EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Patricia Cockerill	v	Coffeelink Limited

Heard at: Cambridge (via CVP) **On:** 21 and 22 April 2021

Before: Employment Judge Tynan

Appearances:
For the Claimant: In person
For the Respondent: Mr A El-Mahraoui, Director

JUDGMENT having been sent to the parties on 2 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

The Law

1. The right of an employee not to be unfairly dismissed by their employer is conferred by section 94 of the Employment Rights Act 1996 ("ERA"). Ordinarily, an employee has to be continuously employed for two years at the date of their dismissal in order to qualify for that protection. The Claimant commenced her employment in 2013 and it was not in dispute that she had sufficient continuous length of service to bring a complaint of unfair dismissal. Section 98 ERA details how a Tribunal should determine the question of whether an employee's dismissal is fair or unfair.

2. It is for an employer to satisfy the Tribunal that there was a potentially fair reason for dismissing an employee who brings an unfair dismissal complaint. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (section 98(2) ERA). Misconduct is relied upon here by the Respondent.

3. If an employer establishes a potentially fair reason for dismissing an employee, the Tribunal must go on to consider whether dismissal was fair or unfair. That 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 the reason as sufficient reason for dismissing the employee. That question is determined in accordance with equity and the substantial merits of the case (section 98(4) ERA). Neither party carries the burden of proof at this

second stage. Tribunals focus in particular upon the procedure that has been followed by an employer before deciding to dismiss an employee.

4. There have been many reported decisions of the Courts and Tribunals over the years dealing with unfair dismissal. The most often cited decision is that in the case of British Home Stores Limited v Burchell [1978] ICR 303. It confirms the approach that the Employment Tribunals should take in cases where an employee has been dismissed for alleged misconduct. The Tribunal must be satisfied that the employer genuinely believed, on the balance of probabilities, that the employee was guilty of misconduct. The employer must have reasonable grounds for that belief following a reasonable enquiry or investigation. The conclusion must be one that a reasonable employer could have reached in the circumstances on the evidence. Finally, even where the employer genuinely and reasonably concludes that an employee is guilty of misconduct, dismissal must fall within the band of reasonable responses; the employer must have acted reasonably in dismissing the employee. If an employee was late for work by one or two minutes it would very likely be outside the band of reasonable responses for the employer to dismiss the employee in that situation as it would represent a disproportionate penalty. However, Tribunals must be careful not to substitute their own views for those of the employer, as long as the employer has acted reasonably.

5. That is the Burchell test that I have kept in mind in coming to a Judgment in this case.

6. I also note the provisions of section 207 of the Trade Union and Labour Relations Act 1992 regarding the status of any Codes of Practice issued by Acas. Section 207(2) provides that any Code,

> *"…shall be admissible in evidence and any provision of a code which appears to the Tribunal to be relevant to any question arising in the proceedings, shall be taken into account in determining that question."*

In determining the Claimant's complaint of unfair dismissal, I have regard to the Acas Code of Practice on Disciplinary and Grievance Procedures.

7. I shall return in due course to the issue of contributory conduct. However, I note the provisions of sections 122 and s.123 ERA.

8. Section 122(2) ERA provides:

> 122. Basic award: reductions
>
> (1) …
> (2) Where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall reduce that amount accordingly.

9. Section 123(6) ERA provides:

> 123. Compensatory Award
>
> …
>
> (6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

10. Finally, I briefly mention the case of Polkey -v- AE Dayton Services Limited [1987] IRLR 503. When assessing compensation in cases where an employee was unfairly dismissed, Tribunals should have regard to what would or might have happened but for any procedural unfairness and to adjust any compensation accordingly. In other words, would or might the Claimant have been dismissed. However, I have to be mindful not to penalise a Claimant twice for the same blameworthy conduct. In other words I should consider the impact of any Polkey reduction before making any further potential reduction under either section 122 or 123 ERA.

