



EMPLOYMENT TRIBUNALS

Claimant: Ms J Hadley

Respondent: Wilsons Express Same Day Ltd

HELD AT: London South (by CVP) **ON:** 16 June 2021

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person

Respondent: Philippa Lloyd, director of the respondent

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The matter will be listed for a hearing to determine the compensation payable to the claimant by the respondent for unfair dismissal on a date to be notified to the parties in due course.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. This was a remote hearing which was not objected to by the parties. The form of remote hearing was a code "V" hearing, being conducted entirely by CVP video platform. A face to face hearing was not held because it was not practicable and no-one requested the same.
2. The documents that I was referred to were not in a bundle of documents as the parties had been instructed, but were submitted piecemeal, some in advance

of the hearing and some after the hearing when the Tribunal had requested that further disclosure of documents be made by the parties.

3. I was provided with the claim form, the response, a schedule of loss and three letters from the respondent to the claimant in connection with arrangements for a disciplinary hearing, an appeal hearing and the appeal decision, as well as minutes of the appeal hearing itself in August 2020. After the hearing, the Tribunal requested and was supplied with the original complaint against the claimant from "Karen" dated 1 June 2020, a text message from 1 April 2019 concerning an earlier grievance by the claimant and written submissions from the claimant dated 23 June 2021 and the respondent dated 30 June 2021.
4. The claimant brings a claim of unfair dismissal. She was summarily dismissed for gross misconduct by the respondent at a meeting on 6 July 2020. She appealed against this decision on 9 July 2020 and an appeal meeting was heard on 4 August 2020, but the decision to dismiss her was upheld.
5. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide are:
 - a. Was misconduct the reason for the claimant's dismissal?;
 - b. Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
 - c. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
 - d. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
 - e. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?
6. The claimant will say that the respondent did not follow a fair procedure in relation to her dismissal and that the dismissal was also substantively unfair in that she did not commit the acts of misconduct alleged and no reasonable employer would have dismissed an employee in the same circumstances.
7. The parties put forward evidence which the Tribunal has considered. However, if the following findings of fact are silent in relation to some of that evidence, it is not that it has not been considered, but that it was insufficiently relevant to the issues that the Tribunal had to decide.

Findings of Fact

8. The claimant was employed by the respondent on two occasions, from June 2008 to December 2011 and latterly from 1 April 2015 until she was summarily dismissed for gross misconduct on 6 July 2020. The claimant was one of only two or three people employed by the respondent at the office where she worked, although the respondent itself employs approximately 34 people in total.

9. The claimant raised a grievance in 2019 about a lack of progression within the company. The resolution of the grievance involved the claimant taking on more responsibility but she was not awarded the title of head of finance, which was ultimately given to Mrs Philippa Lloyd. The claimant understood that the tasks themselves had been given to Mr Simon Lloyd. The parties told the Tribunal that the grievance was resolved, although Mrs Lloyd alluded at several points during the hearing to a belief on the respondent's part that the claimant was still unhappy at work.
10. The respondent's senior management and directors consists largely of individuals who have been or are married to one another or have been or are in a relationship with one another. Mrs Philippa Lloyd was in a relationship with Larry Wilson, the managing director, and was also previously married to Simon Lloyd, the accounts manager and they have a daughter together. Simon Lloyd is now married to Sally Lloyd, who also works in a senior role at the respondent. Mrs Philippa Lloyd also has another daughter, Emma, from another relationship.
11. Ordinarily, such circumstances would not warrant comment by the Tribunal, but such circumstances are relevant to the circumstances of and the reasons for the claimant's disciplinary sanction and dismissal.
12. Mrs Philippa Lloyd's daughter, Emma, had a friend Karen who was looking for employment. Karen began work at the respondent in the office where the claimant worked at the end of May 2020. The claimant was asked to provide Karen with an induction and an introduction to the office, which she did. The evidence before the Tribunal was that they had worked together on 26 May 2020, which the claimant said was for about 30 minutes.
13. On 1 June 2020, Karen provided a written statement to the respondent in which she complained about the claimant. In the statement, she wrote:

