THE EMPLOYMENT TRIBUNALS

Claimant Miss D Payne

Respondent Gentoo Group Limited

Heard at Newcastle upon Tyne Hearing Centre (via CVP video link)

On 20 January 2022

Before Employment Judge Langridge

Representation:

Claimant Mr G Airey, solicitor
Respondent Mr D Crehan, counsel

WRITTEN REASONS

Judgment in this case having been given orally in the presence of the parties, and following a request from the claimant, the Tribunal's reasons for its decision are set out below.

Introduction

1. This was a claim for unfair and wrongful dismissal based on the respondent's decision to summarily dismiss the claimant on the grounds of gross misconduct. The claimant complained that the decision was unfair and unreasonable, and that she had not committed any misconduct of a serious or gross nature such as to justify dismissal without notice. The conduct in question related to the claimant making enquiries of the respondent in respect of a housing application by her former partner, and requesting access to his former property to collect some personal possessions.

2. In her application to the Tribunal the claimant did not deny having made such enquiries, but complained that her dismissal was unfair because she had acted with her former partner's knowledge and consent. She challenged the adequacy of

the investigation because the respondent did not request his "letter of authority" (a document referred to in the pleading, but which did not in fact exist), and she disputed that there was any breach of the respondent's rules on data protection. A further allegation of unfairness was that the respondent had failed to take account of mitigating circumstances and her long unblemished service. The respondent defended the claim on the basis that the claimant's conduct (the facts of which were largely admitted) amounted to a serious breach of its Code of Conduct and Data Protection Policy, and it had no confidence that a repetition would not occur in the future.

3. Although the claimant sought a 25% uplift to any compensation awarded on the grounds that the respondent failed to comply with the ACAS Code, no specific breaches were pleaded or identified in the evidence. The respondent contended that it had acted reasonably throughout the disciplinary process, including the conduct of its investigation, the disciplinary hearing and the internal appeal.

4. At the hearing of this claim, evidence was given by the claimant on her own behalf and she produced a written statement from her former partner, Mr Robson although he did not attend to give evidence. The respondent produced three witnesses: Ms J Walker, the investigating manager; Mr P Sandersfield, the dismissing manager; and Ms S Thompson, chair of the appeal panel. An agreed bundle extending to around 180 pages was provided. Although the Tribunal's decision took into account all the relevant evidence presented by the parties and referred to during the hearing, neither the oral judgment given nor these written reasons aim to include a comprehensive analysis of every aspect of the evidence. Instead, they will focus on the key relevant areas.

Issues and relevant law

5. The legal principles governing these claims are well-established and can be summarised as follows.

6. The respondent relied on conduct as a potentially fair reason for dismissal under section 98(2) Employment Rights Act 1996 ('the Act'). The crux of the case revolved around whether the respondent's decision was fair or unfair in accordance with section 98(4) of the Act and well-established guidelines from the relevant case law. Section 98(4) provides that:

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.*

7. The main authority relevant to conduct dismissals is ***British Home Stores v Burchell [1978] IRLR 379*** which identifies three key questions for the Tribunal:

    a. Did respondent have a genuine belief that the claimant had committed misconduct?

    b. Did the respondent have reasonable grounds for holding that belief?

    c. Did the respondent carry out as much of an investigation as was reasonable in the circumstances?

8. The Tribunal's assessment of the case is to be judged by reference to what the respondent knew or ought to have known at the time of making its decision. The question then is whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might have adopted. This test applies to the handling of the investigation as well as to the reasonableness of the decision to dismiss (***Sainsbury PLC v Hitt 2003 ICR 111***). It is important that the Tribunal does not substitute its own view for the decision reached by this respondent, as long as the decision falls within that range of reasonableness (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*** and ***London Ambulance Service NHS Trust v Small [2009] IRLR 563***).

9. Whether an act of misconduct amounts to gross misconduct is a mixed question of law and fact. Conduct which fundamentally undermines the employment contract and destroys trust and confidence in that relationship may be treated as a repudiatory breach entitling the employer to terminate the contract without notice. The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence (***Sandwell and West Birmingham Hospitals NHS Trust v Westwood EAT 0032/09***).

