EMPLOYMENT TRIBUNALS

Claimant: **Ms Nadia Hafeez**

Respondent: **Jorada Limited t/a Bluebird Care (Medway)**

In person at Ashford Employment Tribunal

On: **6-8 September 2021 and 22 September 2021**

Before: **Employment Judge Martin**

Representation
Claimant: **Mr Saeed- Solicitor**
Respondent: **Ms Grech - Director**

RESERVED JUDGMENT

The judgment of the Tribunalis that the Claimant's claim for unfair dismissal is unsuccessful and is dismissed.

RESERVED REASONS

1. The claim before the Tribunal was for unfair dismissal. The Claimant's claim of discrimination had previously been dismissed. The Respondent denied unfairly dismissing the Claimant arguing that she had been fairly dismissed for breach of a statutory enactment and/or some other substantial reason justifying dismissal due to her immigration status.

The hearing

2. This matter has a long procedural history. There have been at least nine preliminary hearings before getting to this hearing. The final hearing which I was originally listed to hear was for 7 days. On the morning of the hearing, the Claimant's solicitor was not in attendance and there were difficulties in communicating with him using the cloud video platform (CVP). The Claimant was self isolating and did not have the facilities to attend the hearing using CVP. The second day was therefore used for case management and after discussing and agreeing the issues, the hearing was relisted for 6 September 2021 for three days. The hearing went part heard to 22 September 2021 when submissions were given, and I then retired to chambers to consider my decision.

3. I heard from the Claimant and on her behalf from Diane Smith and Hannah Worsfold. For the Respondent I heard from Ms Grech (director), Mr Gillet (who heard the disciplinary hearing) Melinda Street and Shona White]. I had before me an extensive bundle of documents numbered to 912 pages plus some additional documents. The Claimant attempted to introduce a copy of a Facebook page not previously disclosed, during Mr Gillet's evidence. I did not allow this to be produced at this late stage, especially given the number of pervious case management hearings and the numerous opportunities to disclose it before the hearing started.

4. I was concerned that in the bundles were documents that gave the Respondent's service users names, address, and other details including the code to key safes. This was information produced by the Claimant who had emailed it to herself during the disciplinary process described below. I was very concerned that sensitive personal data had not been redacted and will be ensuring that the Tribunal will quickly dispose of the relevant pages. The Claimant is required to dispose of the relevant pages appropriately and swiftly if not already done.

The agreed issues:

5. What the reason for dismissal?

   The Respondent says it is some other substantial reason justifying dismissal namely loss of right to work in the UK. The Claimant says the Respondent wanted to dismiss the Claimant and used the disciplinary process as a vehicle to ensure she lost her right work, and her indefinite leave to remain and her job. The Claimant says the Respondent did this to try to avoid an unfair dismissal claim.

   a. Was the dismissal fair?

   b. Was the procedure fair in that the Claimant was:

      i. Informed in advance what the allegations were

      ii. Given the right to be accompanied

iii. Given the opportunity to defend the allegations

iv. Given an independent and impartial disciplinary officer

v. The Claimant says that Mr Gillett was not impartial or independent because the was previously a principal of the organisation and in a relationship with Ms Getch at the material time.

6. Are the notes of the disciplinary hearing provided by the Claimant a true reflection of the hearing or did the Claimant amend the notes.

7. Was the decision to demote the Claimant within the range of reasonable responses

8. Was the Claimant given the opportunity to appeal

    a. Did the Claimant appeal

    b. Was an appeal hearing held

    c. If the decision to demote was fair and within the range of reasonable responses, did the Respondent have reasonable grounds to believe that the Claimant was no longer eligible for its sponsorship and therefore not able to work.

9. Was the decision to terminate the Claimant's employment on this basis fair.

The law

10. The Tribunal must establish:

11. Whether the Respondent had a reason for the dismissal which was one of the potentially fair reasons within s 98(2) of the Employment Rights Act 1996 ("ERA") and whether the Respondent had a genuine belief in that reason.

12. A reason for the dismissal of an employee is a set of facts known to the employer or it may be a belief held by him, which caused him to dismiss the employee: Abernethy v Mott, Hay and Andersen [1974] IRLR 213 CA

13. An Employment Tribunal will err in law if it holds the dismissal to be fair in circumstances where the employer had, in dismissing an employee, relied upon grounds for dismissal which were shown to be unsustainable and could not be relied upon on as reasonable grounds.

14. S98(2) provides that the following are potentially fair reasons for dismissal:

    a. Conduct
    b. Capability
    c. Redundancy

d. Breach of a statutory enactment
e. Some other substantial reason justifying dismissal

15. The burden of proof rests on the Respondent.

16. Whether the Tribunal is satisfied in all the circumstances (including the size and administrative resources of the employer) that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee (s98(4) ERA the burden of proof here is neutral and that the Tribunal must establish it in accordance with equity and the substantial merits of the case. It is appropriate to regard this matter as consisting of two separate issues, namely:

    a. Whether the employer adopted a fair procedure. This will include:

        i. a reasonable investigation

        ii. informing the employee of the charges or problems in advance of a hearing so that the employee can come to the hearing knowing suitably prepared

        iii. a hearing at which the employee has the opportunity to put their case and to answer the evidence obtained by the employer, and

    b. Whether the dismissal was a reasonable sanction in the circumstances of the case. This will include:

        - Whether the employer acted within the reasonable band of responses in imposing it. The Tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. The Tribunal sits as an industrial jury to provide, partly from our knowledge, an objective consideration of what is or is not reasonable in the circumstances. That is, what a reasonable employer could reasonably have done.

        - Having regard to the matters from the employee's point of view, whether on the facts of the case the employee has objectively suffered an injustice.

17. It is trite law that a reasonable employer will bear in mind, when making the decision, factors such as the employee's length of service, previous disciplinary record, and declared intentions in respect of reform and so on.

18. The Tribunal must also bear in mind the provisions of the relevant ACAS code of practice on disciplinary and grievance procedures and consider any relevant provision.

My findings of fact and conclusions

19. These factual findings are limited to those matters which are relevant to the issues and necessary to explain the decision reached. All evidence was heard and carefully considered together with both parties' submissions even if not specifically recorded below.

20. The Respondent provides care to people in their own homes. The Claimant was employed by the Respondent as a care coordinator from 11 June 2011 to 2 February 2018 when her employment was terminated on the basis that she no longer had the legal right to work in the UK. This was because she was demoted following a disciplinary hearing and that meant that she no longer met the earnings threshold which attached to her permission to work in the UK.

21. The Claimant's right to work was under a sponsorship licence. This licence has various conditions attaching to it, one of which is that the employee earns enough. It is not necessary to set out the Claimant's immigration history in any detail. The only relevant part is the earnings threshold.

22. I heard evidence about the background leading to the disciplinary hearing which took place on 18 January 2018. It is not necessary or proportionate for me to set out this evidence in any detail. It is sufficient to record that the Respondent had concerns about the Claimants performance which came to light when she was absent from work for some weeks following an accident in November 2017. The essence of the concerns about her work was that the Respondent discovered she did not keep the system up to date in relation to imputing data relating to carers and service users' requirements which led to service issues for the Respondent. The Respondent chose to utilise the disciplinary process categorising the allegations as gross misconduct rather than the capability process.

23. This led to the Claimant being called for a disciplinary hearing on her return to work. The letter inviting her is set out in full:

"Dear Nadia Hafeez

I have recently received concerns regarding your conduct as follows:
The Concerns relate to an impact on business during absence due to Inaccurate data keeping.

These matters have now been investigated and I believe the outcomes indicate that there are sufficient concerns regarding your conduct to warrant a disciplinary hearing. Consequently, a disciplinary hearing will be held at our Swale office 123-125 high Street, Sitlingbourne, Kent. ME10 4AQ on 18.01.2018 at 17:30pm.

The meeting will be chaired by Andrew Gillet and will focus on the following allegations:

1. ***Inaccurate Data Keeping***

It is your right to bring a colleague or union representative to the hearing. The hearing will follow the process outlined in Bluebird Care's Disciplinary Policy and Procedure.

Yours sincerely

Charmaine Grech
Director of Bluebird Care (Medway)
Director of Bluebird Care (Swale)" (sic)

24. The Claimant was accompanied to the disciplinary hearing. The hearing was held by Mr Gillet. Mr Gillet is a solicitor. He was at one time directly involved in the business and was previously the personal partner of Ms Grech. The Claimant's case is that he was not sufficiently impartial to hold the disciplinary hearing and that this in part rendered the dismissal unfair. The Claimant was not provided with any documentation regarding the allegations against her before the hearing or and was shown (but not given) minimal documentation during the hearing. Mr Gillet said this comprised one page of calculations and a two page print out of a staff plan. There was no investigatory report detailing the inaccuracies that were alleged that led to this disciplinary hearing being held. Mr Gillet said in evidence ***"I was not aware of investigation; I was to do the disciplinary hearing".*** (Taken from my notes of evidence).

25. The outcome of the hearing was that the Claimant was demoted. As a result of the demotion, the Claimant's salary was reduced which meant that she no longer satisfied the sponsorship licence conditions on which her immigration status relied. The Respondent's case is that following a telephone communication with the Home Office it had no option but to terminate her employment as the Home Office informed Ms Grech that the Claimant did not have the right to work because she no longer satisfied the terms of the licence, and that if the Respondent continued to employ her it could be subject to a fine and potential prosecution.

26. After the hearing the Claimant sent emails requesting further information from Mr Gillet. This indicates that she wanted to know more about the allegations and wanted to respond to them properly. However, there was not a further meeting between her and Mr Gillet.

27. Dealing with the disciplinary hearing first, I considered the Claimant's submissions which rely on the unfairness of the disciplinary hearing in that there was no proper notice of the allegations to allow the Claimant to know what was alleged against her, that there was no investigation, the hearing itself was unfair, there was no proper right of appeal, and that Mr Gillet was not the appropriate person to conduct the hearing as he was not sufficiently independent. Reference is made to British Home Stores v Burchill [1978] IRLR 379.

28. I do not agree with the Claimant that Mr Gillet was not sufficiently impartial to chair the disciplinary hearing. He is a solicitor and had knowledge of the business from his previous involvement with it. On balance I accept his evidence and that of Ms Grech, that they were not longer in a personal relationship. Had Mr Gillet still been involved in the business, it would have been appropriate for him to be the disciplinary manager and at that time he was the personal partner of Ms Grech so it does not make sense that he would be in any different situation when conducting the disciplinary process on this occasion.

29. I agree with the Claimant in that there was no proper identification of the allegations against the Claimant sufficient to allow her to properly defend them.

Ms Grech gave evidence that there was some kind of informal discussion prior to the letter inviting the Claimant to the disciplinary hearing and that from this, the Claimant should have known what the problems were. The Claimant says that there was no such meeting. Whether or not there was such a meeting, I do not find that this was sufficient to put the Claimant on notice that formal disciplinary proceedings would ensue or be sufficient to formally notify the Claimant of the disciplinary allegations she was being disciplined for. The letter inviting her to the disciplinary hearing did not set out what the alleged inaccuracies were and there was no documentation provided prior to the hearing which may have helped her understanding.

30. I agree with the Claimant that the investigation was inadequate. I am not sure what investigation was done as part of the formal process. The evidence is that problems emerged while the Clamant was absent from work, and that this constituted the investigation. Mr Gillet also did not know what investigation had been done before he was asked to chair the disciplinary hearing. There was no report, or other document for the Claimant to consider, to be able to properly understand the allegations and defend herself. The documentation relating to what the Claimant was disciplined for was very sparse, as set out above it comprised one handwritten sheet of paper and a print out.

31. In the circumstances, especially given the potential for the Claimant's employment being terminated, the investigation was not within the range of reasonable responses. Although the Claimant was given the opportunity to speak during the disciplinary hearing, given the lack of information about the disciplinary allegations, she could not adequately respond to them. I am satisfied that the Claimant did not know what the allegations were in any sufficient detail, is evidenced by her emails after the hearing asking for further information. There was no attempt to engage with the Claimant in a further meeting.

32. I do not accept the argument put forward by the Respondent that the Claimant was able to search for herself for the records relating to the allegations. It was not the Claimant's role to undertake a search of records to work out herself what the allegations might be. It was the Respondent's responsibility to ensure that she had the necessary information to know what the disciplinary allegations were.

33. The outcome letter dated 2 February 2018 said:

"Due to the seriousness of the effect of these breaches on our business. And as we have said in the absence of any admission of fault on your part, or explanation of the statistics that have been presented, we consider your conduct amounts to gross misconduct.

Taking into consideration your long service, and while it would have clearly been in our power to have proposed a dismissal, we have elected not to proceed down that route. As sanction for your gross misconduct you will forthwith be demoted from your position as a manager with primary responsibility for the coordination function to the position of an assistant/support coordinator.

Your salary and the benefits will be, adjusted to take into consideration your demotion".

The Claimant was given a right to appeal. The outcome letter states this as being 10 days of the outcome letter.

34. Ms Grech told the Claimant by email on 2 February 2018 that she would be contacting the Home Office to check what effect the demotion would have on her immigration status.

35. The Claimant sent a letter of appeal on 17 February 2018. Ms Grech wrote to the Claimant the following day:

"Thank you for your email dated the 17" February and received at 2.45 pm. The contents of your email have been considered but in the absence of any additional information or evidence you make it very difficult for me to review the decision but must add that your time to appeal is now closed."

The letter is at least 2 pages long (the end of the letter is missing from the bundle) and goes into some detail as to why Ms Grech could not consider the appeal.

36. There was questioning during the hearing as to whether the appeal had been sent in time or not. I accept that the normal time for appeal is 5 days pursuant to the Respondent's policies, however the letter gave 10 days from the date of the letter. This is clear. The letter was sent on 2 February 2018 so the appeal should have been made by 12 February 2018. It was made on 17 February 2018. The email from Ms Grech of 18 February 2018 states the appeal was out of time and additionally that there were no grounds to consider an appeal. Even if the appeal had been in time, (I find it was out of time) Ms Grech's letter of 18 February makes it clear that she is rejecting the appeal. That was the end of the process.

37. As such the Claimant did not have a continuing right to work in the UK under her sponsorship visa. To dismiss fairly for breach of a statutory entitlement, there must have been an actual breach of that entitlement. It appears that there was a breach as the disciplinary process had ended and the Claimant no longer met the earnings threshold.

38. Alternatively, the Claimant was dismissed for some other substantial reason justifying dismissal. The substantial reason was that Ms Grech had reasonable grounds for believing that the Claimant could not continue to work for the Respondent once she had been demoted, following her discussion with the Home Office. I am satisfied that this discussion did take place, and that Ms Grech believed the Respondent could be prosecuted or subject to a fine if it continued to employ the Claimant.

39. On 23 February 2018 Ms Grech wrote to the Claimant:

"Dear Nadia

Further to my letter dated 18.02.2018. I write to clarify the position of employment for you.

I have now liaised with the Sponsor License Unit and taken advice regarding your situation.

It has been made clear to me that due to the outcome of your disciplinary hearing and that you were demoted, you would no longer meet the levels and requirements for sponsorship under Tier 2 (General) and that I would need to terminate your sponsorship. I was also warned that if I was to continue with your employment, compliance action would be taken against me.

On this basis. it would mean that as I have had no option but to cease your sponsorship, as a result your employment with Bluebird Care (Medway)' Is terminated.

I have recorded your last day of employment with us as of 2 February when you. would have been notified of the decision to demote you .

If there Is anything that you are aware of that either you or I can do to resolve this situation differently please do let me know."

40. Ms Grech said that she was always mindful of her obligations as a sponsor, especially given the breach of the sponsorship licence which had occurred before. Based on the information she was given, she considered that she had no option but to terminate the Claimant's employment. Her position is that she did not want to do this and wanted the Claimant to remain in work but that she had no choice. In support of this referred me to her suggestion that the Claimant contact her to see if the situation could be resolved.

41. At the first hearing which had to be postponed, the Claimant's representative said that the disciplinary allegations were false, and the Respondent disciplined the Claimant with the intention of demoting her so it would have to terminate her employment as she would not then meet immigration requirements which would be less risky to the Respondent than if it dismissed her in the disciplinary process. However, at the final hearing, this argument was not explored either in cross examination of the Respondent witnesses or in the Claimant's submissions. The Claimant's submission sets out the Claimant's case as follows: submissions instead the Claimant began her submissions by saying:

"It is submitted that the evidence presented to the Tribunal clearly establishes the fact that the Respondent failed to materially and unreasonably follow either the ACAS procedures both prior and during the so-called disciplinary process and in addition failed demonstrably and unreasonably to follow its own policy and procedures in relation to the Claimant's disciplinary and eventual dismissal and as such the dismissal was automatically unfair. In addition, the evidence presented makes clear that the Respondent is a middle size company and has had several employment Tribunal cases and has a detailed procedures manual enhancing the minimum requirements of the ACAS procedures, there can therefore be no excuse for the blatant disregard of those or ACAS procedures, and such blatant disregard must result in a 25% uplift in the event that the Claimant's request for re-instatement cannot be met".

