EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Spencer**

Respondent: **Mr A Beever and Mrs M Beever t/a Netherlands Boarding Kennels**

HELD AT: **Sheffield by CVP** **ON:** **27 April 2021**

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: In person
Respondent: Ms S Ashraf, Consultant (Peninsula Business Services Limited)

JUDGMENT having been sent to the parties on 10 May 2021 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. These reasons are given at the request of the claimant. The request was made by email on 17 May 2021.
2. **The complaint**

   In a claim presented on 28 September 2020 Mrs Spencer complained that she had been unfairly dismissed.
3. **The issues**

   The issues had originally been defined at a case management hearing conducted by Employment Judge Shulman on 1 December 2020. At the beginning of today's

hearing it was agreed with the parties that the following issues, broadly those set out in Judge Shulman's Order, were the issues that I had to determine:

3.1. When did the claimant's employment begin? The claimant contended this was 1 July 2011 whereas the respondents said it was 11 October 2012.

3.2. Can respondents show a potentially fair reason (conduct) for the dismissal of the claimant?

3.3. If so, was that actually fair? In particular:-

- Did the respondent genuinely believe that the claimant had committed gross misconduct?
- Did the respondent carry out a reasonable investigation?
- Did the respondent have reasonable grounds for its belief?
- Was the conduct reason a sham reason so that the real reason was the respondent's desire to avoid making a redundancy payment to the claimant?
- Was the decision to dismiss within the reasonable band of decisions open to a fair employer?

3.4. If the claimant was unfairly dismissed, had she contributed to that dismissal by her conduct and if so to what extent and how should that be reflected in terms of remedy?

4. **Evidence**

4.1. The claimant has given evidence by reference to a brief written statement. Unfortunately the claimant served that statement on the respondent very late, it appears the day before the hearing. The case management orders made by Employment Judge Shulman had required the parties to exchange witness statements no later than 2 March 2021. The absent and then late witness statement had prompted the respondent to apply for today's hearing to be adjourned. Once they received the witness statement they considered it to be inadequate. However the respondent did not pursue the application for adjournment at today's hearing and I took the view that it was a matter for the claimant as to what she put in her witness statement, although it was regrettable that this had been so delayed. The respondent's evidence was given by Mr and Mrs Beever.

5. **Documents**

5.1. I have had before me a bundle which runs to 91 pages.

6. **The facts**

6.1. On balance I conclude that the claimant's employment began on 1 July 2011 with a predecessor of Mr and Mrs Beever. The claimant told me that she had a contract of employment from the predecessor but it was not in the bundle. Conversely the claimant says that she did not receive a copy of the contract of employment which is within the bundle at pages 28 to 29. That contract is in fact a blank proforma other than that the claimant's name appears in it. It is unsigned and undated although significantly it refers to

previous employment with Netherlands Boarding Kennels Limited counting as part of a period of continuous employment. However when that employment began is another part of that document which has not been completed. In any event the respondents concede that they employed the claimant since at least 11 October 2012 and so clearly the claimant has sufficient length of service in order to bring the unfair dismissal complaint.

6.2. The claimant was employed as a kennel maid.

6.3. On 1 April 2020 the claimant was placed on furlough. There is a letter at page 42 in the bundle which confirms this.

6.4. On 3 July 2020 Mrs Beever held a meeting with the claimant during which the claimant was warned that she might have to be laid off. That was because the respondents could not continue to afford the 20% top up of wages to the claimant. The claimant was given the letter which appears at page 87. Whilst that letter states "the company must notify you that you are being laid off with your contract (sic)" a date has been inserted in long hand which is '31/7/20'. Accordingly although the letter is not very elegantly expressed, it seems to be giving the claimant warning that she will be laid off at the end of that month. The letter goes on to refer to payment of statutory guarantee pay and assures the claimant that she has not been dismissed.