10. For the wrongful dismissal claim, the legal test to be applied is different from that under section 98(4) and the band of reasonable responses. Whereas in the latter case it is not for the Tribunal to determine the claimant's guilt or innocence in respect of the alleged conduct, for the purposes of the wrongful dismissal claim that assessment must be made. It was therefore necessary for me to reach conclusions based on the evidence provided as to whether the claimant did or did not commit an act of gross misconduct, and accordingly whether or not the respondent was entitled to terminate the employment without notice.

Findings of fact

11. The claimant started working for the respondent on 10 June 1992 and at the time of her dismissal was working as a Support Coordinator (Young Persons). She was appointed to that position with effect from 13 July 2017. The claimant was subject to the respondent's policies and rules, including its Code of Conduct dated November 2017 and its Data Protection Policy dated 25 May 2018.

12. The Code of Conduct ('the Code') applicable to the claimant employment included the following provisions:

Part 2 Organisational guiding principles

2 Loyalty and conflicts of interest

Housing associations must ensure that their board members, staff and involved residents act, and are seen to act, wholly in the interests of the organisation and its residents and other service users. All actual or potential conflicts or dualities of interest must be openly declared and properly resolved.

3 Conduct of the individual

2 Conflicts of interests

Main principle
You must take all reasonable steps to ensure that no undeclared conflict arises, or could reasonably be perceived to arise, between your duties and your personal interests, financial or otherwise.

Provisions
You must comply with the Groups policies and procedures for declaring, recording and handling conflicts of interest. Amongst other things, these require you to declare any private or financial interests or circumstances which may, or may be perceived to, conflict with the duties of your role.

7 General responsibilities

Main principle
You must fulfil your duties and obligations responsibly, act at all times in good faith and in the best interests of Gentoo, its residents and other service users.

Provisions
1.1 You must comply with the law, your terms of appointment and the Group's policies and procedures relating to your role.

1.5 you must respect the appropriate channels for handling tenancy and service provision issues. You must not act outside the groups established procedures in any matter concerning any resident or other service user.

1.6 You must not misuse your position, for example, by using information acquired in the course of your duties for your private interests or those of others.

13. On 12 February 2010 the claimant was counselled about a breach of the Code relating to an issue involving close family members, and she agreed there would be no repetition of that sort of conduct. A few months later, on 6 December 2010, the claimant was again counselled about a breach of the Code in respect of a further issue. She was advised of the need for a clear separation of duties and told that if there was any repetition then a formal hearing would take place.

14. The claimant had previously attended training on the Data Protection Act on 24 March 2009, and this was refreshed with further training on 8 December 2016. She also attended training on the Code of Conduct on 9 March 2018.

15. The respondent's Data Protection Policy dated 25 May 2018 ('the DPA Policy') set out policy outcomes including the following:

    - *Achieving full compliance with data protection laws and principles*
    - *Treating everyone's personal data with respect*
    - *Ensuring the protection of information resource is against unauthorised access and putting in controls to ensure access only to authorised persons on a need to know basis*

16. The DPA Policy provided that all breaches of the Code must be logged, and under certain circumstances a breach must be reported to the Information Commissioner's Office (ICO) within 72 hours.

17. In 2020 the claimant's former partner, Mr Robson, gave the respondent notice to quit the property he had been occupying. The claimant was no longer living at that property although she had previously done so and had some personal property stored in the garage. The respondent changed the locks to the property to keep it secure. This led to a series of steps being taken by the claimant in an effort to recover her possessions, which steps then formed part of the disciplinary process and dismissal.

