



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Suckling

**Respondent:** Magic (UK) Ltd

**Heard at:** London South Employment Tribunal      **On:** 13-14 April 2022

**Before:** Employment Judge T Perry

## **Representation**

Claimant: litigant in person

Respondent: Mr J Vatcher (Counsel)

# JUDGMENT

The Claimant's dismissal was unfair. The Claimant's claim of unfair dismissal succeeds.

Basic and compensatory awards are to be reduced by 45% to reflect the Claimant's contributory fault.

# REASONS

## **Claim and issues**

1. The Claimant's sole claim is one of unfair dismissal. I explored with the Claimant at the start of the hearing whether his claim included a claim for wrongful dismissal and he confirmed that it did not.
2. It is accepted that the Claimant had the necessary length of service to bring a claim and that he was dismissed.
3. The issues in the case were established at the start of the hearing as follows:
  - 3.1. Has the Respondent shown what was the reason for dismissal and that the reason was a potentially fair one within the meaning of section 98 Employment Rights Act 1996 (ERA)? The Respondent relies on conduct as the potentially fair reason. The Claimant says he was dismissed because of the connection with his wife.

3.2. Was the dismissal fair within the meaning of section 98(4) ERA?

3.2.1. Specifically, was there a genuine belief in misconduct?

3.2.2. Was that based on reasonable grounds having done as much investigation as was reasonable?

3.3. Was dismissal within the band of reasonable responses having regard to whether the Respondent followed a fair process?

3.4. Should compensation be reduced following Polkey v AE Dayton?

3.5. Would it be just and equitable to reduce compensation to reflect blameworthy conduct on the part of the Claimant contributing to dismissal?

3.6. In respect of mitigation, has the Respondent proved that the Claimant failed to take reasonable steps to mitigate loss?

### **Evidence**

4. I was provided with an agreed final hearing bundle running to 294 pages. References in square brackets are to this bundle. A further three pages were brought by the Claimant to the hearing. As they appeared relevant and were very short, I ordered that these be paginated and added to the bundle. I was also presented with a chronology by counsel for the Respondent, Mr Vatcher.

5. The Claimant gave evidence on his own behalf from a witness statement. There were two other witness statements in support of the Claimant. These were unsigned and the witnesses were not in attendance. The Claimant did not ask me to read these. In any event, I would not have been able to give them much weight.

6. The Respondent called two witnesses, both of whom gave evidence from witness statements. They were two of the Respondent's Trustees, Mrs Jennifer Daly, the dismissing officer, and the appeal officer, Mr Chris Pocock.

### **Findings of fact**

7. Much of the chronology of the case is not in dispute. Where there were disputes of fact, I have resolved them, applying the balance of probabilities, on the evidence before me in accordance with these findings of fact.

8. The Respondent is a charitable company limited by guarantee providing support to children and young people with Autism Spectrum Disorders and their families. It

operates one site in Kent, employing 16 people.

