



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107418/20 (V)

Held on 29 September 2021 by CVP

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Employment Judge Jones

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Mr C Gorman

**Claimant
Represented by:
Mr Dorrian -
Trainee solicitor**

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James Dalgety

**Respondent
Represented by:
Mr Lane – solicitor**

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JUDGMENT

The claimant was wrongfully dismissed by the respondent and the respondent is ordered to pay to the claimant notice pay of £4295.39 (net).

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The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant a basic award of £11,895.08, compensation for loss of statutory rights of £500 and a compensatory award of £4,490.63 (net).

The compensatory award of £4,490.63 is subject to the recoupment provisions and the recoupment period is 15 November 2020 to 30 September 2021.

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REASONS

Introduction

1. The claimant brought an unfair and wrongful dismissal against the respondent for whom he had been employed as a personal assistant, providing personal care to him. The respondent's position was that the claimant had been dismissed for gross misconduct. An alternative position was advanced that the claimant had been dismissed for some other substantial reason.
2. The respondent has complex health needs and requires round the clock care and employs a number of personal care assistants directly. The respondent's condition means that those who are not familiar with him can find it difficult to understand his speech. In these circumstances, one of his assistants, Mr Paterson, who had no involvement in the issues to be determined by the Tribunal provided assistance to the Tribunal by repeating to the Tribunal what the respondent said in evidence. In advance of doing so, he was administered the Interpreters' oath.
3. The Tribunal heard from the respondent, one of his personal assistants, Ms Erskine who was employed at the same time as the claimant, and the claimant gave evidence on his own account. Written witness statements formed the basis of evidence in chief of all witnesses and some supplementary questions were asked of the witnesses. All witnesses were also cross examined.
4. A joint bundle of documents was provided to the Tribunal and parties very helpfully provided written submissions after a short adjournment.

Findings in fact

5. Having considered the evidence, the documents to which reference was made and the submissions of the parties, the Tribunal found the following facts to have been established.
6. The claimant commenced work for the respondent in or around March 2005, initially on a part-time basis. He became full time in 2008. The claimant acted as a carer to the respondent, who has complex health needs and suffers from

cerebral palsy. Care was provided in the respondent's home and at times when the respondent left home for social or other visits.

7. A statement of terms and conditions in relation to the claimant's employment was signed by both parties in October 2016. It did not set out the date of the claimant's continuous service with the respondent.
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8. The respondent employs carers directly and requires 24 hour care, so his carers work day and night shifts. He has between two and three carers working at any given time.
9. The respondent was very concerned at risks posed to him of catching the COVID 19 virus. He has underlying conditions which make him particularly vulnerable.
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10. The respondent adopted practices to limit the risk of his contacting COVID – 19. He did not go into any detail about what was required in this regard to the claimant other than the requirement that all staff wear a facemask, PPE and ensure there was regular washing of hands. Only one member of staff would be in the claimant's home at any time, other than at changeover of shifts.
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11. Staff were permitted to go into a courtyard type area outside the respondent's kitchen if they smoked in order to have a cigarette.
12. Staff were required to wear facemasks at all times during which they were in the respondent's home and were required to wash their hands or use sanitiser regularly including when entering or leaving the respondent's home.
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13. In or around June 2020, the respondent exhibited some symptoms of COVID. The claimant then self-isolated with the respondent in the respondent's home for at least 10 days. This involved him providing round the clock care to the respondent as he was the only carer present during this period.
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14. A Ms Erskine and Ms Nelson also provided care to the respondent in 2020. Ms Nelson also took on administrative duties for the respondent. None of the carers had a management role in relation to each other.
15. Around the end of June 2020, Ms Nelson had a conversation with the claimant where she said that 'she would have to let the claimant go' because
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he did not have a PVG certificate. Thereafter an application was completed in relation to a PVG certificate and no more was said about it.