18. On Friday 14 August 2020 the claimant telephoned a customer service assistant at the respondent about accessing her personal effects from the garage at the property. She was told that she had to arrange to meet someone at the garage. In response, the claimant asked whether she "could not just get the keys to get it sorted over the weekend". She was told that was not an option. The claimant asked again about getting getting access to the keys so that she could remove her possessions. She said, "I know it's not in his name any more but he is happy for me to go in and get my stuff out". The claimant gave the respondent no evidence of any such consent from Mr Robson. No written consent had been provided by him, either then or at any later time. The claimant acknowledged twice during this conversation that the situation was "awkward". A customer service supervisor later called the claimant to confirm that she could only access the property by arrangement with Mr Robson.

19. When asked as part of the later disciplinary process to clarify what she meant by whether she "could not just get the keys to get it sorted over the weekend", the claimant explained that she was referring to getting access without needing to meet someone specifically at the property.

20. On Monday 17 August the claimant made another phone call, this time to a neighbourhood manager. She explained that it was "a bit of a private matter" and acknowledged that she could not have the keys as the garage was not hers. She referred again to the situation being "a bit awkward" and recognised that Mr

Robson had to be the person to arrange to meet the respondent's representative at the property, not her.

21. The claimant was aware of the procedure for arranging a formal Third Party Consent to access information held by the respondent, as she had a signed document to this effect in place in respect of her daughter. No such written consent was ever arranged so as to allow the claimant access to Mr Robson's data or property.

22. On 23 September the claimant exchanged emails with the respondent's Neighbourhood Coordinator, Ms Challoner. She asked whether certain flats were ready to let and said that she had Mr Robson "on the list waiting to hear if he has a chance of getting one". Messages were exchanged about which flat Mr Robson was interested in, with Ms Challoner under the impression that the claimant was enquiring in a professional capacity for a prospective tenant, rather than in a personal capacity. She was unaware then that Mr Robson was the claimant's former partner. The claimant asked, "Do you think he will have a chance?" and was told he was in sixth place on the waiting list. The claimant later suggested that she had not meant to refer to Mr Robson being "on the list" but rather being "on the phone" enquiring about the status of his application.

23. In a further email exchange on 6 October the claimant asked Ms Challoner where on the waiting list Mr Robson now was, and was advised he was in third position.

24. On 13 October management became aware that there were some concerns about the claimant's request for information about Mr Robson's application for a new tenancy. Ms Challoner had raised concerns that she had given information to the claimant about Mr Robson which she now realised she should not have done. An investigation was initiated.

25. On 20 October an investigation meeting took place between the claimant and Julie Walker, Head of Operations, with an HR representative present. During the meeting the claimant made various concessions, acknowledging that she should not have enquired about the housing application and that this was a breach of data protection rules. She said she had done it for Mr Robson as he was busy driving all the time. The claimant also admitted failing to declare a conflict. When it was suggested that she would have known she could not request access to the garage, the claimant replied, "I didn't think about it to be perfectly honest, I've gone in and tried to sort things out...". She made a similar concession that she had not given any thought to the fact that she should not have enquired about the housing application. The claimant did not say she had been given Mr Robson's permission to access the garage, but rather she suggested she had been looking for a way around the problem, and also panicking in case her possessions were cleared out of the garage. She made no suggestion that Ms Walker interview Mr Robson to establish that he had given permission to access the property.

26. An investigation summary was produced on 25 November and shortly afterwards the investigator reviewed the claimant's training record. This was included in the documents gathered by the respondent, as well as records of the telephone and email contact and the relevant policy documents.

27. On 27 November the claimant was invited to a disciplinary hearing on 3 December, later adjourned until 20 January 2021. The allegations the claimant was asked to address at the disciplinary hearing were as follows:

"1. You have breached the Gentoo Code of Conduct, specifically:

a. You enquired on the status of a HomeHunt application for someone you have a close personal relationship with and for which you are not a named applicant.

b. You misled a colleague during an email exchange in relation to allegation 1a by failing to declare a personal interest and close relationship with the applicant; this has led to your colleague releasing information to you in good faith and has resulted in a breach of data protection rules.

c. On two separate occasions you requested access to the property of someone you have a close personal relationship with and for which you are not named on the tenancy.