9. The Claimant has continuity of employment with the Respondent from 1 July 2012. This was the date stated in clause 1 of his contract of employment dated 4 October 2016 [74]. The Claimant said in evidence that he was employed by the Respondent throughout. I accept this evidence. Even if part of this period was employment with a previously unincorporated predecessor of the Respondent, there was no evidence of a break of continuity to overturn the presumption of continuity.
10. The Claimant was at the time of his dismissal married to Gayna Simmonds, who was until June 2018 the Chief Executive of the Respondent.
11. The Claimant's role was Office Manager. There is a Job description in the bundle [90], although I understand this was never finalised. The duties under it are largely what would be expected for an office manager. The list includes responsibility for "manag[ing] schedule of the charity's and office's H&S" which I understand to mean health and safety.
12. The Respondent has a conduct and standards policy, in fairly generic terms. It also has a gross misconduct policy which included as non-exhaustive examples of gross misconduct theft, dishonesty or fraud, serious or gross negligence, refusal to carry out reasonable management instructions and serious breach of health and safety policies and procedures. The Respondent had a disciplinary procedure which included phased warnings, a statement that the level of sanction would be determined by the severity of the offence and the expected three stage procedure of investigation, disciplinary hearing and appeal.
13. In late 2017 the Respondent was seeking to become recognised as a school. Around September 2017 there was an unannounced Ofsted visit, which identified what I understand to be quite a large number of improvements required before certification. This included fire safety matters. Two fire drills were scheduled for October 2017 [295]. The Claimant and Ms Amanda Howard, teacher in charge, were tasked with writing a fire policy. This policy was produced in October 2017 and named the Claimant as the Health and Safety Officer. A fire safety review was conducted in October 2017 [104-105], which identified no "Major Concerns" but did identify six priority one matters to be addressed in the next month, and nine priority two matters to be addressed in the next three to six months. I saw no evidence of any of these matters being followed up within the timescales set out in the review. There was a second Ofsted inspection in December 2017. I understand from the report at [192] that by this point the policies and procedures met the statutory requirements necessary to register the

Respondent's premises as a school.

14. It is agreed that on 1 February 2018 the Claimant was suspended pending an investigation into his role in an unauthorised salary increase for Gayna Simmonds, who was also suspended at around the same time. The Claimant's suspension lasted until 15 March 2018. During this period, an investigation was conducted by Helen Sykes, an employment law consultant. Her report contained finding supporting the allegation [130] and mitigating evidence [131]. The mitigation included that the Claimant was following the instructions of the CEO and that there were no agreed policies and procedures in place to govern financial processes, authorisations or spending limits within the Respondent. I have not seen the ultimate conclusions of the investigation but it is common ground that there was found to be no case to answer. Ms Gayna Simmonds remained on suspension until she resigned on 25 June 2018.
15. The Claimant returned to work from suspension on 15 March 2018 and attended a return-to-work meeting with Mrs Daly and Ms Cooper. The notes of which are at [136]. During that meeting it was confirmed that changes had taken place during the Claimant's suspension that that staff were pulling together to ensure the Respondent's continued growth and success. Priorities were set for the Claimant to establish controls and procedures in light of an application for independent school status. These priorities were 1. Stock taking and establishing a stock cupboard. 2. Establishing requisitioning procedures 3. Conducting a full asset register throughout the building and 4. Collating a games list and taking photos of each. There was no mention of the Claimant's health and safety responsibilities.
16. Very soon after his return to work the Claimant began to complain about his treatment. On 19 March 2018 the Claimant emailed Helen Sykes regarding his treatment since return to work and was directed to his managers [132].
17. On 24 April 2018 the Claimant raised concerns with Liz Lee and Claire Cooper [137]. The Claimant's concerns were that Liz Lee had told the Claimant that the Trustees had told her not to meet him alone, that he had not returned to work in the same role; that he was being required to work directly with children which the Claimant said he had not been trained for, and that he had been locked out of the office he used. The Claimant queried whether he was redundant.
18. An informal meeting was held on 27 April 2018 with the Claimant, Ms Lee and Mrs Daly. The notes are at [287]. The Claimant was told his change of duties was temporary, that it was caused by staffing issues and that this was allowed under his contract. The Claimant was told that GDPR was the reason for locking the office

because of a missing key. The Claimant was told that he was not at risk of redundancy. Mrs Daly told the Claimant that he was under investigation for mileage claims form, and that that could lead to a disciplinary and might be gross misconduct.