“Jan told me that the owner “Phill” was married to Simon then went onto Larry all within the same company and then Sally who doesn't really do anything is married to Simon who is doing accounts but it's being denied because Jan herself applied to do Sally's role but didn't get it because Sally is married to Simon! So in Jan's own words “if your [sic] not sleeping with the boss or related in some way you won't get very far within the company”.”
14. Although this was not apparent from the respondent's grounds of response in its ET3 form, nor was it apparent at the outset of the hearing, following the presentation of evidence during and after the hearing, the Tribunal notes that it is the respondent's case that the claimant's actions amounted to “*gross misconduct on the grounds of sex discrimination*”.
15. The Tribunal requested clarification of the respondent's reasoning as to why the claimant's alleged comments were interpreted in this light. Mrs Lloyd told the Tribunal that had they not pursued the claimant through a disciplinary and dismissal process, that Karen “*might have had recourse to pursue an employment tribunal claim for sex discrimination by association*”. The Tribunal

notes that there is no such claim under the Equality Act or other discrimination legislation.

16. Further discussions with Mrs Lloyd led to the explanation that the claimant's comments, in the view of the respondent, amounted to "*gross misconduct of a sexual nature*" in that the respondent believed that the claimant had communicated to Karen by her comments that it was a requirement of the owner, Mr Wilson, that all female employees must sleep with him in order to progress within the company. Mrs Lloyd told the Tribunal that Mr Wilson had a very strong emotional reaction to the claimant's comments and that he considered her position to be untenable on hearing of Karen's complaint. It was the claimant's evidence to the Tribunal that this was not explained to her during her disciplinary or appeal, or prior to the Tribunal hearing. I accept the claimant's evidence in that regard.
17. The claimant's case is that she admits having had a conversation with Karen about the relationships between those in management positions at the respondent, but that she denied making any comments in sexual terms. She told the Tribunal that as Karen was Mrs Lloyd's daughter's friend, she had assumed that Karen would know what the relationships were at the respondent. Mrs Lloyd disputed this possibility entirely, on the basis that Karen was not Mr Lloyd's daughter Naomi's friend, and on the basis that she lived in Wigan. I find that it was reasonable for the claimant to assume some background knowledge on Karen's part.
18. The Tribunal noted to Mrs Lloyd that what the claimant admits she told Karen has a strong factual basis: it was true and is not disputed by the respondent that the senior management are connected to one another as current or former spouses or romantic partners. It was also true that the claimant applied for a role in 2019 that was subsequently given to one of those people who were either currently or previously romantically involved with one another – the claimant understood that it was given to Mr Lloyd or Mrs Sally Lloyd but Mrs Philippa Lloyd told the Tribunal that the duties had been given to her.
19. Furthermore, the claimant's alleged comments were not limited to progression being solely due to a sexual or other relationship with Mr Wilson – the claimant is alleged to have said "*or related in some way*" also and "the boss" could, I find, refer to any one of the directors.
20. The claimant was summoned by way of a letter dated 10 June 2020 to a disciplinary meeting on 15 June 2020. No investigatory meeting was held before this. She was provided with a copy of Karen's letter dated 1 June 2020. The letter stated that the allegations against her were:

"That during the induction training and support of new employee Karen Thomas following the commencement of her employment on 26 May 2020:

 - i. You made negative and disrespectful comments about the company and its employees.*

ii. You specifically stated that “If you’re not sleeping with the boss or related in some way you won’t get very far within the company.”

iii. You suggested that other colleagues were incapable and only “got away with things” because they were “sleeping with the boss or related.”

The above allegations amount to a serious breach of trust and confidence and potentially constitutes discrimination and harassment on grounds of gender. For this reason, you should be aware that the company regards this as an allegation of gross misconduct. Accordingly, the matter needs to be discussed within a formal disciplinary meeting, where you will be given the opportunity to explain your version of events before any decisions are reached. You should however be aware that summary dismissal on grounds of gross misconduct is a possible outcome of the disciplinary meeting.”

21. The claimant told the Tribunal that the issue of alleged “*discrimination and harassment on grounds of gender*” was not raised with her during the dismissal or appeal process. Having discussed this with the parties and also having considered the documentary evidence, I accept the claimant’s evidence in this regard.