2. You have compromised your duties as Support Coordinator (Young Persons) and abused your position within the Group, specifically:

a. Misusing the services of our housing management team to gain information in relation to a non-work-related matter and in breach of the Gentoo Code of Conduct.

b. Your actions question the trust and confidence the Group has in you."

28. The disciplinary hearing on 21 January was chaired by Mr Sandersfield, Head of Data Governance. The claimant chose not to attend in person but through her trade union representative. By agreement, he presented the claimant's pre-prepared written statement in defence of the allegations and further questions were followed up with the claimant by email. In her statement the claimant disputed that she had committed any offence in respect of requesting access to the garage, because she "did not actively try to mislead anyone" in her enquiries. She had specifically stated that it was a personal matter. As for the emails about Mr Robson's housing application, the claimant said she appreciated how the emails "could be interpreted out of context" and said "it was not obvious to me at the time to be specific about something that was common knowledge", meaning her relationship with Mr Robson. Generally, the claimant defended her actions on the grounds that they had not been intended to deceive anyone and were not malicious.

29. The decision to dismiss the claimant summarily was notified to the claimant by a letter dated 27 January 2021, on the grounds that all allegations were proved. The decision was felt to fall within the examples of gross misconduct identified in the respondent's Disciplinary Procedure, which included breaches of data protection rules and serious breaches of the Code of Conduct. Mr Sandersfield was satisfied that the evidence showed serious breaches of the Code and the DPA Policy,

which although not malicious on the claimant's part did show a level of deception, given her knowledge of the relevant rules and procedures.

30. On 1 February the claimant submitted an appeal against the decision, summarising her grounds as follows:

    a. Her actions did not amount to gross misconduct. There was no deceit or malice, and Mr Robson had given his permission.

    b. The respondent did not give proper consideration to mitigating factors. The claimant had been experiencing long-term mental health issues and her actions were "out of character".

    c. The sanction was too severe. There was no data protection breach and she had an unblemished record over many years.

31. The claimant also raised an issue about having felt pressurised into returning to work from sickness absence in the recent past, though in fact she had told her GP that she was fit enough to return to work.

32. The hearing of the claimant's appeal took place on 17 February 2021 with a panel chaired by Ms Thompson, Executive Director of Housing. The claimant was again represented by her trade union and she attended remotely. The panel reviewed and addressed the claimant's grounds of appeal in considering its decision and in formulating its reasons in the outcome letter dated 18 February. In particular, the panel considered the mitigating factors put forward by the claimant in respect of recent problems with her mental health, and established that the respondent had previously offered support through the Employee Assistance Programme in around November 2020, which the claimant had chosen not to access.

33. The panel also considered the claimant's length of service. Although she had not previously received any formal warning, she had been counselled about trying to obtain favour through her connections with the respondent. The panel felt that the claimant had again demonstrated an inability to maintain a separation of duties between her personal life and her professional work. The panel was satisfied that the claimant had full knowledge of the relevant policies and procedures but chose not to follow them. The concern was that it had no confidence that the situation would not occur again in the future, and so the dismissal for gross misconduct was upheld.

Conclusions

Unfair dismissal

34. The unfair dismissal claim required me first to consider whether the reason for dismissal was in fact the claimant's conduct, as submitted by the respondent. In principle, this was not in question and I accepted that the respondent's reliance on the claimant's conduct was a potentially fair reason for dismissal in this case. The main issue was whether it was actually fair or unfair under section 98(4), having

regard to all the circumstances of the case including the respondent's size and resources, equity and the substantial merits of the case.

35. Applying the guidelines in Burchell v BHS, there was no serious challenge to the question whether the respondent genuinely believed that the claimant was guilty of misconduct, and no other or ulterior motive was ever suggested. Having heard from the witnesses, I was satisfied that the respondent did hold this belief.

36. The next question was whether the respondent had reasonable grounds upon which to hold that belief, in other words whether there was sufficient supporting evidence. This overlaps with the adequacy of the investigation through which the evidence was gathered, and whether that was conducted to a reasonable standard. This is to be judged by reference to the respondent's knowledge and understanding at the time.