11. I have summarised the Law at the outset of this Judgment because employers cannot plead ignorance of the Law in order to avoid a finding of unfairness; the Law is unforgiving in that respect. Whilst I can and do make allowance for the Respondent's lack of legal knowledge and dedicated HR resource, the Acas Code of Practice (for example) applies to all employers. It is something that the Respondent would be well advised to take away from these proceedings, namely that in its dealings with its staff, whether they have raised concerns by way of a grievance or the Respondent has concerns that need to be dealt with as a disciplinary issue, they will need to be dealt with having due regard to the Acas Code of Practice.

The Hearing

12. Before moving to the findings of fact, I will record who I heard evidence from and what other evidence was available to me.

13. I heard evidence from the Claimant. She had hoped to call a witness, Clare Kynaston but unfortunately Miss Kynaston was unavailable to give evidence. There is an email from Miss Kynaston in the Hearing Bundle, that I have had regard to. However, as I explained to the parties, where a witness does not attend the Hearing, with the result that the Tribunal does not hear their evidence directly and there is no opportunity for them to be cross examined, the Tribunal will give limited weight to their evidence. In particular Miss Kynaston's email is not in the form of a signed statement and does not contain a statement of truth. In any event the issue she deals with relates to a change in the Claimant's hours of work, which is not a central issue in this case.

14. For the Respondent I heard evidence from Mr El-Mahraoui. His wife was also present throughout the Hearing but she did not give evidence herself. On behalf of the Respondent I heard evidence from one of its employees, Maria Vaskovska.

15. In addition to the written statements there were effectively two sets of documents. Each party had submitted a limited number of documents but there was no single agreed Hearing Bundle.

Findings

16. The Respondent is a privately owned family coffee business operating in the East of England. It currently has, I believe, 17 cafés and kiosks, having closed a number of its outlets permanently as a result of the economic impact of the Coronavirus pandemic. It also sells coffee and coffee machines and accessories on-line and over the past year has seen significant growth in this part of its business as consumers and retailers have adjusted to the Coronavirus. The Respondent has a wholesale customer base including selling coffee to the East of England Co-Op.

17. The Claimant commenced working for the Respondent on 3 November 2013. She seems to have had a wide remit, initially helping to establish systems and processes at its offices which is also the roastery, during a period of rapid growth and expansion.

18. Form ET1 indicates the range of activities that the Claimant undertook. At some point her job title changed from Office Manager to Administrator. During her first year the working arrangements seemed to me to have been entirely flexible, but over time they were formalised. For example, by the end of 2014 the Claimant was working one day a week in the office and two days from home.

19. The evidence in the Claimant's pack of documents suggests that she was issued with a written Contract of Employment early on in her employment. It is less clear to me that the contract was updated after 2014. By 2020 the Claimant was working 24 hours per week entirely office based.

20. There was no evidence of any material issues or concerns on either side prior to the events in question. Certainly, there were no disciplinary matters or grievances. Whatever frustrations there may have been between the parties, which I observe are common in close working relationships, those frustrations were manageable for each party. I was taken to certain emails in the Respondent's pack of documents from 2016, 2018 and 2019 from the Claimant to the Respondent. They are not in and of themselves greatly significant, though I accept that they are illustrative of some tendency on the part of the Claimant to announce, as it were, her intentions rather than to communicate issues which may have been impacting her and to explore in a more collaborative manner how these might be resolved. What is very clear from the emails is how important the Claimant's family is to her and, understandably, that she puts them first. For her part, the Claimant was critical of how the Respondent had handled aspects of their working relationship, including a reduction in her days and hours of work. It was on this issue that Miss Kynaston was expected to give evidence. I do not have particular clarity as to when the changes are said to have occurred, though ultimately do not think it is particularly material in the context of this particular employment relationship.

21. The Claimant also gave evidence that she often felt under pressure as a result of her need to leave work on time to collect her children from school. She made particular reference to comments by Mr El-Mahraoui that she said had upset her when she had approached him about taking some holiday. Again, I do not think anything turns on this.