22. The Tribunal notes that the disciplinary meeting, which was conducted by Simon Lloyd, was scheduled to start at 10am, adjourned on the claimant’s evidence at 10.26am and reconvened at 10.30am, at which time the claimant was summarily dismissed. The respondent does not dispute this. The decision-maker was Simon Lloyd. The claimant’s evidence to the Tribunal was that her representative was initially prevented from addressing the meeting and was only allowed to speak after he insisted on it. The respondent does not dispute this.

23. The claimant appealed against her dismissal on the following grounds:

1. I have worked within the company for 11 years and have never been subjected to any form of disciplinary actions, either verbal or written.

2. No interviews were conducted of any other staff members to determine whether these suggested opinions have ever been made by me before in so far as the derogatory comment referring to “sleeping with members of staff”. A fact that I vehemently refute and can assure you that this is not a language that I would speak in.

3. Karen would clearly have knowledge of who staff members are and their relations due to personal relationships outside of the firm as informed by you to myself that she is a close friend of your daughter. She would therefore be acutely aware that Simon is your ex partner being that he is the father to your daughter, who she is friends with. I did not need to inform Karen of any such connections as she was already aware.

4. I refuse to accept the dismissal of “Gross Misconduct” and this will as you know hugely impact my ability to seek work within another firm and thus I wish therefore to appeal the grounds of dismissal and equally seek to reinstate

myself within my position as I feel I have given the company many years loyalty and this investigation was built solely on "he said, she said".

5. I previously raised a grievance to air my feelings in the appropriate manner and these issues were resolved. If there were any negative feelings within the firm on my behalf I would have left at the time that I felt that these matters were causing conflict. This has not been the case and I was happy with the outcome of that previous meeting."

24. Mrs Lloyd did not dispute with the claimant's evidence that the respondent did not carry out any interviews with other staff members or investigate the matter any further than speaking to Karen and discussing it with the senior managers, in particular Larry Wilson. Her evidence was that *"the facts and evidence in this matter comprised of Karen's letter of complaint and representations made by the complainant during the disciplinary and appeal meetings. As previously stated, further investigations could have yielded no additional evidence as there were no witnesses to the alleged comments."*

25. The appeal hearing took place on 4 August 2020 and was conducted by Mrs Philippa Lloyd. The claimant was accompanied by her union representative. The claimant's points of appeal were discussed, but the notes do not record that the claimant was specifically told that the respondent considered her comments to amount to references to sexual harassment or sex discrimination. In this regard, the Tribunal accepts the claimant's evidence that she was not given the opportunity to discuss this assumption during either this meeting or the disciplinary meeting in June 2020.

26. Mrs Lloyd told the Tribunal that the matter was considered gross misconduct and that dismissal was an appropriate sanction because the claimant had

"accused Mr Wilson of sleeping with his employees. She was aiming that at me and Mr Wilson because we used to have a relationship".

27. Mrs Lloyd told the Tribunal *"how would be able to trust her and move on in the company if she said women sleep with the boss?"*. Mrs Lloyd was asked about whether she had considered a sanction short of dismissal when she heard the claimant's appeal but she told the Tribunal *"I didn't think of keeping her on. What she said was so derogatory."*

28. In relation to this issue, the respondent provided written submissions to the Tribunal which take this gloss further and state:

"to suggest or state that a woman has been promoted or otherwise holds a specific role by virtue of her relationship with a male colleague in the same business is gender based, derogatory and offensive to the woman, and potentially other women working in the business:

- It undermines the commitment and hard work of that woman

- It undermines the skills, qualifications, and experience of that woman

- It is a comment that one does not hear said about male colleagues in a relationship with a senior female colleague in the same business.

It is the understanding of this company that an employee can be subjected to sexual discrimination by association i.e. Karen as a female was entitled to be offended by sexist and derogatory comments made against other women.

The Disciplining Manager and Appeal Manager believe that had a male colleague made those same comments about other female employees in the business – then there would be no doubt about the comments being discriminatory on grounds of gender.”