- 5 16. Ms Nelson drafted an email on 23 August 2020 which she forwarded to the respondent which was addressed to the claimant. The email said that the claimant's employment would terminate following a week's notice on the 30th August 2020. The email said 'You have been spoken to multiple times about attitude and conduct in the workplace and after further training I feel only short term changes were made and rules and regulations were not being followed which does not meet the job requirements of my care'. The email
10 was printed out and signed by the respondent and Ms Erskine.
17. Ms Nelson no longer works for the respondent due to concerns by the respondent regarding Ms Nelson's conduct during her employment with him.
18. On 24th August 2020, the respondent asked the claimant to retrieve a letter
15 from his desk. The claimant found the email which had been signed by the respondent and Ms Erskine. He asked the respondent and Ms Nelson for further details as to why he was being dismissed, but no further details were given to him. The claimant was not offered a right to appeal against his dismissal.
19. The claimant worked a week's notice.
- 20 20. Following the termination of his employment the claimant has been unable to obtain alternative employment and is in receipt of benefits.
21. During his employment with the respondent, the claimant's average weekly wage was £528.67 gross.

25 **Issues to determine**

22. The Tribunal was required to determine three issues:

- What was the period of the claimant's continuous service and therefore what was his notice entitlement?

- Whether the claimant had been wrongfully dismissed in that he was only provided with one week's notice; and
- Whether the respondent had established a potentially fair reason for dismissal and if so, whether the Tribunal was satisfied that dismissal was fair in all the circumstances of the case in terms of section 98(4) Employment Rights Act 1996.

Observations on the evidence

23. The Tribunal heard evidence from the respondent, the claimant and very brief evidence from Ms Erskine.
24. The Tribunal found the respondent generally credible, but his evidence on the reasons for dismissal was not at all clear. The respondent spoke of difficulties he had with his former employee Ms Nelson, who he said was no longer in his employment 'for legal reasons' and that he felt let down by her. The Tribunal did not hear from Ms Nelson and formed the impression that it was not getting the whole picture of what happened in June to August 2020 or why the respondent formed the view that the claimant would be dismissed.
25. Further, the Tribunal did not accept the respondent's evidence that he did not trust the claimant to take precautions regarding the COVID virus seriously. The claimant had self-isolated with the respondent for at least 10 days, with no time to himself other than when the respondent was sleeping during that period. This was, by agreement only 2 months before the claimant was dismissed. The Tribunal found it difficult to understand why the respondent would come to this view when the claimant had demonstrated his commitment to him by going beyond his contractual requirements.
26. It was also not in dispute that the reason it was the claimant and not one of the other personal assistants who had self-isolated with the respondent was because Ms Erskine and Ms Nelson both had families and therefore the claimant was willing to take into account their needs in addition to those of the respondent. This did not seem to the Tribunal to be consistent with a member of the team who did not treat his colleagues with respect which was

one of the concerns put forward by the respondent which led to the claimant's dismissal.

27. The Tribunal found the claimant a credible and reliable witness. It was clear to the Tribunal that the claimant had felt let down after 15 years of service to the respondent by having been dismissed for reasons which were not clear to him. The dismissal had clearly deeply affected him.

28. Ms Erskine's evidence was of limited value. The Tribunal understood that only one member of staff was on duty at a time during COVID and so the Tribunal did not accept Ms Erskine's evidence that she had seen the claimant fail to wash his hands when returning from a cigarette. Further, she did not elaborate on specific dates in this regard. Her evidence was that she only saw the claimant on shift changes and therefore the Tribunal gave limited weight to her evidence.

Relevant law

Unfair dismissal

29. In order to determine whether a dismissal is fair or unfair, it is first necessary to determine whether the respondent has established that the reason for dismissal was one of the potentially fair reasons set out in the Employment Rights Act 1996 ('ERA'). Section 98(2) ERA sets out the potentially fair reasons for dismissal. These include conduct (section 98(2)(b)) and some other substantial reason.

30. Where an employer has established a potentially fair reason for dismissal, that is not an end to the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to the provisions of section 98(4) ERA which states:

- a. 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) – 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 dismiss the employee, and shall be determined in accordance with equity and the substantial merits of the case.

