



# EMPLOYMENT TRIBUNALS

## COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been not objected to by the parties. The form of remote hearing was V (fully – all remote). A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of a bundle of 87 pages which included witness statements produced on behalf of the Respondent and a witness statement from the Claimant.

### Claimant

### Respondent

Mr S Fox

v

Bellstar Management Ltd

**Heard at:** Watford (CVP)

**On:** 14 April 2021

**Before:** Employment Judge Smeaton

### Appearances:

**For the Claimant:** In person

**For the Respondent:** In person

## JUDGMENT

1. The correct name of the Respondent is Bellstar Management Ltd.
2. The claim of unfair dismissal succeeds by way of being procedurally unfair but the Tribunal having concluded, applying Polkey v A E Dayton Services Limited [1988] ICR 142 HL, that had a fair process been followed the outcome would have been the same, it follows that no award of compensation will be made.
3. The Claimant contributed to his dismissal to the extent of 100% and the basic award is reduced to nil accordingly.

## REASONS

### Introduction

1. The Claimant, Mr Fox, was employed by the Respondent from 19 February 2017. He was (and remains) one of two director/shareholders of the

company. The other director/shareholder is Mr Miller. Both individuals hold equal shares. Neither has a majority.

2. The Respondent, Bellstar Management Ltd, owns a number of tenanted properties. One of those properties is a House in Multiple Occupation (“HMO”) referred to below as “105 London Road”.
3. At a preliminary hearing on 3 July 2020, Employment Judge Postle found that Mr Fox was an employee of the Respondent for the period 19 February 2017 to 27 September 2019. I take that to be a finding that he was employed for *at least* that period. Employment Judge Postle was not asked to consider the question of whether the Claimant was dismissed or when. The preliminary hearing was listed to consider the issue of whether the Claimant was an employee (and, if so, whether the employment contract was tainted by fraud/illegality).
4. By letter dated 27 September 2019 from Mr Miller on behalf of the Respondent, the Claimant was purportedly dismissed summarily for gross misconduct. At the date of his dismissal he earned £123.15 (gross and net) per week.
5. By a claim form dated 25 November 2019, the Claimant brought a claim against the Respondent for (ordinary) unfair dismissal (s.94(1) Employment Rights Act 1996 (“ERA 1996”). The claim was denied by the Respondent. The ET3 was presented by Mr Miller on behalf of the Respondent.
6. The claim was brought against ‘Kevin Miller Bellstar Management Ltd’. Both parties agreed before me today that the correct name of the Respondent is Bellstar Management Ltd. The Tribunal record will be amended accordingly.

#### The hearing

7. The final hearing took place via CVP over one day during which I heard evidence from Mr Fox and Mr Miller. I was provided with a hearing bundle running to 87 pages. Witness statements had been prepared by both Mr Fox and Mr Miller in advance of the preliminary hearing. No further witness statements had been produced by them to address the substantive issues.
8. Further witness statements had been produced on behalf of the Respondent from tenants at 105 London Road and from Ms Shani Sharpe, the Respondent’s House Manager. None of these witnesses attended the hearing to give evidence.
9. Both parties appeared unrepresented. I did my best to ensure a fair hearing and a level playing field between the parties by asking such questions of Mr Fox and Mr Miller as I considered pertinent to determining the issues I had to decide. I explained to both parties that I would ask more questions than I might ordinarily expect to do if they were represented and/or had produced witness statements addressing the substantive issues in the claim. I took care to ask open questions and not to cross-examine either witness.