22. The events in question with which I am concerned which, occurred between 30 March 2020 and 6 April 2020. In terms of the context, on 16 March 2020 the Government recommended that employees should work from home where possible. On 20 March 2020, an instruction was given by the Government that non-essential retail (this included coffee shops) must close immediately. On 23 March 2020 the country went into its first full national lockdown. On 26 March 2020, the Coronavirus job retention scheme, the furlough scheme, was announced by the Chancellor, though it was not until 15 April 2020 that the detailed Treasury Direction was issued which provided much needed detail as to how the scheme would operate in practice. Finally, between 17 March 2020 and 30 March 2020, the Claimant and her family self-isolated after her son fell ill with symptoms consistent with Coronavirus. That inevitably would have been a worrying and stressful time for the Claimant.

23. I turn then to the emails to which I was referred by the parties.

24. The first email is an email dated 30 March 2020. It is Item 2 in the Claimant's pack of documents. In that email the Claimant confirmed that she was coming to the end of her period of isolation and she attached her isolation note which confirmed that the isolation was ending on 30 March 2020. She noted that her husband was a key worker and that he would need to have the family car for any emergency call outs. She then asked Mr El-Mahraoui, *"How are we going to proceed going forward?"* and noted that she could work from home.

25. Mr El-Mahraoui responded on 1 April 2020. The response, which is also within Item 2 of the Claimant's pack of documents, is friendly and supportive. It began as follows,

> *"Thank you for your email and I am pleased to hear you are all well".*

26. Mr El-Mahraoui went on to set out the situation in the Roastery where the Claimant worked. He then wrote,

> *"I'm happy for your to work from home for now. We can review it in a couple of weeks".*

27. It was a friendly, professional and pragmatic response to a highly uncertain and rapidly evolving situation. His email concluded,

> *"I am happy to discuss this with you later today".*

I find that he was inviting a conversation with the Claimant.

28. For the next email we have to go to page 9 of the Respondent's pack of

documents. This was also on 1 April 2020. I find that email was less friendly. The Claimant cited her concerns about stopping infection, which was understandable, albeit something that she had not referred to previously in her email of 30 March 2020. As she was emerging from a 14 day period of isolation, it seems unlikely that she would have posed an immediate infection risk at that moment in time. She reiterated her husband's need for their car and also her need to be at home for her children. She went on to set out two options: either that she work from home or that she should be furloughed.

29. What is clear is that she was not satisfied at that point in time with Mr El-Mahraoui's immediate response to her initial email. I find that she was not happy to work from home for a trial period. Inexplicably, she concluded her email with a request that any response should be in writing before they speak further. I do not understand why that was and why she was unwilling to have a phone conversation with Mr El-Mahraoui. It formalised matters in a way that was not warranted by Mr El-Mahraoui's perfectly friendly email of 1 April 2020.

30. I move then to Mr El-Mahraoui's further response and in that regard go back to the Claimant's pack of documents to find a copy of his response of 2 April 2020. It was sent at 1:40pm and is at Item 3 of the Claimant's pack. Mr El-Mahraoui was evidently hurt by the email that he had received from the Claimant on 1 April 2020. He sent a reasonably firm response which included some relatively mild criticism of the Claimant. However, he emphasised that the Claimant was a valued member of staff and further emphasised that the Respondent was respecting all Public Health England guidelines including those in relation to social distancing.

31. Mr El-Mahraoui went on to say,

> *"We need you in the office to help with processing orders, answering the phone and making sure orders are accurately packed".*

His email concluded,

> *"Your email was not clear, are you refusing to come to work in the office?"*

32. There is a sense of a developing disagreement or of tensions beginning to ratchet up, which is regrettable particularly given the way that matters then evolved and escalated over the following few days.