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b. This requires the Tribunal to consider whether in all of the circumstances, including the procedure which was followed, the dismissal of an employee was fair.

31. A Tribunal must always keep at the front of its mind that it should not stray into what is called a 'substitution mindset'. Rather it should assess the actions of an employer in the context of a band of reasonable responses of a reasonable employer.

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Wrongful dismissal

32. In terms of section 86 Employment Rights Act 1996, an employee is entitled to a week's notice for every year of service up to a maximum of 12 weeks. The claimant's contract replicated these provisions.

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33. An employee is not entitled to notice pay if they have fundamentally breached the contract of employment such that their conduct amounts to a repudiation of the contract. The test is quite different from that of unfair dismissal in that it is for the Tribunal to determine whether the claimant committed a repudiatory breach of contract.

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Submissions

34. Parties very helpfully provided written submissions.

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35. The respondent's position was that the claimant was dismissed for conduct or alternatively some other substantial reason. It was said that the respondent had complied with the principles set out in *British Homes Stores Limited v Burchell* [1978] IRLR 379, that as much investigation as was reasonable was carried out and that dismissal was within the band of reasonable responses.

36. It was recognised that elements of the procedure departed from the ACAS Code, but this did not render the dismissal unfair.

37. In terms of wrongful dismissal, it was said that the claimant had committed a repudiatory breach of contract and therefore was not entitled to receive any notice pay. It was however accepted that the claimant's employment commenced in 2008 and therefore there was a recognition that the claimant had not been paid his full notice pay if it was not accepted that the claimant could be dismissed for gross misconduct.

38. The claimant's position was that the claimant had not been dismissed for gross misconduct as that would be inconsistent with the provision of a week's notice and that there were significant procedural flaws in the process followed in relation to the claimant's dismissal. The claimant was never advised that there was any investigation ongoing, for instance.

39. It was also said that there should be no Polkey deduction or that such deduction should be minimal and that the claimant had not contributed to his dismissal as there was no evidence to support any allegation that the claimant had engaged in blameworthy conduct.

Discussion and decision

Continuous service

40. The Tribunal preferred the claimant's evidence regarding the commencement of his employment to that of the respondent's which was vague. Therefore, it concluded that the claimant had commenced employment in March 2005. The contract of employment was silent on the commencement of continuous service and the Tribunal concluded that the claimant's evidence in this regard was more reliable.

Wrongful dismissal

41. The Tribunal did not accept that the claimant was dismissed for conduct reasons. Further it did not accept that any action on the part of the claimant could be said to amount to a repudiation of his contract of employment. Even if the claimant had failed to replace his face mask until he was inside the

respondent's house and failed to sanitise his hands on returning from having a cigarette (which the Tribunal did not accept had happened), this would not have amounted to a repudiation of contract on the part of the claimant. The Tribunal was of the view that there was no basis whatsoever for the respondent to fail to pay the claimant the notice pay to which he was entitled or allow him to work out his notice.

Unfair dismissal

42. The Tribunal did not accept that the claimant had been dismissed for conduct reasons. It found the respondent's position in relation to the dismissal of the claimant confusing and contradictory. On the one hand, it was said that the claimant was dismissed for gross misconduct, in that he failed to put his face mask on or wash his hands before coming back from having a cigarette on a particular occasion. However, the letter of dismissal made reference to the claimant having been dismissed because he had been 'spoken to multiple times about attitude and conduct in the workplace and after further training I feel only short term changes were made and rules and regulations were not being followed which does not meet the job requirement of my care.' The respondent's ET3 made reference to other matters, such as being rude to visitors and colleagues.

43. On the basis that the respondent's evidence as to whether the claimant had been dismissed for conduct reasons was confusing and contradictory, the Tribunal was of the view that the respondent had failed to establish that the reason for the claimant's dismissal was conduct.