42. Given this, I am not sure whether the Claimant continues to pursue her argument that the hearing was contrived; however, for completeness, as it was discussed when finalising the issues, I have considered this aspect of the claim as well.

43. For this to have been the case, there would have to have been collusion between Ms Grech and Mr Gillet. This was not explored in evidence nor in the Claimant's submissions. I have considered Mr Gillet's and Ms Grech's

evidence in detail and find that there was no such collusion. Mr Gillet said he was aware that the Claimant was subject to immigration control, but he did not know the details. I have no reason to doubt this evidence. If the Respondent had wanted to dismiss the Claimant, I find it would have done so at this stage. Whilst I find that there was a lot wrong with the disciplinary process, and I have some qualms about how the disciplinary hearing was handled, I do not find that the Respondent demoted the Claimant only to be able to dismiss her for not remaining eligible to continue to work in the UK. In favour of the Respondent is the email sent to the Claimant by Ms Grech asking the Claimant to contact her to see how else the situation could be resolved. Ms Grech was trying to consider ways to ensure the Claimant did have the right to work and offered to assist the Claimant. On balance this shows that Ms Grech did not have a hidden agenda.

44. I then considered whether the Claimant was, as a matter of fact, not in compliance with the terms of her sponsorship agreement when she was demoted as she did not then meet the earnings threshold. The Claimant submits that she was entitled to work in the UK while the appeal process in relation to the demotion was ongoing. It is the Claimant's case that the appeal was on going. The Respondent's position is that the appeal process had finalised. It appeared to be accepted by both parties that if the appeal process was ongoing then the Claimant's immigration status was legal. I have found that the appeal was submitted late and that Ms Grech's response to it made it clear that the appeal process had concluded.

45. The other potentially fair reason for dismissal, some other substantial reason justifying dismissal does not need there to be an actual breach of the entitlement. For this, the Respondent must have reasonably believed that the Claimant did not have the continued right to work in the UK.

46. Ms Grech gave evidence that she was very careful about how she managed the licence she had been granted by the Home Office to sponsor the Claimant's employment. Previously both the Respondent and the Claimant had been in breach and the Home Office downgraded the licence. Ms Grech knew she had to notify the Respondent of changes to the Claimant's employment and her evidence is that she telephoned the Home Office to seek advice when the Claimant was demoted and was told that the Claimant no longer met the immigration requirements and that if the Respondent continued to employ her it would be subject to a fine and potential criminal prosecution. Ms Grech's evidence is that because of this she had no alternative but to terminate the Claimant's contract of employment. Her evidence is that she wanted to retain the Claimant as an employee and suggested to the Claimant that they should discuss options. However, the Claimant did not contact the Respondent further.

47. The Claimant says that Ms Grech's evidence should not be believed as there is no corroborating evidence to show that she did talk to the Home Office by telephone. The Claimant is correct that there is no documentary evidence. In this situation, I must decide on the balance of probabilities whether Ms Grech was telling the truth. I found Ms Grech to be a reliable witness. She was consistent in her evidence that she had spoken to the Home Office, and consistent in her other evidence too. She was willing to accept that she may

have made mistakes in the disciplinary process but was adamant that she had made this phone call. On balance I find that she did make this phone call and was told by the Home Office that to continue to employ the Claimant would be an offence and the Respondent could be fined.

48. Had the disciplinary procedure resulted in a dismissal, then I would have no hesitation in finding that the dismissal was procedurally and substantively unfair. However, it did not, and the sanction applied was demotion.

49. As a result, I find that the reason for dismissal was some other substantial reason justifying dismissal. The justification is the reasonable belief of Ms Grech that the Respondent would be liable to a fine or prosecution if it continued employing the Claimant.

50. In these circumstances I find the dismissal to be fair and the Claimant's claim is dismissed.

Employment Judge Martin

Date: 17 November 2021