Mr Miller's authority to act on behalf of the Respondent in these proceedings

10. By email dated 8 August 2020, Mr Miller wrote to the Tribunal requesting a stay of the proceedings on the basis that he was unable properly to comply with the case management orders because he did not have the Respondent's authority to act on its behalf. As set out above, Mr Miller and Mr Fox are equal shareholders and directors. They are the only members of the board of directors ("the Board"). They are currently in dispute and the Board is, accordingly, in deadlock.
11. The application was refused by the Tribunal on 11 October 2020 on the basis that the parties had time to mediate prior to the final hearing (which was at that point listed for January 2021).
12. At the outset of the hearing I raised this issue with the parties. It appeared to me, from the notes of the preliminary hearing in July 2020, that the matter had not yet been resolved. It also appeared to me to be a matter of significance going to my ability to proceed to hear the case. Mr Miller's position is difficult. Technically, he can only advance a defence to the claim on behalf of the Respondent with Mr Fox's agreement. He also requires Mr Fox's agreement to call himself as a witness.
13. I explained the difficulties as I understood them to the parties. Mr Miller agreed with my analysis (above). Mr Fox's response suggested to me that he had not given the matter much thought. I suggested to the parties that the most practical way forward, allowing this hearing to proceed and the claim to be resolved, would be for Mr Fox to agree that Mr Miller could act as the company's representative for the purposes of these proceedings and give evidence on the Respondent's behalf. The parties both agreed with that suggestion and accordingly I felt able to proceed with the hearing and to hear evidence and submissions from Mr Miller on behalf of the Respondent.

List of issues

14. I confirmed the list of issues with the parties as follows:
  - 14.1 Was Mr Fox dismissed. In answering this, I must consider whether Mr Miller had authority (actual or apparent/ostensible) to dismiss Mr Fox
  - 14.2 Was Mr Fox dismissed for a potentially fair reason. The Respondent relies on the potentially fair reason of misconduct
  - 14.3 Was the dismissal fair. In answering this question, I must consider the following:
    - 14.3.1 Did Mr Miller have a genuine belief that Mr Fox was guilty of misconduct
    - 14.3.2 Was that belief based on reasonable grounds following a reasonable investigation
    - 14.3.3 Was the process fair
    - 14.3.4 Was dismissal within the range of reasonable responses open to the Respondent

- 14.4 If the dismissal was procedurally unfair, would Mr Fox have been fairly dismissed had a fair procedure been followed and, if so, what is the appropriate reduction to any award of compensation
- 14.5 If Mr Fox was unfairly dismissed, to what extent, if any, did he cause or contribute to his dismissal
- 14.6 Should there be any adjustments to any award of compensation in relation to failures to follow the ACAS code of practice.

The law

15. The law relating to unfair dismissal is contained in s. 98 ERA 1996. In order to show that a dismissal was fair, the Respondent must prove that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996). Misconduct is a potentially fair reason (s.98(2)(b) ERA 1996). If I am satisfied that Mr Fox was in fact dismissed and was dismissed for misconduct, I must then turn to consider the question of fairness, by reference to the matters set out in s.98(4) ERA 1996.
16. In considering the claim of alleged misconduct, I must ask myself a series of questions as set out in British Home Stores v Burchell [1980] ICR 303, EAT:
- (a) was there a genuine belief that Mr Fox was guilty of the misconduct as alleged;
  - (b) if so, was that a sustainable belief on the evidence available;
  - (c) was that belief based on a reasonable investigation.
17. Finally, I must consider whether summary dismissal was within the range of reasonable responses open to the Respondent.
18. In reaching my decision, I must not put myself in the position of the employer and consider how I would have responded to the allegations of misconduct. It is not open to me to substitute my own decision for that of the Respondent. That means that, even if I find that I would have reached a different decision, it will not necessarily mean that the dismissal was unfair. The dismissal will be unfair if I find that there was no genuine belief in the misconduct, or that the belief was not a reasonable one based on a reasonable investigation, or that summary dismissal fell outside of the range of reasonable responses open to the Respondent.
19. The dismissal may, additionally, be unfair if there has been a breach of procedure which I consider sufficient to render the decision to dismiss unreasonable. In considering this question, I must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If there is a defect sufficient to render dismissal unfair, I must then, pursuant to the case of Polkey v A E Dayton Services Ltd [1998] ICT 142 determine whether and, if so, to what degree of likelihood, Mr Fox would still have been dismissed had a proper procedure been followed. This is a matter relevant to remedy.
20. If I conclude that the Claimant has, by culpable or blameworthy conduct, caused or contributed to his dismissal, I must reduce the compensatory award by such amount as I consider just and equitable (section 123(6) ERA

1996). I may also reduce the basic award if it is just and equitable to do so (section 122(2) ERA 1996).