6.5. On 5 July 2020 the claimant had a telephone conversation, which it seems she instigated, with a Lynda Wright. Ms Wright was a volunteer at the kennels and to a limited extent she may also have been a client of the respondents. Ms Wright subsequently, on 7 July 2020 contacted the respondents to inform them of various statements which the claimant had made during the course of that conversation. Subsequently and within the context of a disciplinary process, Ms Wright made a handwritten statement which appears at page 83 of the bundle and there is a typewritten copy at page 55. Ms Wright stated that the claimant had made derogatory comments about another volunteer. Because of the nature of the allegations which the claimant made we have referred to this young male volunteer as 'X' during the course of this hearing. The claimant described this individual as "a known druggie" and told Ms Wright that she could not understand how the respondents could leave X alone in charge of the dogs. Ms Wright also stated that the claimant had asked her to get some information about the kennels and to relay this back to her. Ms Wright also wrote: "she (the claimant) asked me to "watch this space", implying that something was about to happen that would be damaging to the owners of the kennels. She said she couldn't tell me but I would soon find out".

6.6. On 6 July 2020 the claimant telephoned a customer of the respondent, Linda Emmans. Ms Emmans also on 7 July 2020 reported the telephone conversation she had had with the claimant to the respondent. Ms Emmans also made two statements. One of those, in what appears to be a text message, appears at page 84 in the bundle. In that statement Ms Emmans reports that the claimant said that she understood that X was a heroin user; that the respondents paid him £30 daily and that X spent that money on drugs. Ms Emmans went on to say that the claimant told her that there were a lot of things that she could tell her about the respondents. Ms Emmans

recorded that her impression was that the claimant was angry and bitter and that Ms Emmans herself felt uncomfortable during the conversation. In the typewritten statement which appears at page 54 Ms Emmans described the claimant as saying "horrible things about Netherlands Boarding Kennels and X". That included saying that X spent the money he earned every day on buying drugs to feed his heroin addiction. The claimant had gone on to allege that X did not look after the dogs properly and she could not believe that the respondents left X in charge of the dogs whilst they went out delivering parcels, apparently that being a side line they had adopted during lockdown. Ms Emmans goes on to record that "She said she could tell me some really bad things about the kennels and the owners and said to 'watch this space' and that 'Karma's a bitch' and that in her words 'the shit is going to hit the fan'. And knew things (sic) that would ruin the kennels." She went on to say that the claimant was very angry and bitter throughout the conversation and clearly did not have a good word to say about the respondents or X. Ms Emmans concluded her statement by writing "I found her words very upsetting and poisonous".

6.7. On 7 July 2020 Mrs Beever telephoned the claimant to conduct an investigatory meeting with her. The claimant was told what had been reported by Ms Wright and Ms Emmans. The claimant did not dispute that she had made the statements.

6.8. On 12 July 2020 Mrs Beever wrote to the claimant (a copy of this letter is at page 44). It was an invitation to attend a disciplinary hearing on 15 July 2020. The claimant was notified that the purpose of that meeting was to discuss matters of concern whereby it was believed that the claimant had wilfully and maliciously contacted customers and disclosed sensitive business information as well as "speaking illy" (sic) about the business owners and a colleague. There followed a summary of what had been reported by Ms Wright and Ms Emmans. In addition there had been a complaint by a customer called Mrs D. The claimant had allegedly told Mrs D that she could catch Covid-19 from her dog with the result that that customer had left their dog with the respondents for longer than intended – some three months, incurring a cost she could not afford to pay. A further matter of concern was that the claimant had divulged to Ms Wright that another staff member was worried that he could not pay his bills. The letter went on to inform the claimant that if these allegations were substantiated they would be regarded as gross misconduct. The claimant was provided with copies of the statements made by Ms Wright and Ms Emmans and also a statement by Mrs D. The claimant was offered the right to be accompanied at the meeting by a fellow employee or a trade union official.

6.9. On 13 July 2020 the claimant sought a postponement of the disciplinary hearing because the date was unsuitable. The respondents agreed to rearrange the date to 21 July 2020.