19. On 2 May 2018 the Claimant submitted a grievance letter [142-143]. This covered a delay to start of meeting on 27 April, his previous suspension, the failure to finalise his job description, that he had been locked out of his office, the change to his duties, and an alleged breach of confidentiality regarding Kieran Yates. The Claimant said he felt bullied and intimidated and that the Respondent was trying to force him to resign.
20. The following day, 3 May 2018, Ms Lee had sent C home as a supposed safeguarding concern for saying the previous day that he was losing patience and might “lose it” with the children. By email later that day, the Claimant disputed saying that he might “lose it with the kids”. The Claimant again complained about being asked to work with children.
21. On 10 May 2018 Mrs Daly made a file note about staff complaining that the Claimant was obstructive. [140]
22. On 18 May 2018 Claire Cooper showed Brian O’Bray a document “Items needed to meet fire assessment”. I find on the balance of probabilities, this was the significant findings and action plan document at [105]. Mr O’Bray said that he had walked around the building with the Claimant and that the Claimant said that the work could not be done because it would be too expensive but that the Claimant had said he would organise getting the materials. I have been shown no evidence of this matter being raised with the Claimant at around this time.
23. A grievance meeting was held on 4 June 2018. The minutes are at [144-147]. Claire Cooper was the decision maker. The Claimant confirmed that he was not pursuing his complaint regarding the delay to the start of the meeting. Ms Cooper went through the chronology of the changes to the Claimant’s duties and confirmed that “you have now returned to completing those tasks outlined on 15 March”. It was agreed that the Claimant was no longer being required to work with children. The Claimant was told that part of the staff room would be turned into an office for him. There was a discussion about the training and qualification issues the Claimant had raised regarding working with children but it was confirmed that this no longer remained an issue as the Claimant was no longer working with children. The Claimant raised an issue regarding payment of his salary by cheque and asked whether the investigation should have been done by an independent party.
24. The Claimant was provided with an outcome to his grievance by letter dated 21 June

2018 [148-151]. His grievance was not upheld. The Claimant's list of priorities was repeated. The outcome stated that there was no evidence of bullying and intimidation.

25. Four days later on 25 June 2018 the Claimant attended a meeting with Liz Lee and Jennifer Daly. The minutes are at [152-154]. At this meeting Ms Lee stated that a number of staff had reported the Claimant asking them questions rather than reporting to Ms Lee. The Claimant says he was told he was intimidating staff. Ms Lee raised that the Claimant had been questioning the safety of the seatbelts on the minibus with other staff and raised an incident when the Claimant raised that children were destroying palettes without having gloves or goggles on. The Claimant was told to report to Ms Lee. Mrs Daly said to the Claimant "You no longer have to snoop Chris. [Gayna Simmonds] is no longer in the business. Staff don't like that." The Claimant apparently said he was resigning and the meeting ended. However, later that day the Claimant returned to say that he was going to see his doctor regarding a sick note.
26. On 5 July 2018 Mrs Daly and Ms Cooper met with the head teacher of Cliff Woods primary, Tim Muggeridge regarding whether Mr Muggeridge had told the Claimant that the muster area could not be in the car park [155].
27. On 6 July 2018 a member of staff, Sam Paterson emailed Ms Lee to state that she did not have a DBS certificate covering her role at the Respondent [156].
28. On 9 July 2018 a meeting was held between Mrs Daly, Ms Lee and the Claimant. The minutes are at [157]162]. This dealt with fire safety issues and the issue regarding Ms Paterson. The Claimant was asked about fire plans and the lack of exit arrows and the contents of the "emergency grab bag". A set of action points were agreed. There was a discussion about muster stations. It was raised that Mr Muggeridge had not objected to the muster station. The Claimant confirmed that it was the Chair of the Trustees who had objected to the assembly point being in the car park. Again, action points were set. There was a discussion around fire extinguishers and stands. Mrs Daly referred to the "SMT minutes dated end of 2017" requiring the extinguishers to be replaced. The Claimant was unable to answer whether they had been replaced. Mrs Daly referred to a fire drill having been cancelled due to the Claimant being off sick and asked whether the fire marshals had been trained on the use of extinguishers. The fire risk assessment dated 4 October 2017 [104-105] was shown to the Claimant. It was raised that there had been no fire alarm drills or checks. The Claimant was shown the list and asked whether items had been completed. The Claimant said that "Ricky did some of them". The Claimant was asked why priority 1 and 2 matters had not been completed in time. It was raised that the fire door was still wedged open. The Claimant stated that matters could not be completed because they were looking for