21. Having heard the evidence and closing submissions from both parties, I made the following findings of fact.

Findings of fact

22. Mr Fox and Mr Miller were friends until mid-2018 when their relationship deteriorated. In late-2018, Mr Miller was diagnosed with cancer. He underwent treatment in early 2019 and was effectively 'out of action' for three months.
23. Prior to this period, the process for collecting rent (that which was paid in cash) from the tenants at 105 London Road was as follows: Ms Sharpe, an employee of the Respondent, would collect the rent in cash and place it in a safe at the property. She would make a written record of the amount collected against each tenant's name. Mr Fox would then collect the rent and pay it into the company's bank account. This process was described by Ms Sharpe in her witness statement and was not challenged by either party.
24. During the period that Mr Miller was undergoing treatment for cancer, that process changed. Mr Fox began to collect the rent himself from the tenants. Although a written record of the amount collected against each tenant's name was still completed, the money was not all paid into the company's bank account. There is no dispute between the parties that the process did change in this way.
25. The parties do not agree, however, when the change occurred, the reason for it and whether any money was subsequently withheld by Mr Fox.
26. On this issue, and generally, I prefer the evidence of Mr Miller.
27. Mr Miller's evidence was that the change took place in or around February 2019, whilst he was undergoing treatment. That evidence was supported by a witness statement from Ms Sharpe. Ms Sharpe did not attend to give evidence and accordingly, I am not able to afford her statement as much weight as I may have been able to do had Mr Fox had the opportunity to cross-examine her. Nevertheless, I accept the evidence that is in her statement and that given by Mr Miller, for the following reasons:

27.1 Mr Miller's evidence on this point was clear and compelling. He denied any agreement between himself and Mr Fox that Mr Fox would take over the rent collection and, to the contrary, maintained that he and Mr Fox were not properly communicating by that point;

27.2 By contrast, Mr Fox's evidence on the issue was confused and contradictory. He confirmed at the outset of his evidence that Ms Sharpe's evidence as to the old and new system of rent collection and banking, and the point at which the system changed, was correct although he maintained that the reason he took over collecting the rent in early 2019 was because Ms Sharpe was taking informal 'payday loans' from the company and that he and Mr Fox had agreed that he would take over as

a result. Mr Miller clearly denied such an agreement. Mr Fox subsequently maintained that in fact he had taken over rent collection at some point in 2018, although he was unable to say when. He was very vague on this point. His evidence was inconsistent. It was clear, upon hearing evidence from both witnesses, that Mr Miller was more genuine and believable.

28. Having discovered that Mr Fox was collecting rent, Mr Miller became concerned that money was being withheld by Fox. I was shown a spreadsheet showing payments from the tenants of 105 London Road between February 2019 and August 2019. That spreadsheet shows that Mr Fox collected £428 per week between February 2019 and May 2019, £328 per week between May 2019 and the end of July 2019, £200 per week at the end of July/beginning of August and £100 for the remaining two weeks. Mr Fox did not challenge those figures and I am satisfied they are accurate.
29. Despite collecting those amounts, Mr Fox paid only £100 each week into the company's bank accounts between February 2019 and May 2019. Mr Fox's explanation for this was confused. He maintained that some of it was put into the bank account but some was given directly to Mr Miller "*because he was obsessed with doing everything himself*", that he didn't get payments regularly because some tenants were late and that he would just pay whatever he had on him into the account when he went into town. I do not accept that explanation. It does not explain why the same sum of £100 was paid into the bank account each week. Further, the company had financial liabilities during this time that it was struggling to meet. Mr Fox has not explained adequately or at all why money, that he accepts he held, was not paid into the company's bank account so that it could be used to meet those liabilities. It is not in dispute that at one point Mr Fox was holding sums in the region of £9,000, a not insignificant sum for a company with liabilities including nearly £6,000 of outstanding corporation tax.
30. By letter dated 21 May 2019, Mr Fox confirmed that he was holding company funds at home but maintained that they were kept in a company safe and under the control of the Respondent. No explanation is given for why that cash was not simply deposited in the company's bank account.
31. I was shown one email from July 2019 in which Mr Miller expressly asked Mr Fox to bank all rent collected. Mr Fox's response failed to engage with that request and the money was not subsequently banked.
32. Mr Fox stopped answering Mr Miller's calls after 18 July 2019. Mr Miller, understandably, became increasingly concerned about the company funds being held by Mr Fox and Mr Fox's refusal to engage with the issue. It was clear that the funds had been collected and also clear that they had not been paid into the company's bank account, despite requests from Mr Miller. Mr Miller maintains, and I accept, that he subsequently made numerous attempts to communicate with Mr Fox about the missing rent. I also accept that he attempted to intercept Mr Fox at 105 London Road on a number of occasions but was unable to do so.
33. On 2 September 2019, Mr Fox caused the Respondent to issue a Notice of General Meeting proposing a resolution that Mr Miller be removed from his