29. The Tribunal notes that the respondent has drawn a conclusion from Karen’s statement that it was not open to them to draw without further evidence or investigation. That conclusion was that the comments made by the claimant were “*to suggest or state that a woman has been promoted or otherwise holds a specific role by virtue of her relationship with a male colleague in the same business*”. Even if the respondent’s case is taken at its highest and it is accepted that Karen’s statement is entirely accurate, at no point does Karen record that the claimant has singled out women as having been promoted by reason of their relationships with men or that female employees were obliged to sleep with Mr Wilson.
30. The Tribunal finds on the balance of probabilities the claimant was not given the opportunity during the disciplinary or appeal to dispute the assumptions that her comments were directed only at women. The Tribunal also finds on the balance of probabilities that the fact that Mr Wilson took gross personal exception to the allegations made by Karen was a strong influencing factor in the decisions taken by the respondent in relation to the claimant.

The Law

31. It is well established that determination of an unfair dismissal complaint is to be done, in the first instance, in accordance with section 98 of the Employment Rights Act 1996.
32. A respondent employer must show on the balance of probabilities that it had a fair reason for dismissal. In this case, the respondent’s reason is that of gross misconduct.
33. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of **British Home Stores v Burchell [1978] IRLR 379** which is:
- a. Did the respondent have an honest belief that the claimant had committed an act of misconduct?
 - b. Did the respondent have reasonable grounds for holding that belief?

- c. At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?
34. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures is not legally binding, the Tribunal must have regard to it when assessing both the substantive and procedural fairness of an employer's decision to dismiss. However, it is a well-established feature of the law of unfair dismissal that the investigation and procedure need only be within a range of reasonable actions. For example, the investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.
35. The ACAS Code of Practice on Disciplinary and Grievance Procedures (Code of Practice 1, 2015) states in its introduction
- "A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provisions of the Code. That means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25%."*
36. The Code states, at paragraphs 5, 6 and 7:
- "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*
- 6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*
- 7. If there is an investigatory meeting this should not by itself result in any disciplinary action....*
- 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to answer the case at a disciplinary meeting....*
- 14. The [employee's chosen companion] should be allowed to address the [disciplinary] hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing..."*
37. The respondent must show that the reason to dismiss was within a range of reasonable responses that a respondent could have taken in that situation.

There must be a fair investigation in all the circumstances, and the decision to dismiss must take into account equity and the substantive merits of the case

38. Furthermore, the Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions, including the decision to dismiss, were the actions of a reasonable employer in the circumstances.

Application of the Law to the Facts Found

39. It is for the respondent to establish on the balance of probabilities that they had a potentially fair reason for the dismissal. I find that the respondent has established such a reason on the evidence, that being misconduct.
40. It is for the respondent to show that the decision-maker had a genuine belief in the claimant's culpability. The Tribunal did not hear from Mr Lloyd, nor were the minutes of the disciplinary meeting presented in evidence. The respondent has not established that Mr Lloyd had a genuine belief in the claimant's culpability. However, Mrs Lloyd as appeals officer clearly held genuine belief in the claimant having committed an act of gross misconduct by her comments to Karen.
41. The question for the Tribunal to consider next is whether such a genuine belief was reasonably held. Was that belief held on reasonable grounds as a result of an investigation that was a reasonable one in the circumstances?
42. I find that the respondent's investigation was not a reasonable one in the circumstances. There was no investigation that involved the claimant. As confirmed by the respondent during these proceedings, the matters taken into account were Karen's statement and the claimant's comments during the disciplinary and appeal meetings. It would have been reasonable, in the circumstances, to allow the claimant to provide a response to Karen's allegations at the investigation stage, before the respondent had formed a definitive view that this constituted gross misconduct. It might also have been reasonable, for example, to speak to other members of staff at the investigation stage about whether either the claimant or Karen had made any comments that might have assisted the respondent in considering Karen's complaint in the light of the broader circumstances of the respondent's workplace.
43. However, the respondent did not take any such steps and had already decided, at the time the claimant was invited to the disciplinary meeting in the letter of 10 June, that the matters reported in Karen's statement were matters which might amount to gross misconduct. The respondent did not therefore take steps to establish the facts of the matter in a way which approached the allegations with an open mind, nor did it look for any evidence which supported the claimant's case as well as evidence against it.
44. On the contrary, I find on the balance of probabilities from the evidence before me that the respondent had already determined that the claimant had committed the acts as alleged and that they were gross misconduct. Certainly

Mrs Lloyd appeared to have reached such a conclusion in advance of the appeal hearing. There was no willingness on the part of the respondent to be open-minded to reaching a different conclusion at any stage in the disciplinary or appeal proceedings. Even on a cursory reading of the allegations in Karen's statement it would, I find, have been apparent that the claimant's comments could just have easily have been complaints about nepotism within the company, as opposed to statements that amounted to "gross misconduct on the grounds of sex discrimination" as they are described by the respondent.