33. I pause at this point to deal with the Claimant's evidence at Tribunal when she called into question Mr El-Mahraoui's motives in keeping the Roastery open. I am satisfied that the Respondent had every justification for continuing its wholesale operations and give short shrift to the Claimant's suggestion that because the Respondent sells gourmet coffee it should have ceased operating during the pandemic. Throughout the pandemic supermarkets and other retailers have continued to stock a full range of products, including fine wines, champagne, gourmet cheeses, specialist chocolates, and biscuits and the like. It may well be the Claimant's

personal view that only producers and distributers of basic every day products should have continued their operations, but that was not the view of the Government or the wider public who continued to buy such products.

34. I find that it is a little naïve on the Claimant's part, and I certainly do not accept her attempts to portray the Respondent (or Mr El-Mahraoui) as greedy or simply wanting to steal a march on its competitors regardless of any public health considerations. The jobs of approximately 100 people depended on the survival of the Respondent's business. Mr El-Mahraoui and his wife are businesspeople, but like the Claimant first and foremost they are parents, wanting the best for their family in the same way that the Claimant wants her family to be safe and to thrive.

35. Whilst the Respondent addressed the issue in somewhat emotive terms in his submissions, I find that the Claimant lost sight that there were two individuals behind this business navigating their way through an unprecedented global crisis anxious for themselves, their family, their business and their staff, and that they experienced many of the anxieties and concerns that the Claimant and countless others experienced during this period of time.

36. Returning to the correspondence of 2 April 2020, there is a second email at page 3 of the Claimant's pack of documents from the Claimant to Mr El-Mahraoui. She wrote that Mr El-Mahraoui's email had stressed her out, that she found it very threatening and not at all caring. Again, there is a sense with this email of the disagreement any tensions going to the next level. This is the story of an escalating disagreement. The email concludes,

> *"…staff must come first and I am surprised you are taking such big risks with the rest of the team in making them come in, by staying open and almost threatening me to come in given this emergency crisis".*

37. For the reasons above, I do not accept that that is a fair summary of Mr El-Mahraoui's or the Respondent's position. The Claimant went on,

> *"…I cannot put my family at risk in these frightening circumstances and I am surprised that you don't understand that being a family man yourself".*

38. Mr El-Mahraoui's responded on 3 April 2020. I would describe that response (which can be found at page 4 of the Claimant's pack of documents) as something of a lecture notwithstanding his complaint that he had been lectured to by the Claimant. It was as emotional response, though Mr El-Mahraoui did explain to the Claimant, or seek to explain to her, why she would be required in the office. I have some difficulty reconciling his comments in that email, particularly his comment that the Claimant was being *"very unreasonable"* with his agreement just two days earlier that there could be a two week trial period of working from home.

39. The next email is also at page 4 of the Claimant's pack of documents and

was sent on 3 April 2020 at 12:28pm. Once again, the Claimant ratcheted up the dispute. She wrote in bold type,

"I cannot come in".

40. The Claimant did not cite the public health considerations but instead cited her husband's situation and the fact that he required their car and that their children, understandably, could not be left on their own as they were dependents and at that point the schools were shut.

41. That was the position as of Friday 3 April 2020. The Claimant concluded her email by reiterating that it was not possible for her to go into the office. It marked something of a standoff between herself and Mr El-Mahraoui and a further escalation of the tensions between them.

42. Matters took a further turn over the weekend. On Saturday 4 April 2020, the Claimant spoke with a colleague, Renata and learned that staff might be be going into the Roastery over the weekend to deal with packing and distribution of products and produce. Their phone conversation led to a wider Whatsapp group chat later in the day; extracts from those chats are to be found at page 5 onwards in the Claimant's pack of documents. The Respondent also cites comments from the chats in Form ET3.

43. This was a private chat on individuals' personal mobile devices. However, the fact is that these were the Claimant's work colleagues even if they were also her friends. I find that she crossed a line in terms of her comments and that she was not, as she suggested in her evidence at Tribunal, solely motivated by their best interests. I conclude that she conflated her own interests with theirs, namely her firm wish and intention to remain away from the office, if necessary, on furlough leave. I reject Mr El-Mahraoui's description of her comments as the actions of a saboteur. Whatever her motives or intentions, I am in no doubt that the effect was to unsettle the team. In the case of Ms Vaskovska, it seems to have led her to feel pressured and to experience a conflict of loyalties between her employer and to her colleague and friend.