office as Director of the Company. The meeting took place on 27 September 2019 at the offices of Mr Fox's personal accountant. Mr Fox's brother was also in attendance. Neither the accountant nor Mr Fox's brother had any involvement in the company and it was not clear to me why it was necessary for them to attend.

34. As Mr Fox and Mr Miller are the only shareholders/directors, and as Mr Miller objected to his removal as director, the motion was not passed.
35. At the same meeting, Mr Miller asked that it be recorded that Mr Fox was holding company money at his home address and had failed to answer questions about that money thus exposing the company to accusations of false accounting and tax fraud. He handed Mr Fox a letter terminating his employment with the Respondent with immediate effect on grounds of gross misconduct.
36. By letter dated 7 October 2019, Mr Fox (via an external HR representative) raised a formal grievance objecting to his dismissal and alleging various breaches of the ACAS Code of Practice. Mr Miller did not respond to that grievance.

### Conclusions

37. A decision to terminate an employee's employment can only be made by someone with actual or apparent/ostensible authority to do so, i.e. the individual must either have the authority or be held out as having the authority by someone capable of binding the company (Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480).
38. It was clear to me that neither Mr Fox nor Mr Miller had considered the legal position as to authority in any detail or at all. Neither had considered the Respondent's articles of association in this respect.
39. There was no express agreement from the Board to the effect that employment matters generally were delegated to Mr Miller. There is nothing in the articles of association which give Mr Miller, as a director of the company, authority to dismiss employees without authorisation of the Board. Unsurprisingly, there was no resolution by the Board giving Mr Miller the specific authority to dismiss Mr Fox. I find that Mr Miller did not have actual authority to carry out the dismissal.
40. In order to establish apparent or ostensible authority, the Board must, by words or conduct, have represented or permitted it to be represented that Mr Miller had authority to act on its behalf in the relevant way. It was clear to me that both Mr Miller and Mr Fox generally acted on behalf of the company and made decisions about the day-to-day operations of the company without recourse to the Board. The most relevant example here is the way in which the company's only other employee, Ms Sharpe, was dealt with. Mr Miller's evidence, which was not challenged, was that he would generally deal with Ms Sharpe, addressing any issues raised by her during her employment. Mr Fox's evidence was that he himself would have had authority to dismiss Ms Sharpe without recourse to the Board. Although he considers that he would have discussed a dismissal of Ms Sharpe with Mr Miller first, he did not

consider that it was necessary for him to do so as a matter of law.

