (a) that Miss Crank intended to agree a new contract which was to be a substitute for the existing contract or (b) that the terms of the contract were going to be potentially quite expensive or (c) that it

was a contract which would provide services across the whole of the respondent's IT suite.

46. Whilst I am quite clear on the Claimant's case today and whilst I found the Claimant to be a very straightforward and thoughtful witness, I must determine whether the decision makers in November and December 2018 made a decision which was open to them.

47. In the absence of any documentation to confirm the Miss Crank's case, the respondent's decision necessarily centred on the Trustees' decision on what the claimant had communicated orally. They found that she had not communicated the facts set out in paragraph 45 above.

48. Taking all of the above into account it is hard for me to find fault with the conclusion that the Trustees were not so aware and that, when they signed the authority, they had not seen the contract and nor had the relevant points been expressed to them. Further, and the relevant points are not about the service OES would provide or the equipment that OES would provide but there was a subsisting contract that was to be cancelled or there was a subsisting contract where if it was terminated early that the new contractor would pay off any penalty that would be incurred.

49. I also note that by the date of the respondent's decision the contractual window for Miss Crank to cancel the OES contract was between 13 April and 14 May 2018 had passed and she neither cancelled that contract nor sent the invoice to OES so that the Respondent could be repaid for the damages arising from the breach of contract with the subsisting contract.

50. In my Judgment, on the evidence before the respondent, it was open to a reasonable employer to prefer the account of the Trustees in this respect.

51. It is a very similar situation with regard to the allegation in respect of the new mobile phone contracts. Even in the absence of the respondent giving evidence, the documents before me are very detailed (as a consequence of having 5 reports from Face2Face, each of which set out detailed analysis of the evidence)

52. Whilst the burden of proof on these issues is neutral, I find the documentary evidence and the respondent's contemporary written rationales persuasive. I have therefore reached the conclusion the respondent's decisions that the claimant had misled the respondent and acted in a grossly negligent manner with regard to the two contractual matters are ones which were open to a reasonable employer in all the circumstances of this case.

53. There was also a clear basis to conclude that, contrary to Miss Crank's account to the respondent, she had received the correspondence from Gwynedd County Council in respect to the intended grant to the respondent; the opened correspondence was found by an employee of the respondent during Ms Crank's sickness absence. Ms Crank offered mitigation in respect of this incident (which was also pertinent to a lesser degree to the contact claims).

54. The issue of the sanction was not argued before me. Nevertheless, as Miss Crank is a litigant in person, I address it. Ms Crank put a considerable degree of mitigation before the Respondents which I have read but I will not repeat it.

55. Ms Crank was in a position of trust, she had a good degree of independent authority and, as the Manager, she was expected to be competent to prioritise issue of importance such as confirming acceptance of essential funding from the council.

56. Whilst the respondent, at both the disciplinary and appeal hearings were aware of Miss Crank's personal circumstances and the weight of work upon her they were also aware that she assisted with "on call" work when junior staff were absent or unwilling to assist at the refuge. That was not a criticism, but it was reasonable for the employer to conclude that if she was able to undertake those tasks, she was able to sign a confirmation of acceptance of a £130,000.00 of essential funding and arrange for the letter to be posted.

57. The two matters relating to the contracts, and particularly the IT contract, required a modest effort on Ms Crank's part to have communicated the terms of the contract or for instance to have completed an invoice which would have mitigated the financial direction to the Respondent, a matter of perhaps 15 to 20 minutes and that was not done. On her own account (which the respondent did not accept) she had found time to do so, in a meeting with the Trustees.

58. It was a reasonable conclusion that Ms Crank had failed to communicate information which misled the Trustees and that she had sought in the disciplinary process to assert that she had informed them, when she had not.

59. I I must consider the band of reasonable responses open to the reasonable employer. Taking into account all the circumstances of this case that it was within the band to have dismissed the Claimant in those circumstances. Accordingly, I find that the sanction of dismissal was one which was reasonable for the purposes of Section 98(4) of the Employment Rights Act 1996.

60. For the above reasons, I must therefore dismiss this claim.

Employment Judge R Powell
Dated: 7th March 2021

JUDGMENT SENT TO THE PARTIES ON

14 March 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS