



EMPLOYMENT TRIBUNALS

Claimant

Miss T Cook

Respondent

Ms K McCune

Heard at: CVP

On: 8 July 2021

Before: Employment Judge Davies

Appearances

For the Claimant:

Mr P Constable (lay representative)

For the Respondent:

Ms G Nicholls (counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. This was a claim of unfair dismissal brought by the Claimant, Miss T Cook, against her former employer, Ms K McCune. The Claimant represented herself, and the Respondent was represented by Ms G Nicholls, counsel.
2. There was an agreed file of documents, but the Claimant did not have a hard copy with her at the hearing, despite the Tribunal's clear orders. The only device she had was a mobile phone and it was not appropriate for her to be cross-examined about documents on a mobile phone. We adjourned so that her representative could print out a copy of the file at the local library. The hearing resumed at midday.
3. I heard evidence from the Claimant on her own behalf. I heard evidence from the Respondent herself, and from Mr Traynor on her behalf. The Claimant did not have a copy of her witness statement in any format. Counsel for the Respondent emailed a copy to her. I adjourned so that she had time to read it carefully before confirming its truth.

The Claims and Issues

4. The issues to be determined were:

- 4.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct or some other substantial reason. The Tribunal needs to decide whether the Respondent genuinely believed the claimant had committed misconduct or that trust and confidence had broken down.
- 4.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - 4.2.1 there were reasonable grounds for that belief;
 - 4.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
 - 4.2.3 the Respondent otherwise acted in a procedurally fair manner;
 - 4.2.4 dismissal was within the range of reasonable responses.

The Facts

5. The Claimant started working for the Respondent on 27 October 2017 as a Personal Assistant. Her duties were to care for the Respondent's disabled daughter, and to provide general assistance to the Respondent. She worked in the Respondent's home and she agreed that trust and honesty were of the utmost importance. Mr Traynor is the Respondent's ex-husband and is the father of her daughter. He cares for his daughter part of the time. The Claimant's duties include providing care at Mr Traynor's home too. The Claimant worked 7.5 hours per week.
6. When the pandemic started in March 2020, the Respondent was initially advised that her daughter was clinically vulnerable. They went into voluntary self-isolation a week before the national lockdown was imposed on 23 March 2020. The Claimant was put on paid leave but was still to do some duties out of the home, such as shopping and collecting prescriptions. She makes complaints about that, but they are not relevant to the issues I have to decide.
7. On 26 April 2020 the Respondent messaged the Claimant by WhatsApp to say that she had been discussing her daughter with the hospital and they could hopefully get the Claimant back to work soon with some PPE guidelines. The Claimant asked whether that was safe. The Respondent said that it was safe for the Claimant, as the Respondent had been self-isolating since 17 March 2020. She was wary for her daughter but had discussed it with the hospital who had gone through PPE etc. The following day, 27 April 2020, the Respondent emailed the Claimant to ask if she would work Thursday and Friday morning that week. She discussed safety measures. The Claimant did not reply. The Respondent sent a further message the following day, saying that she had tried calling the Claimant and asking her to confirm her working hours. The Claimant replied that afternoon as follows:

Hi ... have been in bed. Troubling symptoms. Isolating. Will get back to you within couple of weeks. Hope you are all still well.

8. The Respondent suggested that she order a home testing kit. The Claimant did not respond. On 15 May 2020 the Claimant messaged the Respondent:

Hi ... Having completed 2 week isolation I'm looking at coming back Monday. What PPE have you managed to source. Look forward to your reply.

9. The Respondent did not reply and on Sunday 17 May 2020 the Claimant went to her home address. They agreed she would attend work at 9am on Monday 18 May 2020. They exchanged messages that evening about PPE.

10. When the Claimant attended work at 9am on Monday 18 May 2020, the Respondent took her into the back garden to discuss PPE. In fact, she wanted to have a private discussion with her about something. She reminded her about the message she had sent on 28 April 2020 and she said to her that Mr Traynor had seen her on 30 April 2020 walking her dogs at the traffic lights on New Walkergate. The Claimant accepts that she responded by saying that she had felt something in her chest for a few weeks before she said about isolating, that was now gone; she had had a rash on her toes which had gone; she had had a headache and a dry sore throat; and she felt she had a responsibility to walk her dogs. The Respondent recorded this at the time and in an email sent to the Claimant later that day. She sent the Claimant home.

11. That afternoon, the Respondent emailed the Claimant with a letter suspending her on full pay pending disciplinary investigation. She said that the reason was an allegation of dishonesty: i.e. that the Claimant had said she was at home self-isolating but had been seen out walking her dogs, resulting in a breach of trust and confidence. The same day, the Respondent emailed the Claimant a letter inviting her to a disciplinary hearing on 20 May 2020 by video call on WhatsApp. The letter said that the requirement to attend the disciplinary hearing was regarded as a reasonable management instruction and failure to do so without good reason would be treated as a separate act of misconduct. The letter set out the same allegation. The Respondent's note of the discussion on 18 May 2020 was emailed to the Claimant, along with an email from Mr Traynor which said:

Between approximately 9-10am on 30/4/20, whilst driving along New Walkergate in Beverley in the direction of the train station, at the traffic light which crosses to the Butcher Row car park and M&S, I saw [the Claimant] by the traffic light on my left with two dogs.

12. The Claimant replied on 19 May 2020. She said that the meeting was not convenient for her and proposed Friday instead. She did not explain why she could not make a meeting on Wednesday. She asked for Ms Critchley from Direct Payments to be on the call and she asked for documents to be re-sent because she had not been able to open them. The Respondent replied shortly afterwards. She said that Ms Critchley was available on Wednesday. She also said that she had arranged a carer for Wednesday, and could not arrange one for Friday. The Claimant replied again to say that Wednesday/Thursday was not convenient for her. she did not give a reason. She proposed the following week.

The Respondent emailed on the morning of 20 May 2020. She reminded the Claimant what she had been told about failure to attend the disciplinary hearing without good cause, and asked what the reason was that she was unable to attend. She said that if no evidence were provided, the meeting would go ahead in the Claimant's absence. Alternatively, the Claimant could submit written evidence that day. The Claimant did not respond. At about 12:30pm the Respondent emailed her a list of the questions that would have been asked at the disciplinary meeting. They were about why the Claimant was self-isolating, whether she knew that meant she was not allowed outside at all for 14 days and why she had told the Respondent that she was in bed with troubling symptoms and had to self-isolate and, subsequently, that she had completed 2 weeks' isolation, when she was seen outside during that period walking her dogs. The Respondent asked for a response by 4pm. The Claimant did not respond.

13. At about 10pm, the Claimant emailed a grievance to the Respondent. It complained about the time restraints imposed in respect of the disciplinary process, and made allegations about events prior to the first lockdown, which are not relevant to this claim. In the grievance letter, the Claimant wrote:

Dog walking is out in the open, and as your witness will verify I was wearing a certified mask at the time and for your information was en route to the post office when "spotted by your ex husband."

14. The Respondent put the disciplinary process on hold and invited the Claimant to a grievance meeting by video on 17 May 2020. She had arranged for Ms Critchley to join. Mr Traynor would take notes. The Claimant produced a written statement, which she read out at the start of the grievance hearing. It repeated the allegations about events prior to the first lockdown, which are not relevant in this claim. As regards the events leading to the disciplinary process, the Claimant said that at no stage had she told the Respondent that she had symptoms relating to Covid-19, by 30 April she was feeling better, and she was following government guidelines to self-isolate for 14 days as a precautionary measure. She was trying to protect the Respondent's daughter. After the Claimant had read out her grievance, the Respondent attempted to go through it item by item. She gave her response to the points raised. There came a point where the Claimant objected to the Respondent going through her responses and repeatedly said that she wanted to adjourn. The Respondent said that she would not hold another grievance meeting. The Claimant hung up the phone. It was put to the Claimant that she was very difficult during the meeting. She disagreed. It was suggested to her that she kept interrupting. She agreed and said that she had to because the Respondent was not listening. In her evidence to me the Claimant kept interrupting. She did not listen to the questions, and she started answering before the questions had been asked. It was not suggested to the Respondent in cross-examination that she had been aggressive or had not listened during the grievance hearing. In her evidence to me she was not aggressive and she gave thoughtful answers to the questions. I find it much more likely that it was the Claimant who was difficult and interrupting during the grievance meeting, not the Respondent and I so find.

15. On 29 May 2020 the Respondent provided a written outcome to the grievance. She dismissed the allegations about events prior to the first lockdown. As regards the disciplinary process, the Respondent said that the Claimant had failed to provide any reason whatsoever why she could not attend the disciplinary hearing. She was given the opportunity to answer questions in writing and did not do so. The Respondent explained that she had followed the lockdown rules, which applied to everyone. She said that this was different from the rules about self-isolating, which applied when somebody had Covid-19 symptoms. She quoted the guidance from the government website, which said that if self-isolating people must stay at home and specified that they would need to ask somebody else if they needed help with walking a dog. She told the Claimant of her right to appeal against the grievance outcome.
16. On 1 June 2020 the Claimant emailed the Respondent. She expressed a series of concerns and complaints, and said that she expected a full written apology and reinstatement of her employment. On 3 June 2020 the Respondent emailed a letter in response, asking the Claimant if she wanted to appeal the grievance decision. She confirmed that the Claimant had not been dismissed and that an outcome of the disciplinary was still pending.
17. In the evening of the same day, 3 June 2020, the Respondent then emailed the Claimant the outcome of the disciplinary process. She told her that she was dismissed for gross misconduct. The Respondent had concluded that the Claimant told her she was self-isolating, which meant that she should stay at home for 14 days and could not go out shopping or walking the dog. She was then seen outside, which indicates that she was well and could have attended work. Her role included going out shopping and collecting prescriptions, and the fact that she was out with her dogs near the town centre demonstrated that she could have done this part of her job.
18. In her evidence, the Respondent repeated that explanation. In cross-examination she was questioned about how she had reached the conclusion that the Claimant had Covid-19 when she was not medically qualified, whether she had breached lockdown rules, whether the Claimant had breached lockdown rules and whether everybody who was off work self-isolating should have been dismissed. She repeated that she had dismissed the Claimant because she told her she was self-isolating and was then seen walking her dog. She referred to the fact that the Claimant had referred to “troubling symptoms” and “isolating” in her WhatsApp on 28 April 2020, and had then mentioned completing 2 weeks’ isolation in her message of 15 May 2020. The Claimant had insinuated that she was self-isolating because of a concern she had Covid-19 and that is what the Respondent had understood. The Respondent said that if the Claimant was self-isolating she should not have left the house for any purpose, but she was seen out walking her dogs. I had no hesitation in accepting that the Respondent believed that the Claimant had been dishonest with her and that this was why she dismissed her. That was consistent with all the documents from the time and the Respondent’s evidence to me was clear and consistent.

19. The Claimant was told that she could appeal against her dismissal and she did so in an email dated 5 June 2020. She said that suggesting she attend a disciplinary hearing 2 days after her suspension when that was not convenient to her would have been laughable if not so serious. She still did not explain why she had been unable to attend the meeting. She said that there was “no evidence” she had been walking her dogs on 30 April 2020, and even if there were she would have been well within her rights to do so. She said that she failed to see how a simple act such as exercising her dogs could be perceived as dishonest or gross misconduct.
20. In a letter dated 9 June 2020, the Respondent invited the Claimant to an appeal meeting on 16 June 2020. On 15 June 2020 she emailed to ask the Claimant to confirm whether she was attending. The Claimant replied to say that she wanted communication to be by email. She asserted that the Respondent had raised her voice aggressively during the grievance hearing. On 16 June 2020 the Respondent wrote to say that the Claimant had failed to attend the disciplinary appeal meeting and asked if she would like to attend a re-scheduled hearing. She said that if she did not hear from her, she would assume she did not want to attend her disciplinary appeal hearing. The Claimant did not respond.

Legal principles

21. So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides, in s 98, so far as material as follows.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

...

22. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on

reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303; *Boys and Girls' Welfare Society v McDonald* [1996] IRLR 129.

23. Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *Foley v Post Office*; *HSBC v Madden* [2000] ICR 1293 *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23. I emphasise, therefore, that with respect to the unfair dismissal claim, it is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that he was, based on reasonable grounds and following a reasonable investigation.
24. The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant and I have had regard to it.

Application of the Law to the Facts

25. Applying those principles to the findings of fact, my conclusions on the issues were as follows.
26. The Respondent has proved that the reason for dismissal was conduct. For the reasons explained in the findings of fact above, she genuinely believed that the Claimant had committed an act of dishonesty, by telling her that she was self-isolating when she was not, because she was seen out walking her dog.
27. That brings me to the question whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason for dismissing the Claimant. I have no hesitation in finding that she did. Fundamentally, she reasonably concluded that the Claimant had been dishonest. Honesty was fundamental to the employment relationship – the Claimant was working in the Respondent's home, caring for her vulnerable daughter. Dismissal was in the range of reasonable responses open to her in those circumstances.
28. Dealing specifically with the reasonableness of the investigation, the grounds for believing in misconduct and the fairness of the process:
 - 28.1 The Respondent is a parent directly employing a number of carers to look after her daughter. The process followed is to be assessed in that context. It is clear that she took advice and was careful to follow a clear and proper process, all of which was carefully documented.
 - 28.2 The investigation was reasonable. There was a simple allegation. The Respondent waited until the Claimant was fit to return to work and she raised it with her. She made a note of their discussion, checked it with the Claimant at the time and emailed it to her that day. The Claimant did not deny walking her dog. She explained what her symptoms had been and she said that she felt a responsibility to walk her dogs.
 - 28.3 The Claimant was provided with the only other relevant evidence – Mr Traynor's email confirming what he had seen. She was given the chance

to attend a disciplinary hearing. She gave no explanation, even when explicitly asked, why she could not attend a disciplinary hearing on Wednesday or Thursday. The context of course was that this was a national lockdown and the Claimant was being asked to attend the meeting from home by video. She was also given the opportunity to provide written answers to the Respondent's questions, but she did not do so. It was reasonable for the Respondent to proceed with the disciplinary process in those circumstances.

- 28.4 The Claimant's grievance was dealt with before the disciplinary process was concluded.
 - 28.5 The evidence available to the Respondent when she reached her decision that the Claimant had been dishonest by saying that she was self-isolating when she was not included the WhatsApp messages sent on 28 April and 15 May 2020. It was plainly reasonable open to the Respondent to infer that the Claimant was telling her she was self-isolating because she thought she might have Covid-19. The Claimant spoke about "troubling" symptoms, used the word "isolating" and then subsequently confirmed that she had completed "2 weeks isolating". When the Respondent suggested that she get a Covid-19 test, the Claimant did not respond to say that the reason she was self-isolating was unrelated to Covid-19.
 - 28.6 The Respondent informed herself of the rules for self-isolating at the time. They were different from the lockdown rules that applied to everybody. They made clear that people should not leave the house to walk their dogs.
 - 28.7 As to whether the Claimant had done that, the Respondent had Mr Traynor's account that he had seen the Claimant walking her dogs on 30 April 2020. Crucially, she also had the Claimant's response on 18 May 2020, when she appeared to accept that she had walked the dogs, and her explicit statement in her grievance that she had been wearing a mask and was on her way to the post office when Mr Traynor saw her. The Claimant did not suggest at the time that she had not walked her dogs or that Mr Traynor was mistaken or lying about seeing her. On the contrary, the only reasonable interpretation of what she said in her grievance was that she admitted she had done so, and volunteered that she was on her way to the post office. It was plainly reasonable for the Respondent to conclude on the basis of that evidence that the Claimant had not in fact been self-isolating at home.
 - 28.8 The Respondent was not aggressive or difficult during the grievance hearing. She tried to address the Claimant's concerns and the Claimant did not want her to. The Claimant's decision not to participate in a disciplinary appeal hearing is to be seen in that context. It was her choice not to attend a hearing. It was reasonable for the Respondent not to take any further action in that context. The appeal did not identify any new evidence. The Respondent stuck by her original decision. She was the employer and parent. It was reasonable for her to deal with the appeal.
29. For these reasons, the Respondent acted reasonably in dismissing the Claimant for gross misconduct and her complaint of unfair dismissal does not succeed.

Case Number: 1803907/2020

**Employment Judge Davies
8 July 2021**