funding at which point Ms Lee asked why the Claimant had not challenged purchasing Christmas presents for staff in that case. There was a discussion about putting signage in place and the Claimant said these needed plastic wallets. Ms Lee told the Claimant that these had been ordered. When the Claimant complained that he had not been told, he was told that he should be asking questions. The discussion moved on to Ms Patterson. The Claimant stated that he thought she had a file. The Claimant raised that he felt Amanda Howard or Jackie Pierce were responsible and stated that Becky Dunn had records.

29. Later that day the Claimant was invited to a disciplinary hearing on 12 July 2018 [163-164]. The disciplinary letter listed 5 allegations as follows:

1. *Theft dishonesty or fraud - falsified mileage claim forms. You have failed to comply with company practice and procedure.*
2. *As Health and Safety Officer you have committed a serious breach of Health and safety by failing to action priority 1 and priority 2 matters following the First Risk Assessment dated 4 October 2017.*
3. *It is alleged that you have failed to challenge Christmas gifts and expenditure when you were aware a serious breach of Health and Safety i.e. failing to action Priority 1 and Priority 2 matters in aforementioned Fire Risk Assessment dated 4<sup>th</sup> October 2017.*
4. *Failure to comply with MAGIC (UK) Limited operational procedures and policies by refusing to carry out reasonable management instructions by your line manager.*
5. *Safeguarding - Gross negligence of record keeping and allowing staff on site without being DBS checked.*

30. The letter stated these matters were viewed as gross misconduct and that an outcome might be summary dismissal. The Claimant was suspended. The Claimant was provided with a number of documents including mileage forms, the fire assessment, the fire precaution log book, notes of the meetings with Mr O'Bray and Mr Muggeridge, the fire safety policy, the email from Ms Paterson, receipts and emails regarding Christmas expenditure and the conduct and standards and disciplinary policies from the handbook.

31. The disciplinary hearing took place on 12 July 2018. The minutes are at [165-168]. In relation to allegation 1 the Claimant stated that despite the form requiring a signature on the bottom, Ms Simmons rarely signed the forms. It was stated that this went against practice and procedure which was there to protect the Claimant. The Claimant was then asked about two entries being claimed for the same journey. The Claimant

said this was an oversight. The Claimant was asked about two other potentially inappropriate journeys and replied that they had been approved by Ms Howard and Ms Simmons.

32. In relation to allegation 2, the Claimant confirmed that he put together the policy with Ms Howard. The Claimant was asked why he had not completed priority 1 and 2 tasks within the required timeline. In relation to arrangements to provide contractors with information, the Claimant confirmed that he had informed the cleaners what to do. In relation to training given to employees, it was suggested that there was no record of training being given to fire marshals. In relation to fire tests the Claimant said there had been a fire drill but Mrs Daly said there was no record of this and that the fire hydrant test the week before was the first entry in the book. The Claimant suggested there was another book and insisted that a fire drill had taken place in October and that Ofsted had looked at the book when they visited. There was a discussion about the statement with Mr O'Bray and the suggestion that there was not enough money to make the changes. The Claimant stated that he had been due to get quotes in February half term but that this was not done. There was a discussion about fire signage and the punched pockets ordered for the Claimant.
33. In relation to allegation 3, the Claimant responded to say that he was told that approval had been granted by the Chair of Trustees. There was a discussion of the email dated 21 December 2017 send by Ms Simmons stating that the gifts would be paid for by a combination of a donation and her and Ms Howard's own funds. The Claimant said that Ms Simmons needed to be asked about this. The Claimant disputed that he was in charge of finance.
34. Allegation 4 was not separately discussed in any detail.
35. In relation to allegation 5, the Claimant did not deny receiving paperwork but stated that he gave it to Jackie Pierce. The Claimant said he paid Ms Paterson on instructions from Ms Simmons and that he checked timesheets with Becky Dunn.
36. The meeting ended with Mrs Daly stating "the notes of the meeting would be sent to Mentor and they would make the decision regarding what action to take as the HR for MAGIC UK LTD."
37. Later that day, the Claimant asked for a copy of the minutes of the meeting. Mrs Daly responded saying that she was taking advice on the outcome of the decision and that the Claimant had been taking his own minutes. Ms Daly did not provide a copy of the minutes requested.