45. I find therefore that the respondent's belief in the claimant's misconduct was not one that a reasonable employer could hold, in the circumstances, given the lack of a reasonable investigation.
46. The respondent does not appear at any stage to have considered any mitigating circumstances in relation to the decisions it took in relation to the claimant. Assumptions were made about Karen's motives, including that her reasons for presenting the complaint could only have been genuine. Mrs Lloyd told the Tribunal that she could think of "no reason" why Karen might have not been absolutely trustworthy and reliable and why her word should not have carried more weight than the claimant's, despite the claimant having a good work record and long service with the respondent and despite Karen being a new member of staff. Assumptions were also made about the claimant's dissatisfaction with her role and position within the respondent company that were not put to her at any stage by the respondent.
47. The ACAS Guide to Discipline and Grievances At Work (2019) suggests that, when deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:
- a. Whether the rules of the organisation indicate what the penalty will be as a result of the particular misconduct;
 - b. The penalty imposed in similar cases in the past;
 - c. The employee's disciplinary record, general work record, work experience, position and length of service; and
 - d. Whether the proposed penalty is reasonable in view of all the circumstances.
48. There was no evidence before me that this was considered by the respondent's decision-makers. In fact, Mrs Lloyd told the Tribunal at one point that the respondent had almost entirely delegated the decision to dismiss to external advisors. This is not an appropriate course of action where such advisors have not been provided with sufficient information about the circumstances of the case. In this case, as there had been almost no investigation, the external advisors could not have been provided with enough information to take a decision and in any event, the final responsibility for such decisions must lie with the respondent as the claimant's employer.
49. Taking all the circumstances of the claimant's dismissal into account, on the balance of probabilities I find:
- a. misconduct was the reason for the claimant's dismissal;

- b. the appeals officer Mrs Lloyd had a genuine belief that the claimant was guilty of the misconduct alleged, although this was not established in relation to the dismissing officer Mr Lloyd;
- c. the belief in misconduct was arrived at having not carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The respondent admitted that it carried out almost no investigation into the allegations against the claimant. It did not look for evidence that supported the claimant and only considered evidence that strengthened their allegations. The belief in the claimant's misconduct was therefore not one held on reasonable grounds;
- d. the procedure was not within the band of reasonable responses, in other words, a reasonable employer would not have carried out the procedure the respondent did. The factors that were taken into account in reaching the decision to dismiss for gross misconduct were not fully presented to the claimant and she was not given a proper opportunity to respond to all of them. The respondent's officers did not approach the matter with an open mind; and
- e. the sanction was not within the band of reasonable responses, in other words, a reasonable employer would not have imposed the sanction that the respondent did in the circumstances, particularly given the claimant's clean work record and her length of service.

50. The claimant's claim for unfair dismissal succeeds.

51. The matter will be listed for a remedy hearing with a time estimate of 3 hours, to determine the compensation payable to the claimant. At that hearing, the Tribunal will consider the following issues and the parties are to come prepared to discuss them:

- a. Does the claimant wish to be reinstated to her previous employment?
- b. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- c. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- d. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- e. What should the terms of the re-engagement order be?
- f. What basic award is payable to the claimant, if any?
- g. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- h. If there is a compensatory award, how much should it be? The Tribunal will decide:

- i. What financial losses has the dismissal caused the claimant?
 - ii. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the claimant be compensated?
 - iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - vii. Did the respondent or the claimant unreasonably fail to comply with it?
 - viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - ix. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
 - x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - xi. Does the statutory cap of fifty-two weeks' pay apply?
52. The claimant is to provide an updated Schedule of Loss to the respondent within 28 days of the date that this decision is sent to the parties, the Schedule of Loss to be accompanied by evidence of her attempts to secure alternative employment and any evidence of the losses incurred by her.

Employment Judge Barker

Date: 21 July 2021