44. By the following day, Miss Vaskovska was tearful at work and I conclude that she revealed the content of the group chat to Mr El-Mahraoui. It is evident that he considered the Claimant to be sabotaging the business and he resolved to terminate her employment.

45. I was not been presented with any evidence of any further email communications between the Claimant and Mr El-Mahraoui. Accordingly, the last email communication between them would have been on Friday 3 April 2020.

46. On Monday 6 April 2020 (the letter explicitly states that it was written at 10am on 6 April), Mr El-Mahraoui wrote to the Claimant terminating her employment. I was provided with a copy of the letter in the course of the hearing, though neither party had thought to include it within their respective pack of documents.

47. The letter of 6 April 2020 cites the Claimant's absence from the Roastery

as unauthorized, a surprising statement given that the homeworking arrangement had in fact been agreed to by Mr El-Mahraoui on 1 April 2020 on the basis of an initial two week trial period. There is nothing in the emails that passed between Mr El-Mahraoui and the Claimant on 2 and 3 April 2020 to indicate that the trial period had been terminated or that working from home had proved ineffective.

48. The letter also cites the Claimant's absence and / or a statement by her that she could not come in as insubordination and a serious breach of contract. Whilst the letter does not specifically mention the group chat, I find that the group chat, specifically the comments made by the Claimant, were at the forefront of Mr El-Mahraoui's mind when he decided to dismiss the Claimant. The Claimant's employment was terminated with immediate effect.

49. Mr El-Mahraoui accepts that the Respondent did not write to the Claimant setting out the Respondent's concerns in writing. It did not undertake a formal investigation into any concerns, nor was it suggested that Mrs El-Mahraoui might handle the matter given Mr El-Mahraoui's close involvement to that point. The Claimant was not invited to attend a disciplinary hearing. There was no hearing and no suggestion that the Claimant might submit comments, observations in writing, or participate in some sort of disciplinary process by telephone, Zoom or any other on-line means of communication. The Claimant was not afforded any opportunity to state her case.

50. The Respondent, or Mr El-Mahraoui as the decision maker in this matter, did not consider a range of potential outcomes, or seemingly have regard to the Claimant's clean disciplinary record, or the circumstances of her alleged insubordination. Finally, the Respondent did not offer the Claimant any right of appeal against her dismissal.

51. Within the space of just four days, or two working days, someone whom El-Mahraoui had described as a very valued member of the team, with six and a half years of employment, was gone with no right of appeal against her summary dismissal.

Conclusions

52. The Acas Code of Practice inevitably has a significant bearing upon my conclusions and Judgment in this case. The Code could not be clearer as to the expectations of an employer when it is dealing with alleged misconduct in cases such as this. March and April 2020 was an unprecedented and trying time for everyone. However, it called for calm minds and careful reflection, particularly if the Respondent was contemplating dismissing an employee in circumstances where people were concerned for their jobs and security. In the midst of a global crisis there was a particular need to adhere to recognized procedures and processes. That did not happen here.

53. The Acas Code of Practice was not adhered to in numerous respects. I refer to paragraph 5 to 29 of the Code. There was no investigation and there was no letter to the Claimant setting out the problem. There was no

invitation to attend a disciplinary meeting or any form of meeting or hearing with all the protections that come with a meeting including the right to be accompanied and to state one's case. There was no consideration as to the appropriate action, instead there was only ever one outcome, namely dismissal. Even if the Respondent believed the Claimant to be guilty of misconduct, no consideration given to a lesser penalty such as a warning or a final written warning. Significantly, there was no right of appeal. Even if Mr El-Mahraoui was the right person to decide the matter at the first stage, there was a lost opportunity for that decision to be reviewed by Mrs El-Mahraoui or another Director (assuming there are other Directors).