38. On 17 July 2018 Ms Daly sent the Claimant the outcome letter to the disciplinary, which dismissed him for gross misconduct [171-175]. In relation to allegation 1 the letter quoted Ms Simmons response to the allegations in emails. Mrs Daly mentioned that after the disciplinary hearing she had found the Claimant's weekly report, which did not mention the petty cash. The conclusion was that the Claimant had falsified the forms, failed to follow practice and procedure and that they reasonably believed he had benefitted from the money.
39. In relation to allegation 2, the Claimant's responses to questions about fire safety were recorded. The Claimant was accused directly of lying based on a CEO report dated 9 October 2017 reviewed by Mrs Daly after the meeting. The conclusion was that the Claimant "committed a serious breach of Health and Safety Fire Regulations placing the children, staff and business at risk. The Company views this as gross misconduct."
40. In relation to allegation 3 the letter referred to the email dated 21 December 2017 as evidence that the Chair of Trustees had not approved the payment. The letter went on to quote Senior Management Meeting notes dated 23 January 2018 checked after the disciplinary hearing. It was stated that the Claimant should have raised at that point that the presents were bought with company funds. The conclusion was that the money spent on presents "should have been allocated to Fire Safety compliance. By not doing this you have placed the children, staff and business at risk."
41. In relation to allegation 5, the letter outlined that Sam Paterson provided her documentation to the Claimant. In relation to the Claimant's assertion that he had passed the information on to Jackie Pierce, the letter stated "Jackie no longer works for the Company. SP is adamant that she met with you to complete the contract." Mrs Daly went on to say that she had searched the dongle and hard drive kept on record for Jackie Pierce, which contained a number of contracts but not one for Sam Paterson.
42. On 20 July 2018 the Claimant submitted a notice of appeal [176]. The Claimant's main ground of appeal was the inaccuracy of his alleged responses recorded in the outcome letter. The Claimant complained at not having been provided with the minutes. The Claimant requested either an external party hold the appeal or a trustee who had not conducted a meeting with him before (naming Chris Pocock specifically).
43. The appeal meeting was scheduled for 26 July 2018 but was brought forward to 25 July 2018 at 2pm at the Claimant's request. On the morning of the appeal hearing the Claimant wrote to request that Rebecca Dunn be his companion or to be told who else was available. The Claimant was told that neither Ms Dunn nor any other colleague

was available that day [178-179].