44. However, the Tribunal accepted that the claimant was dismissed for some other substantial reason in terms of section 98 of the Employment Rights Act 1996. Although the Tribunal had some hesitation in concluding that the respondent had established a potentially fair reason for dismissal, it took into account the unique circumstances of the claimant's employment relationship with the respondent. While the Tribunal did not accept that the reasons put forward in the letter of dismissal provided to the claimant, it nonetheless concluded on the basis of the evidence of the respondent that he genuinely no longer wished to employ the claimant. What amounts to a break down in

trust and confidence between an employer and employee will vary depending often on the nature of the role played by the employee and the nature and size of the respondent's organisation.

5 45. Given that the claimant was required to provide intimate care to the respondent and that he was one of a very small number of people required to provide such care, the Tribunal was of the view that any genuine concerns the respondent may have had about the employment relationship continuing would amount to a break down in mutual trust and confidence. While the Tribunal did not accept the reasons put forward by the respondent as
10 accurate, in that it was not accepted that the claimant was dismissed for what was referred to as 'the cigarette incident', the Tribunal did accept that the respondent no longer wanted the claimant to work for him. It seemed to the Tribunal that in such circumstances, it was almost inevitable that there was a breakdown in mutual trust and confidence.

15 46. However, the Tribunal did not consider that the claimant's dismissal was fair. The respondent did not act reasonably. No procedure whatsoever was followed in relation to the claimant's dismissal. The Tribunal considered the judgments in the cases of Jefferson (Commercial) LLP v Westgate, UKEAT/0128/12 and In Lund v St Edmund's School, Canterbury, UKEAT/0514/12 to which the respondent made reference in their
20 submissions regarding the requirement for compliance with the ACAS code of practice where the dismissal was for some other substantial reason.

47. In the present case, there was no investigation whatsoever and the Tribunal did not accept the respondent's submission that an investigation was
25 unnecessary given that the respondent was said to have witnessed the conduct which led to the claimant's dismissal.

48. Moreover, at no stage was the claimant given the opportunity to comment on any allegations against him. There was no disciplinary hearing or meeting of any kind to allow a discussion of the reasons why the respondent had
30 decided to dismiss the claimant and the claimant was not given any opportunity to appeal against his dismissal. While the Tribunal noted that the claimant's contract did make reference to a right of appeal, this was not

highlighted to the claimant and the Tribunal also noted that an appeal should be referred to the respondent. Further, the letter of dismissal said that any questions should be referred to Ms Nelson, who had drafted the letter of dismissal in the first place.

5 49. The Tribunal accepted the claimant's evidence that he asked the respondent and Ms Nelson on a number of occasions why he was being dismissed and was not given any coherent answer. The Tribunal therefore accepted that any attempt by the claimant to appeal against his dismissal would have been pointless.

10 50. The Tribunal was mindful that a meeting may not always be required in circumstances where an employee is being dismissed for some other substantial reason. However, it concluded that it would have been reasonable in the present circumstances to have a meeting with the claimant to discuss the reasons for his proposed dismissal and give him an opportunity to make
15 representations.

51. The Tribunal took into account the fact that the respondent was an individual who employed the claimant directly, and it had great sympathy with him in that he had limited resources to deal with employment issues and that he said that did not deal with conflict well. However, where someone is willing
20 and able to take on the responsibility of being an employer there are duties which are associated with that role. The bare minimum of those responsibilities in terms of termination of an employee's employment, particularly where that employee has been providing services for over 15 years, is that a basic process should be followed in relation to any dismissal.
25 It was noted that the claimant did have a contract of employment albeit it was deficient in a number of respects. However, the respondent was aware of the fact that there was a disciplinary procedure referred to in the claimant's contract. The Tribunal was of the view that a meeting or hearing ought to have taken place to explain to the claimant why it was being proposed that
30 his employment would be terminated. The Tribunal was of the view that such a meeting may have resulted in the respondent reconsidering his position. The claimant was a long standing member of staff who had shown loyalty and

dedication to his duties particularly during the period of the pandemic, and it cannot be said that such a meeting would have been pointless.