41. Although it is not enough to establish apparent or ostensible authority that the Board mistakenly but genuinely believed Mr Miller to have the authority to dismiss Mr Fox, that genuine belief is indicative that that apparent or ostensible authority existed. Both Mr Miller and Mr Fox believed that Mr Miller had authority to carry out that dismissal. Mr Miller believed simply that, as a director of the company, he had the authority to bring to an end any contract of employment with the company. He further considered that, as a director, he had a responsibility to stop money being taken from the business. Mr Fox did not, at the meeting on 27 September 2019 or thereafter, suggest that the dismissal was of no effect because Mr Miller had no authority to dismiss him.
42. I find that the Board permitted both Mr Fox and Mr Miller to act in the management or conduct of the company's business on all day-to-day matters, including managing and making decisions in respect of Ms Sharpe (the company's only other employee). The Board represented to all those dealing with either director that they had authority to make decisions about the company's management on its behalf, including engaging and dismissing employees.
43. Accordingly, I find that Mr Miller had apparent or ostensible authority to dismiss Mr Fox and that Mr Fox was in fact dismissed with immediate effect on 27 September 2019.
44. I accept that the reason for dismissal was misconduct, namely withholding company funds. I further accept that, at the time of dismissal, Mr Miller genuinely believed that Mr Fox was guilty of the theft of those funds. He was holding company funds and seemingly refusing, without explanation, to pay those funds into the company's bank account.
45. I also accept that that genuine belief was based on a reasonable investigation. Mr Fox had accepted that he had the funds in his possession. He had, despite requests and despite having access to the bank account, not banked those funds. He had provided no explanation for his failure to do so. That failure was particularly significant to Mr Miller given that the company needed money for repair bills and had an outstanding tax bill. Mr Miller had attempted to telephone and meet Mr Fox in person and believed, reasonably, that Mr Fox was trying to avoid him.
46. In the circumstances, there was no need to carry out an extensive investigation. The facts, and the failure by Mr Fox to explain himself despite having the opportunity to do so, spoke for themselves.
47. Without doubt, summary dismissal was within the range of reasonable responses open to the Respondent. The company had financial liabilities that it was struggling to meet. Mr Fox was holding onto company money, without explanation, that could have been used to meet those liabilities. Theft is a very serious breach of trust.
48. It is clear, however, that the Respondent did not follow a fair procedure in dismissing Mr Fox. He was not informed of the allegations in writing prior to dismissal, he was not given a formal opportunity to answer the allegations,



he was not invited to a disciplinary meeting at which he could have been accompanied. He was not given a right of appeal against his dismissal. Those failing are sufficient to render the dismissal procedurally unfair overall.

49. In my view, however, it is also clear that if a fair procedure had been followed the Claimant could have been fairly dismissed and in fact would inevitably have been so. Mr Miller had been attempting to communicate with Mr Fox for some time prior to handing him the dismissal letter on 27 September 2019 and, accordingly, I find that had a fair procedure been followed he would have been dismissed on that date. Mr Fox has provided no adequate explanation for his actions and has put forward no evidence that would lead me to consider that there was any chance of Mr Miller reaching a different decision had a fair process been followed. It is just and equitable in the circumstances to make no compensatory award applying Polkey.
50. In addition, and for the same reasons, I am satisfied that the Claimant has wholly caused his dismissal such that, had I not already reduced the compensatory award to nil, it would have been just and equitable to reduce it by 100%. Without good reason or explanation, the Claimant took company money from tenants, held on to it, and failed to pay it into the company's bank account at a time when the company needed funds to meet its liabilities. That conduct is plainly blameworthy and caused his dismissal. For the same reasons, I find that it is just and equitable to reduce the basic award by the same amount.
51. In summary, and answering the list of issues as set out above, my findings are as follows:
  - (a) Mr Miller had apparent or ostensible authority to dismiss the Claimant so that his dismissal was effective
  - (b) The Claimant was dismissed for a potentially fair reason, namely misconduct
  - (c) The Respondent had a genuine belief in the Claimant's misconduct
  - (d) That belief was based on reasonable grounds following a reasonable investigation
  - (e) Summary dismissal was within the range of reasonable responses open to the Respondent
  - (f) The Respondent did not follow a fair process in reaching its decision
  - (g) Had the Respondent followed a fair process, the Claimant would have been fairly dismissed on the same date
  - (h) In any event, the Claimant wholly caused his dismissal such that any award of compensation should be reduced by 100%. For the same reasons, it is just and equitable to reduce the basic award by 100%.
52. For all those reasons, whilst I have made a finding that the Claimant's claim succeeds by way of being procedurally unfair, I make no financial award.
53. As I have made no financial award, I have not made any adjustment for failure to follow the ACAS Code of Practice.

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Employment Judge Smeaton

Date: 9 May 2021

Judgment sent to the parties on

9 June 2021

S. Bhudia

For the Tribunal office