6.10. The disciplinary hearing on 21 July was conducted by Mr Beever. Notes of the meeting are at pages 49 to 53. The claimant attended on her own. The claimant admitted telling Ms Wright that X was a druggie, although she added that Ms Wright was "lying and twisting my words." When the allegation was put to her as to what Ms Emmans had reported, the claimant did not appear to deny that she had said as reported and her recorded

comment is "we were wrong to leave X in charge … leaving a druggie in charge". With regard to Mrs D, Mr Beever explained that Mrs D suffered from mental health issues hence in particular the respondent's concern as to what the claimant had allegedly told her. Because Mrs D had not been able to afford to pay the full bill the respondents had been obliged to substantially reduce the bill. The claimant could not recall having a conversation with Mrs D. Mr Beever did not give a decision at the meeting and told the claimant that he would write to her.

6.11. On 22 July 2020 it was in fact Mrs Beever who wrote to the claimant. A copy of that letter is at pages 56 to 57. The letter informs the claimant that the respondent had decided that her conduct resulted in a fundamental breach of the contractual terms which irrevocably destroyed trust and confidence. The appropriate sanction for that was summary dismissal. Mrs Beever explained to me that although her husband had conducted the disciplinary hearing, the decision to dismiss the claimant was a joint one hence her at least signing the letter of dismissal. She maintained that it was in effect her husband's letter. The letter recorded that the claimant had suggested that Ms Wright had been lying and that Ms Emmans had conspired to get the claimant into trouble. However it was noted that the claimant had not been able to give a reason as to why either of those individuals should act in that way. The claimant had not shown any remorse for her actions. The respondent believed that the claimant had made what were described as defamatory comments. Although it is not recorded in the minutes to which we have referred, the letter says that the claimant when asked about her comments regarding X had "confirmed that "he is a thieving druggie" and that "I stand by what I said to Linda". With regard to the allegation in respect of Mrs D, the respondents had concluded that the claimant had given false information to her whether that was intentional or not. They believed that the claimant had shown a lack of empathy for Mrs D's situation and it was further alleged that the claimant's comments had caused Mrs D to have to seek medical treatment.

With regard to the reports from Ms Wright and Ms Emmans, the respondents considered the claimant's explanations to be unsatisfactory and they could not accept that two individual witnesses "could come out with exactly the same words and phrasing on two separate occasions". In any event the claimant had repeated her allegations about X (being a 'thieving druggie') during the course of the disciplinary hearing. The letter expressed the concern that if that could be said to them "how many more people have you said it to". The dismissal letter concluded by informing the claimant that she had a right to appeal.

6.12. In a letter dated 25 July 2020 (pages 58 to 60) the claimant lodged her appeal against dismissal. She said that what she had told Ms Wright and Ms Emmans had been taken out of context. Even in the appeal letter the claimant referred to it being common knowledge that X used his £30 a day to fuel his drug habit. The claimant said that what Ms Wright had reported to them could have been because Ms Wright wanted to please the respondents and so she may have "taken things out of all proportion when you have asked her about the situation". With regard to what had been said to Ms Emmans the claimant alleged that she had only talked about X

because Ms Emmans had brought it up first. The claimant felt that the disciplinary action had been too severe.

6.13. Because there was no one within the respondent who could now hear an appeal against the dismissal the respondents engaged a subsidiary of Peninsula (Face2Face) and it was their Ms Kubok who conducted the appeal hearing on 6 August 2020. At the appeal the claimant was accompanied by Mr S Clark of Unite. The minutes of that meeting are at pages 72 to 82. The claimant repeated her assertion that what Ms Wright had reported had been "lied or twisted". The claimant reiterated her view that everybody knew that X took drugs and that he had been caught stealing from the respondent. The claimant said that she believed that she was going to be made redundant and that she was not happy because she believed that X was being kept on to do her job.