44. The meeting went ahead in any event with the Claimant confirming at the start of the hearing that he was comfortable to continue. The minutes are at [180-184]. During the hearing the Claimant raised points regarding his appeal.
45. In relation to allegation 1 the Claimant stated that he did not personally benefit. The Claimant stated that the evidence that the CEO report did not include the petty cash was because such reports did not include petty cash payments.
46. In relation to allegation 2, the Claimant stated that his comment about telling cleaners was taken out of context and relates solely to the action point about providing information to contractors. The Claimant said he did deal with other priority 1 matters. The Claimant said staff needed to be trained within 12 months and said Ms Harding had scheduled in the training programme. The Claimant was unable to explain why there would be two fire record books as he claimed. The Claimant referred in relation to the evacuation routes, that these were constantly being changed, for example when the fire point at the rear needed to be moved.
47. In relation to allegation 3, the Claimant repeated that the gifts had been approved by the Chair of the Trustees. The Claimant questioned the finding that he had deliberately lied in the meeting. The Claimant denied being aware of limitations about charity spending.
48. In relation to allegation 5, the Claimant repeated that he had passed matters over to Jackie Pierce.
49. On 31 July 2018, Mr Pocock sent the Claimant the appeal outcome letter. The decision to dismiss was upheld, albeit allegation 4 was overturned [185-189].
50. In relation to allegation 1, the letter stated that the belief the Claimant may have benefitted was justified. Mr Pocock was dissatisfied with the Claimant's answer regarding the CEO report not including petty cash summaries and stated that all outgoings needed to be reported. Mr Pocock defending the dismissal letter referring to documents not provided to the Claimant saying that he had the chance to comment on them in the appeal hearing.
51. In relation to allegation 2, the letter stated that the steps the Claimant took were insufficient. The letter stated that the allegation regarding Ms Howard having scheduled fire training was unsupported by the documentation available. Mr Pocock emphasised the importance of fire safety and stated that he would have expected the

log book to contain more entries. Mr Pocock was unable to locate the second log book.

52. In relation to allegation 3, the letter stated that whilst control over finances was not being exercised, that the responsibility was the Claimant's. Mr Pocock was also critical of the Claimant for not being aware of limitations on spending of charitable funds and that these two matters amounted to gross misconduct.

53. Allegation 4 was overturned on appeal.

54. In relation to allegation 5, the letter was very brief. Essentially Mr Pocock concluded that the Claimant's representations did not deal with the key issue that someone was able to access the site without a DBS check being done.

### The Law

55. Section 98 ERA states

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

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

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

*(2) A reason falls within this subsection if it—*

*(b)relates to the conduct of the employee,*

.....

*(4) In any other case 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.*

56. The burden is on the Respondent to show the sole or principal reason for dismissal

and that it is potentially fair.

57. The classic statement of the reason for dismissal is per Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'."
58. The leading case on establishing the 'real' reason for dismissal is **Associated Society of Locomotive Engineers and Firemen v Brady** 2006 IRLR 576, EAT. Brady is authority that, in a case of mixed motives such as malice and misconduct, the principal reason may be malice even although the misconduct would have justified the dismissal had it been the principal reason. Evidence of inconsistent treatment might suggest the misconduct is not the "real" reason for dismissal. If the Tribunal is not satisfied that the Respondent's reason is the real reason, it does not have to (but may want to) go on to find what the real reason for dismissal was.
59. **London Borough of Brent v Finch** EAT 0418/11, is authority that if an employee wishes to cast doubt on an employer's seemingly fair reason for dismissal, he or she must adduce some evidence in this regard.
60. **Tayeh v Barchester Healthcare Ltd** 2013 ICR D23, CA, is authority that where an employee faced disciplinary proceedings relating to more than one charge, a tribunal must consider whether the employer regarded the charges as being cumulative or standalone. If the charges were cumulative, in the sense that they formed a composite reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds. If, however, each charge stood on its own — for example, independent acts of gross misconduct each meriting dismissal — then they would require separate consideration in determining whether it was reasonable to dismiss.
61. Once the employer has shown the reason for dismissal, it is then for the tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA is neutral.
62. The leading case on misconduct dismissals remains **British Homes Stores v Burchell** 1978 IRLR 379 EAT, which requires that there be a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation.

63. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**).
64. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness **Taylor v OCS Group Ltd** [2006] IRLR 613. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt** 2003 IRLR 23 CA is authority that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.
65. As to contributory fault, the relevant principles are laid down by the Court of Appeal in **Nelson v BBC (No.2)** 1979 IRLR 346 CA. There must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. That conduct must have caused or contributed to, to some extent, the dismissal. It must be just and equitable to reduce the assessment of the Claimant's loss to a specified extent.
66. Even where the employer fails to establish the reason or principal reason for the dismissal, this does not preclude the tribunal from analysing contributory fault in precisely the same way as it does where the unfairness arises under ERA 1996 s 98(4) **Polentarutti v Autokraft Ltd** [1991] IRLR 457.
67. In considering whether the 'Polkey' principles, laid down by the House of Lords in **Polkey v A E Dayton Services Limited** 1987 IRLR 503 HL, apply, regard should be had to **Software 2000 Ltd v Andrews** 2007 IRLR 568 EAT.