37. The evidence gathered by Ms Walker included a transcript of the phone calls on 14 and 17 August 2020 enquiring about access to Mr Robson's garage. The facts of those calls were also admitted by the claimant at the investigation interview. She did not tell the respondent that she had made those calls with Mr Robson's permission, and there was nothing else to alert the respondent to any need to contact him for a statement. Even though the test of reasonableness applies to the events as they were understood at the time, I am reinforced in my conclusions by the absence at this hearing of any evidence that consent was given at the time, in an appropriate and transparent manner which the respondent could be expected to rely on.

38. The evidence gathered by the respondent about the email exchanges with Ms Challoner on 23 Sept was similarly clear from the copy emails and again not disputed by the claimant. At the outset of the investigation meeting the claimant immediately understood that there was concern about her requests for information on Mr Robson's housing application. At no time did the claimant allege that she was unfamiliar with the Code or the DPA Policy. On the contrary, she made the respondent aware at the time that she knew she should not have taken these actions but had not given the matter any thought.

39. The scope of the investigation was correctly influenced by the clear written evidence coupled with the claimant's own admissions. My conclusion is that there was no evidence missing from the investigation report which either Ms Walker or Mr Sandersfield could reasonably have been expected to obtain.

40. Having reviewed the case as a whole, I am satisfied that the respondent's decision was amply supported by evidence, not least the claimant's own admissions. While the claimant challenged that her actions had the intent or motive attributed to them by the respondent, the core facts were not in dispute. The investigation began with Ms Challoner reporting her knowledge of the situation. It is clear from the investigation meeting that the claimant accepted that Ms Challoner was shocked and had been put in a difficult position. There was nothing to alert the respondent to the need to look further into any aspect of the case. The "letter of authority" pleaded in the claimant's application to the Tribunal never existed and at the time she did not rely on any such document. The claimant was familiar with Third Party

Consent forms but did not take any such steps here. In fact, her explanation to the respondent at the disciplinary hearing was that she had hoped to get access to the garage over the weekend, without the need to meet someone there, showing that this was never really a case about the existence or otherwise of Mr Robson's permission. Even if his verbal permission had been provided, it was clear to both parties that the respondent could not have been expected to rely on that.

41. The other alleged unfairness relied upon by the claimant in her application to the Tribunal amounted essentially to the mitigation arguments put forward during the internal disciplinary and appeal process. She referred to her mental health, her long service, the severity of the sanction, and the fact that there was no intent to deceive. There was no criticism of the respondent's handling of the process, such as to warrant any uplift for failure to comply with the ACAS Code. In her witness statement the claimant made similar points, reiterating that she acted with Mr Robson's consent and on his instructions when enquiring about the housing application. Mr Robson's witness statement said he had authorised the claimant to speak to the respondent on his behalf about access to the garage, because he did not have time to do so. Although he knew it was not her department, he asked her to enquire about the new property because he was "being lazy". The claimant had attributed the need for her to enquire to the fact that he was driving all the time, and tried also to explain a misstep in the email by saying he was "on the phone" to her. The claimant's case as presented to the respondent and to this Tribunal was somewhat contradictory.

42. The next consideration was whether the respondent's decision to apply the sanction of summary dismissal was one which an employer could reasonably have reached. It might be said that dismissal was harsh and that a warning with an opportunity to improve would have been appropriate. However, it is not for me to substitute my own view of what would have been a reasonable outcome. Instead, the question is whether this respondent's decision fell within a range of reasonable responses. Only if it could be said that no employer, acting reasonably in such circumstances, would have dismissed the claimant could she succeed with her claim.

43. The allegations against the claimant were serious in nature, and amounted to breaches of the respondent's Code of Conduct and its Data Protection Policy. The conduct fell squarely within the examples of gross misconduct in the respondent's disciplinary procedure. She failed to disclose her personal relationship with her former partner when enquiring about his housing application on 23 September 2020, as a result of which information was supplied to her in an inadvertent breach of data protection rules. She repeated the action on 6 October, without any apparent reflection in the meantime on the implications. This supported the respondent's belief that the conduct was conscious and deliberate, and reinforced its doubts that the conduct might be repeated in the future.