52. Therefore the Tribunal is of the view that the failure to follow any procedure whatsoever, and in particular failure to have a meeting at which the reasons
5 for the claimant's proposed termination of employment were put to him rendered the dismissal unfair.

Remedy

Wrongful dismissal

53. The claimant was, both on a statutory and contractual basis entitled to twelve
10 weeks' notice of termination of his employment. He was only given one week's notice and is therefore entitled to be paid eleven weeks' notice pay at a weekly rate of £390.49 gross, being a total net sum of £4,295.39 in respect of his wrongful dismissal. This would cover the period from 30 August 2020 to 15 November 2020.

Unfair dismissal

54. The claimant is entitled to a basic award of £11,895.08 on the basis of his age, 15 years' service and a weekly gross pay of £528.67. The Tribunal concluded that it was not just and equitable to reduce the basic award on the basis that the claimant may have been fairly dismissed had a fair procedure
20 been followed, or for any other reason.

55. The claimant has not obtained alternative employment and has been in receipt of Universal Credit since November 2020.

56. The claimant has a net loss of income from the expiry of the notice period, being 15 November 2020 to the date of hearing 30 September 2021 of almost
25 46 weeks which is a net loss of £17,962.54. The claimant has ongoing net loss of £390.49 per week thereafter.

57. The Tribunal considered whether or not it should apply an uplift to the compensatory award on the basis that the respondent had failed to follow the ACAS code. It declined to do so. Given the very unusual circumstances of the employment relationship between the claimant and respondent, the Tribunal
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concluded that it would not be just and equitable to apply an uplift in the award.

58. It is appropriate to award £500 in respect of loss of statutory rights.

59. The Tribunal considered on the basis of *Polkey v AE Dayton Services Ltd* [1987] IRLR 50 whether had a fair procedure been followed, the claimant would have been fairly dismissed. The Tribunal concluded that there was a 75% likelihood that the claimant would have been dismissed in any event. The Tribunal concluded that had the claimant been given an opportunity to make representations, then it may be that the respondent would have changed his position. However, the Tribunal could not put the likelihood at more than 25%. Therefore the claimant's compensatory award falls to be reduced by 75% on the basis that the Tribunal concluded that there was a 75% likelihood that the claimant would have been dismissed had a fair procedure been followed. The Tribunal did not consider it just and equitable to make an award of future losses, therefore the claimant is entitled to a compensatory award of 25%/£17,962.54, which is a net amount of £4,490.63. The Tribunal did not consider it just and equitable in those circumstances to make any award in respect of future losses.

60. The Tribunal concluded that the claimant did not contribute to his dismissal. He was not dismissed for reasons of conduct, and the claimant's conduct was not blameworthy in any way. Therefore, the Tribunal rejected the submission that there should be any reduction in compensation to the claimant on the basis of his conduct.

61. The Tribunal then considered whether there should be any discount from the compensatory award on the basis that the claimant had failed to mitigate his losses. The Tribunal rejected that argument for the following reasons:

- The claimant had worked for the respondent for 15 years and this was the only job he did during that period. It would inevitable that his ability to find alternative work would be compromised after that period of time, particularly given the claimant's age.
- The claimant was unwell during the relevant period
- The exceptional circumstances of the pandemic

- The claimant's age, admitted computer illiteracy and lack of qualifications
- The fact that the claimant did not have a driving license.

5 62. Therefore the Tribunal concluded that the claimant is entitled to compensation as follows:

	Unpaid notice pay	£4295.39
	Basic award	£11,895.08
	Loss of statutory rights	£500
10	Compensatory award	£4,490.63

Total £21,181.10

15 63. The compensatory award of £4,490.63 is subject to the recoupment provisions and the recoupment period is 15 November 2020 to 30 September 2021.

20 Employment Judge: Amanda Jones
Date of Judgment: 14 October 2021
Entered in register: 19 October 2021
and copied to parties