6.14. The claimant's view was that she could not see that she'd said anything wrong. She had only spoken her mind and spoken the truth. When the claimant was asked why Ms Emmans would make a false statement the claimant said that she had not made a false statement, but went on to qualify that by saying *"Well the only thing that was false was its just not how I've said it. I've admitted I did say X should not be working there and he is taking drugs. He does use his money for drugs at the end of the day so I'm not saying I didn't say that. But as for this "shit will hit the fan" and all that, I never said anything like that. But as for knowing bad things. If I said I know bad things, I'm explaining the bad things. It's him being there. I've not said anything about the owners of the kennels, only what they are doing is wrong and it will come out in the end. He shouldn't be down there*". (See page 78). The claimant went on to complain that the respondents should simply have paid her redundancy and notice pay and let her go that way instead of doing what they had done. She though it was all because they didn't want to pay money out. The claimant was asked whether she believed it was appropriate for her to speak about X as she had done with Ms Emmans. The claimant said that it was not and she was sorry. Maybe she shouldn't have said that "but I was annoyed with her saying what a fantastic job he (X) was doing down there … I just wanted to explain that he shouldn't be there and wanted her to understand. But I didn't see her as a customer". (See page 80).

6.15. Mr Clark is recorded as saying "Unfortunately there has been conversations. Beverley does admit to the conversations that have taken place, although she believes these conversations have been taken out of context. In terms of her comments regarding X, I think we have to understand that Beverley doesn't think she is saying anything wrong here because he has actually paid X herself under the instruction of the owner and she's told you other people have done that". He went on to suggest that one outcome of the appeal could have been for the decision to dismiss being rescinded but with a view to looking at redundancy for the claimant.

6.16. Ms Kubok subsequently prepared a report and a copy is at pages 63 to 71. In the recommendations which appear at the end of that report Ms Kubok said that having given full and thorough consideration to the information which had been presented at the appeal she recommended that the appeal be dismissed in its entirety and the original sanction of dismissal to remain.

It was however a matter for the respondent to decide whether they wished to accept that recommendation.

6.17. In the event the respondent did wish to adopt that recommendation and so it was that on or about 17 August 2020 Mr Beever wrote to the claimant. He enclosed a copy of Ms Kubok's report and informed the claimant that the decision was to uphold the initial decision to dismiss. A copy of that letter is at page 86.

7. The parties' closing submissions

7.1. Claimant's submissions

The claimant addressed me briefly. The claimant reiterated an allegation in her ET1 - that when she was furloughed she was asked to come in to the kennels from time to time so that the respondents could go out delivering parcels. I should add that the claimant has not pursued her case on the basis that this alleged situation had anything to do with her dismissal. X had then been brought in. Ms Wright had told her how many days X was there and had apparently she said had told her that it should be the claimant rather than X being at work. That had made the claimant feel upset.

7.2. Respondent's submissions

Ms Ashraf reminded me of the test in **British Home Stores v Burchell** – that is that the employer must have a reasonable belief held on genuine grounds after a reasonable investigation that there has been misconduct. The respondent was a small family business with only two employees. The respondents had received complaints about the claimant's comments to Ms Wright, Ms Emmans and Mrs D. The claimant had made admissions at the disciplinary hearing. There had then been an appeal before an impartial consultant and the claimant had been represented by her union. The claimant had not been dismissed to avoid the need to pay redundancy. It was not certain that that would ever have happened – redundancy. There had been a fair reason to dismiss. The respondent had lost trust and confidence in the claimant. There could have been further comments of which the respondent was unaware made to other customers.

8. The Tribunal's conclusions

8.1. Can the respondent show a potentially fair reason to dismiss?

The Employment Rights Act 1996 sets out in section 98 the potentially fair reasons for dismissal and one of those is a reason which relates to the conduct of the employee. As that is what the respondent is putting forward as the reason for dismissal, I find that they have shown that potentially fair reason.