44. Although the claimant's requests to access the garage over the weekend in August 2020 were not successful, the respondent treated this too as a serious matter. There was a clear conflict of interests as well as a potential breach of the Data Protection Policy. The claimant made – and pursued – these requests knowing that she had no right to access her former partner's property.

45. The respondent was also entitled to take account of the evidence that the claimant knew what she was doing at the time. It was deliberate and conscious behaviour on her part, as she knew she had no formal consent from Mr Robson. That much was clear from the evidence and supported, for example, by the several references to the situation being “awkward” and the acknowledgement that Ms Challoner had been put in a difficult position.

46. Before deciding on a sanction, a reasonable employer can be expected to have regard to length of service and any other mitigating factors. The evidence shows that respondent did do so here. It is also clear that the respondent addressed its mind to the alternative of a warning, but the claimant’s response to the allegations entitled the respondent to conclude that she did not fully understand the seriousness of her behaviour and the importance of her employer having confidence that there would be no repetition in future.

47. Part of the consideration under section 98(4) of the Act includes the procedural handling of the case, and in this respect I find that the respondent acted in a fair manner throughout. Some points of argument were raised on the claimant’s behalf in submissions, for example about inconsistency, a lack of up to date training, and not providing copy documents to the appeal panel or the claimant when they were not in issue. It was also said that the matter must not have been serious if it was not reported to the ICO, even though a different test applies in that case. Those arguments formed no part of the claimant's pleaded case, and they were not supported by any evidence.

48. For all these reasons I am satisfied that the respondent acted reasonably in its decision to dismiss the claimant for gross misconduct. There was no doubt that it was genuine in its belief that this was the reason for dismissal, and that belief was supported by evidence gathered through an investigation which was reasonable in its scope. The fact that the claimant had attended training and understood from previous counselling in 2010 the importance of complying with the Data Protection Act supported the decision to dismiss rather than imposing some other sanction.

Wrongful dismissal

49. This part of the claim related to the decision to terminate the claimant's employment without notice or payment in lieu of notice. Unlike the unfair dismissal claim, this required me to reach conclusions as to the claimant’s actual guilt or innocence in respect of the allegations. The legal question was whether the respondent was entitled to treat the claimant’s conduct as amounting to gross misconduct justifying summary dismissal; in other words, whether the claimant had committed a repudiatory breach entitling the respondent to terminate the contract without notice.

50. In respect of the allegation about seeking to access the garage, I am satisfied that the claimant made more than a simple enquiry about how a person could go about handling this. Instead, she was clearly finding the situation somewhat stressful and was panicking about how to retrieve her personal possessions. The evidence shows clearly that she wanted access to the garage that particular weekend even though she knew it was in Mr Robson's name, and the garage contained his

property as well as hers. The claimant knew that the respondent could not give her access to the garage without his consent. The evidence shows clearly that the claimant continued to press her point during the call on 14 August, initially not taking no for an answer, in the hope that she could use her position with the respondent to access the property. Even on her own account of events, the claimant hoped to do so on her own, without the need to involve Mr Robson or meet anyone from the respondent at the premises.

51. As for the emails dated 23 September, I am not satisfied that the claimant made any mistake in the wording by referring to Mr Robson being "on the list". Even if that were correct and the words "on the phone" were substituted, I cannot see how this makes any difference to the fact that the claimant was making inquiries about someone with whom she had a personal relationship. She chose not to disclose that fact to the respondent and her argument that it was common knowledge lacked credibility. The claimant used her position at work to obtain data belonging to someone else an an improper manner and in breach of data protection rules.

52. The claimant's actions did amount to a serious and repudiatory breach of contract and the respondent was entitled to terminate the contract without notice.

SE Langridge
Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

9 June 2022