## **Conclusions**

### **Reason for dismissal**

68. The Claimant advances malice as the reason for his dismissal, that he was dismissed because of his connection with Gayna Simmons. There is potential evidence for malice against the Claimant by the Respondent's employees including the following:
- 68.1. The apparent instruction to Liz Lee not to have a meeting with the Claimant alone;
- 68.2. The changes to the Claimant's duties on return from suspension;

- 68.3. Locking the Claimant out of the middle office in which he worked;
- 68.4. Failing to allow the Claimant to return to the middle office in which he worked even after 4 June 2018 but rather making an office for him elsewhere;
- 68.5. Sending the Claimant home on 3 May 2018 allegedly as a safeguarding risk on the day after he submitted a grievance;
- 68.6. Mrs Daly collecting a series of file notes critical of the Claimant including 10 May 2018 (regarding him being uncooperative) and 18 May 2018 (regarding fire risk assessments) but not raising these matters with the Claimant;
- 68.7. The meeting of 25 June 2018 at which the Claimant was criticised for raising health and safety concerns regarding the minibus and children not using the correct safety equipment when breaking up pallets. At this meeting, Mrs Daly accused the Claimant of snooping for Ms Simmonds - which is the clearest evidence of all of malice; and
- 68.8. Mrs Daly's refusal to let the Claimant have a copy of the minutes of the disciplinary hearing.
69. Against this, the Respondent advances a multiple set of reasons, each of which is said to be Gross Misconduct. In line with **Tayeh** the Respondent appears to have considered each allegation (apart from allegation 4) to amount to a separate incident of gross misconduct. This reflects the contents of the dismissal letter, which describes each allegation (apart from allegation 4) as gross misconduct in their own right under their own headings. It is therefore necessary for the Tribunal to find whether each individual cause was the sole or principal reason for dismissal and to consider whether as a composite they were the sole or principal reason for dismissal.
70. In relation to the two allegations of falsified expenses and the failure to challenge expenditure on Christmas presents for staff, I am not satisfied that either or both was the sole or principal reason for dismissal. Primarily, this is because of the similarity to the issue for which there had been an investigation in February. Indeed, it seems that the Claimant having approved a salary increase of £30,000 for his wife must be a far more serious allegation than those relied upon for dismissal. However, seemingly as a result of the matters in mitigation referred to in Ms Sykes' report, including that the Claimant was acting under instructions from the CEO and that there was a lack of agreed policies and procedures governing financial processes, the outcome of that initial investigation was that there was no disciplinary case to answer. The Claimant was not even subjected to a disciplinary process with a view to issuing him with a

warning. In the context of that obvious inconsistency with the Claimant's later dismissal, the Respondent has not persuaded me that this was the principal reason for dismissal.

71. In relation to the allegation of health and safety breaches, I am again not satisfied that this was the sole or principal reason for dismissal. Largely this was because, on the evidence before me, no mention was made of these duties on the Claimant's return to work after suspension and no or next to no mention made at any time thereafter until his dismissal. The failure to chase the Claimant up for missing the supposed deadlines for achieving the completion of the priority one and priority two matters is conspicuous as is the failure to show these matters continuing to be discussed in the minutes of the senior management team. I saw no evidence that anyone else was tasked with advancing the fire safety plan during the six weeks' the Claimant was suspended or that anyone was reprimanded in any way for failing to progress the plan during that time. The only evidence of the matter being considered at all is the 18 May meeting with Mr O'Bray and no steps were taken to either move to disciplinary in light of this note or to raise the matter with the Claimant. At this stage, I do not raise these inconsistencies as points of fairness, rather, in the context of the evidence of malice against the Claimant, these are evidential points showing why the Respondent has not satisfied me that this was the principal reason for summary dismissal in July.