8.2. Was that reason actually fair?

The starting point in this assessment is the test of fairness which is also contained within section 98 in these terms:

"Where the employer has (*shown the potentially fair reason to dismiss*) 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".

In a conduct case the leading authority of **British Home Stores Ltd v Burchell** [1980] ICR 303 explains that it is necessary to consider whether the employer believed the employee to be guilty of misconduct; that the employer had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

8.3. Genuine belief

I find that this did exist in the respondents' minds. Both Ms Wright and Ms Emmans had, independently and unsolicited, reported back to the respondents what the claimant had said to them. In relation to the Ms D matter those matters had come to light when the respondents had conversations with Mrs D about arrangements for paying her bill, whereupon it was realised why Mrs D had kept her dog at the kennels for such a long period of time.

8.4. Investigation

I find that the respondents carried out a reasonable investigation. The claimant was approached and interviewed over the telephone and further enquiries were made of her during the disciplinary hearing and subsequently at the appeal hearing. Two statements had been taken from both Ms Wright and Ms Emmans and Mrs D had also been interviewed although that was informal and I have not seen a statement. It must also be borne in mind that the degree of investigation that was required was limited because the claimant essentially did not deny that she had said the things which Ms Wright and Ms Emmans had reported.

8.5. Reasonable grounds for belief

I find that as a result of the investigations referred to above and the voluntary statements from Ms Wright and Ms Emmans the respondents did have reasonable grounds to believe that the claimant had made potentially defamatory comments about X; had made sinister, albeit vague, aspersions about the way in which the respondents ran their business and had also made misleading and scaremongering comments to a vulnerable customer of the respondents.

8.6. Was the stated reason for dismissal a sham?

Here the claimant contends that the respondents intended to make the claimant redundant but then decided to in effect fabricate a conduct reason so that the claimant could be dismissed without the expense of paying a statutory redundancy amount. I find that this is at best nothing more than the claimant's theory. On the basis of what had happened and been notified to the claimant at the beginning of July, at worst the claimant might have been laid off with statutory guarantee payments at the end of that month. The respondents had not mentioned redundancy. However, over and above this, the claimant has not been able to explain how the respondents allegedly manufactured or fabricated the conduct reason. They had not solicited statements from Ms Wright and Ms Emmans. As noted above those two individuals had independently and voluntarily contacted the respondents.

The claimant at the time initially sought to contend that Ms Wright and Ms Emmans had lied or twisted her words, although subsequently the claimant essentially admitted that she had made those comments to Ms Wright and Ms Emmans. That is very clear in the parts of the appeal minutes to which I have referred above and to which the claimant was taken during the course of cross-examination. Indeed even in the claimant's witness statement for this hearing she acknowledges that she does not dispute making those statements and goes so far as to stand by them as being true.

8.7. Was the decision to dismiss within the reasonable band?

Here I need to consider whether the decision to dismiss in this case fell within the range of reasonable responses of a reasonable employer in the circumstances as I have found them to be. I am satisfied that the respondents, as proprietors of a business which relied upon their personal reputation and knowledge and skills, were entitled to be very concerned once they learnt that one of their employees was making comments of the type which the claimant admitted, to third parties who were respectively a customer and a volunteer. There was a legitimate concern also that the claimant may have spoken in similar terms to other third parties and that she was threatening to make other "revelations". I consider that a reasonable employer would have concluded that they could no longer have trust and confidence in an employee who was prepared to make reckless comments causing reputational damage to the respondent. If the claimant did have genuine concerns, for instance about X and his role in the business, there were other legitimate avenues which she could have pursued. Unfortunately it appears that her anger at what she saw as her replacement by X led her to pursue her concerns through the wrong channel. The claimant was at least reckless in making very serious allegations to people who she believed to be friends but who in the event in each case felt constrained to report what they regarded as disturbing comments to the respondent.

Accordingly for all these reasons I conclude that this was a fair dismissal and so the complaint must be dismissed.

Employment Judge Little

Date: 28th May 2021