54. All of those essential protections exist for a reason. Hopefully this case and the resulting Judgment will provide a valuable learning experience for the Respondent for the future.

55. Having regard to the Burchell guidance, I am in no doubt that Mr El-Mahraoui genuinely believed the Claimant to be guilty of misconduct and that he felt essential trust and confidence had been lost. But that conclusion was not reached following an investigation or following a hearing at which Mr El-Mahraoui took into account the Claimant's explanation. Presented with the emails and group chat messages, the Claimant might for example have said that she got herself "into a pickle" and recognised the Respondent's need for her to go into the Roastery.

56. In my judgment the Claimant was unfairly dismissed. I take into account that the Respondent is a relatively small company and that most of its staff are not based at the Roastery, but work instead at its various kiosks and cafés. But it is not a one man band either. Like any other employer it must have regard to the Acas Code of Practice in how it deals with disciplinary issues and grievances.

57. I conclude that the Respondent acted unreasonably and unfairly in dismissing the Claimant, not withstanding its genuine belief that she was guilty misconduct.

58. Both parties are jointly at fault in allowing the correspondence to develop in the way that it did and to ratchet up so quickly. The correspondence indicates a very firm intention on the Claimant's part not to work at the Roastery come what may and, indeed that she wanted to be furloughed regardless of whether this was warranted in her case. But for her dismissal this may have led to difficulties in the working relationship, indeed it may have become untenable. I cannot be certain because many employees have adjusted to homeworking when this was previously thought to be untenable. The Hearing in this case proceeded by CVP, something that is unlikely to have happened but for the Coronavirus pandemic. We have all learned to adapt to new ways of working. It may have been that the parties that would have found a way to make a success of homeworking. I weight in the balance that the Claimant was determined not to return to the Roastery and even if the situation had not been handled as it was by Mr El-Mahraoui, I think the Claimant's stance would have brought her into conflict with the Respondent.

59. In all the circumstances I have come to the conclusion that there should be a 40% reduction to the basic and compensatory awards to reflect the Claimant's conduct in this matter and the chance that she would have been dismissed or even resigned her employment had Mr El-Mahraoui insisted that she return to the Roastery even for part of her contracted days and hours. I have settled on an overall 40% reduction. The Claimant's firmly expressed intention not to return to the Roastery did not reflect any specific health or safety concerns on her part. Instead it was plain insubordination on her part. And her culpability in the matter was aggravated by her actions over the weekend of 4/5 April 2020 evidenced by the group chat in which she was disloyal to the Respondent and, consciously or otherwise, put her own interests ahead of those of the Respondent and her colleagues. By her actions the Claimant unsettled the Roastery team and undermined workforce cohesion during what I consider was a sensitive and critical time when others, including Miss Vaskovska, were concerned for their safety and for their jobs and futures. Mr El-Mahraoui was seeking to reassure them and safeguard their jobs, whereas the Claimant's actions undermined his efforts in this regard, causing disharmony and upset.

60. As regards the Claimant's claim for her notice pay, it is for the Respondent to prove that any misconduct passed the threshold justifying summary termination. Whilst the Respondent has satisfied me that it genuinely believed the Claimant to be guilty of serious misconduct, in terms of her claim to be paid her notice the Respondent has to satisfy the Tribunal not just that it believed her to be guilty of misconduct but that she was guilty of misconduct which justified her dismissal without notice or payment in lieu of notice. There was no written contract available to the Tribunal or a copy of any Disciplinary Policy or Rules to enable the Tribunal to come to an informed view as to whether the Claimant's actions passed the threshold for summary termination.

61. The burden, as I say, is on the Respondent and I am not satisfied it has discharged the burden upon it to prove that the matters and conduct complained of meant that the Claimant forfeited her right to notice. The Claimant's claim for her notice pay therefore succeeds.

62. It was not necessary for me to determine remedy in the case as this was agreed between the parties and recorded in the Judgment.

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Employment Judge Tynan

Date: 3 July 21

Judgment sent to the parties on

8 July 21

For the Tribunal office