72. Allegation 4 relates to failure to follow instructions and raising matters of concern with staff members rather than with the Claimant's line manager. This is the only allegation not described as gross misconduct. The finding was overturned on appeal but, notwithstanding this, the decision to dismiss was upheld at appeal. This leads me to conclude that it was not the sole or principal reason for dismissal and indeed only played a small part in the original decision to dismiss. Indeed, its inclusion as a reason for dismissal at all somewhat undermines the Respondent's attempts to persuade me that the other reasons included in the dismissal letter were the sole or principal reason for dismissal rather than simply malice towards the Claimant because of his connection to Ms Simmonds.

73. Allegation 5 regarding failure to confirm a DBS check and allowing a member of staff on site without a check is in some ways the allegation I have the fewest reservations about. This only came to light shortly before the initiation of the disciplinary process. However, in light of the evidence of malice and in part because it was packaged up together with other allegations, I am not satisfied that on its own it was the sole or principal reason for dismissal.

74. Even turning and considering the allegations as a composite, in light of the plentiful

evidence of malice, the Respondent has not met its burden to satisfy me that its stated reasons, rather than malice because of the Claimant's connection with his wife, was the principal reason for dismissal. I have been alive in reaching this decision, to the distinction referred to in Brady that there is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords. In this case, I am not satisfied that the Respondent has proven its stated reason was the sole or principal reason.

75. Accordingly, the Respondent not having established a potentially fair reason, I hold dismissal to be unfair. I am not required to go on to consider the test under s98(4) ERA. Equally, I am not required to consider a reduction to compensation under Polkey.

76. I do still have to consider contributory fault. Whilst, I do not find that the Respondent's stated reasons were the sole or principal reason for dismissal, I do consider that they contributed to the dismissal to an extent. The Respondent's stated reason were part of the reason to dismiss, even if not the sole or even principal reason for dismissal.

77. My findings of fact in relation to contributory fault are as follows:

77.1. The Claimant failed to sufficiently progress the fire safety plan and to address the priority one and priority two matters. The answers given by the Claimant at the disciplinary hearing show that priority one and two matters were outstanding. Although this was in part due to his suspension, that his normal duties had been taken away from him on his return to work in March, and that fire safety was not referred to as a priority even as late as the meeting on 4 June 2018, the Claimant remained the Health and Safety officer. I find that his failure to be proactive regarding achieving these targets was blameworthy conduct within the meaning contained in **Nelson** and was causative of his dismissal.

77.2. The Claimant also failed to require his wife to sign off her mileage forms. I accept the Claimant's evidence that it was simply an oversight that he failed to identify that two people were claiming for the same journey. However, authorising and paying forms that were not signed, amounts to blameworthy conduct within the meaning contained in **Nelson** and was causative of his dismissal.

77.3. The Claimant failed to ensure that Sam Paterson had DBS clearance despite having been provided with the documentation for her and therefore being in the best position to make sure the relevant checks were completed. It is not clear to what extent the Claimant was solely responsible for this failure as there was some evidence that Jackie Pierce or Becky Dunn had responsibility for these



forms. However, it is clear that the Claimant failed to take ownership of this responsibility. I consider that this failure amounts to blameworthy conduct within the meaning contained in **Nelson** and was causative of his dismissal.

78. I find that these three matters were blameworthy conduct that contributed to dismissal. Whilst I am not satisfied that they were the sole or principal reason for dismissal, I consider that, having regard to all the circumstances, it would be just and equitable to reduce all compensation (basic and compensatory awards) by 45% to reflect these serious matters.

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Employment Judge T Perry

21 April 2022