



EMPLOYMENT TRIBUNALS

Claimant: Mrs Denise Waller

Respondent: Opus Care Limited

Heard at: London South via CVP **On:** 26 & 27 October 2022

Before: EJ Rea

Representation

Claimant: Litigant in Person

Respondent: Mr Alex Mellis (Counsel)

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and does not succeed.

REASONS

Claims and Issues

2. The Claimant has presented a claim of unfair dismissal before the Employment Tribunal.
3. The issues are dealt with in the conclusions below.

Procedure, documents and evidence

4. The Tribunal was provided with a joint hearing bundle comprising 678 pages and witness statements from the following individuals:
 - a. The Claimant
 - b. Kerry Such (the investigation manager)

c. Daniela Vitan (the appeal manager)

5. The Tribunal was informed that the disciplinary manager had left the Respondent's employment and attempts to contact her in connection with appearing as a witness in the hearing had been unsuccessful.

The Law

6. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g., conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)
7. Under s98(4) '... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and, shall be determined in accordance with equity and the substantial merits of the case.'
8. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages: (1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation?
9. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693.)

10. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason.
11. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.
12. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).
13. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.
14. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.
15. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.
16. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR

503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Background and Findings of fact

17. The Respondent runs nursing and residential homes for the elderly in Kent.
18. The Claimant was employed by the Respondent in the role of Administrator/Receptionist from 17 October 2018 until her summary dismissal on 13th May 2021. The Claimant was based at the Respondent's Folkestone Care Centre (FCC).
19. On 15 April 2021, an audit of new staff files was carried out by Kerry Such, then the Respondent's HR Manager, at the request of Genevieve Rodrigues, the General Manager.
20. Ms Such carried out similar such audits approximately every 6 months. Staff file compliance is an important aspect of the Respondent's reporting obligations to its regulator, the Care and Quality Commission (the CQC).
21. The FCC had received a 'Requires Improvement' rating following a CQC inspection carried out in August 2019.
22. On this occasion, the audit Ms Such carried out was triggered by the discovery that a new employee had started work without the correct right to work check having been completed or the required references.
23. Ms Such initially checked two other staff files and found several failures (p669-670). She went on to check further staff files and discovered additional failures (p249-264).
24. The failures related to missing, inaccurate or incomplete right to work checks, references and DBS checks as well as no management sign-off for the individual to commence employment.
25. Ms Such conducted an investigation meeting with the Claimant the same day to discuss the failures she had uncovered in these staff files. Ms Such was not satisfied with the explanation provided by the Claimant. The Claimant was suspended pending an investigation and a full audit of all the staff files.
26. The Claimant was instructed to leave work immediately without clearing the reception desk where she worked. Ms Such removed all visible documents from the reception desk and locked them in another room.

27. Ms Such carried out a more detailed audit of all staff files between 15 and 19 April 2021. On 19 April 2021, Ms Such was informed by another employee that a number of documents were stored in the drawers of the reception desk, under the desk, in filing trays and in an unlocked photocopier room behind the reception desk. Some of these documents contained confidential and/or sensitive information about colleagues or residents.
28. On 30 April 2021, Ms Such wrote to the Claimant inviting her to a disciplinary hearing (p504-506). The letter listed 24 separate allegations of misconduct. The Claimant was informed that the allegations could be classed as gross misconduct and that dismissal was a potential outcome of the disciplinary hearing.
29. The allegations fell into three broad categories; failures in respect of the recruitment checks carried out by the Claimant on new employees (including right to work checks, DBS checks and references), breaches of confidentiality/non-compliance with the Respondent's clear desk policy and, unauthorised deletion of computer files.
30. The Claimant's disciplinary hearing took place on 6 May 2021. It was conducted by Sarah Redmond, Deputy Manager of FCC and Lola Titus, Deputy Manager of another of the Respondent's care centres, BCC. The hearing lasted one hour and 40 minutes.
31. All the allegations were found proven by the Respondent and the Claimant was summarily dismissed for gross misconduct.
32. The Claimant was informed of her dismissal and the reasons for it by letter dated 13th May 2021 (p532-535). The letter confirmed the Claimant's right of appeal.
33. The Claimant appealed by letter dated 15 May 2021 (p536). Her grounds of appeal included that dismissal was too harsh a sanction, that it had been based on incorrect or incomplete evidence and, that she had not been provided with sufficient training and support in her role.
34. The Claimant's appeal was scheduled to be heard on 19 May 2021. The Respondent intended the appeal to be heard by Ms Rodrigues but following the Claimant's objection, the appeal was instead heard by Daniela Vitan, Compliance Lead.
35. The Claimant's appeal hearing lasted for 35 minutes.

36. The Claimant's appeal was dismissed, and her dismissal was upheld (p554-556).
37. The first category of allegations against the Claimant related to failings made by the Claimant in carrying out the pre-employment checks required by law and by its regulator, the CQC. The Respondent's witnesses were adamant that the Claimant knew precisely what checks she was required to carry out and her failures to do so were deliberate. The Claimant's evidence was that she completed her tasks to the best of her understanding and that any failings were due to the lack of training and support given to her by the Respondent.
38. The training provided to the Claimant in the course of her employment, specifically in relation to the recruitment vetting duties required of her, was inadequate. The Tribunal accepts the Claimant's evidence that this consisted of virtual training seminars which were rudimentary in content. The Claimant found this style of learning difficult. Although, face-to-face learning was not possible for certain periods due to the pandemic, this was not the case continuously. The Respondent knew that the Claimant had not carried out such checks in her previous employment and did not have an HR background. The complexity and importance of these pre-employment checks, particularly in a highly regulated sector, warranted more investment by the Respondent in training at the outset with refresher training at regular intervals.
39. The basic virtual training seminars were supplemented by the Claimant's managers forwarding emails to her containing official guidance on changes to the requirements in relation to DBS checks and right to work checks plus slides from a training session Ms Vitan had attended. These requirements were particularly subject to change during the pandemic. Although the Respondent's witnesses claimed to operate an open-door policy, there was little evidence of the Claimant's managers providing the Claimant with 1:1 support, mentoring or training. The Claimant only had, at most, two supervisions during the entirety of her 2.5 years' of employment (p191-199).
40. The Tribunal finds that the Claimant took steps to plug this gap by training herself. In particular, she created a recruitment checklist for herself to use when carrying out the various pre-employment checks for new members of staff. There was also evidence of the Claimant asking for advice from a friend in relation to right to work checks which substantiates the Claimant's

case that she did not receive adequate training and support from the Respondent.

41. The Tribunal also finds that the Claimant's managers were not regularly checking and signing off pre-employment checks. This resulted in pressure on the Claimant from line managers who were frustrated by delays in their new recruits starting work. Had this important step in the recruitment process been in place consistently, any errors in the pre-employment checks carried out by the Claimant would have been picked up much sooner and the serious consequences that transpired would have been prevented.
42. During cross-examination, the Respondent's witnesses stated that the most serious allegation against the Claimant was that she sent an email confirming, incorrectly, that all pre-employment checks had been completed in relation to a new starter. This led to the individual commencing employment with the Respondent when he did not have the right to work in the UK (p503).
43. The Claimant accepted in her evidence that she made an error in sending this email. She explained that what she meant to communicate was that the DBS and reference checks had been completed and that the individual could start work, subject to the right to work check being completed and management sign-off. The Claimant had been unsure how to complete the right to work check for this individual and had raised her difficulties with a Deputy Manager, Sarah. In the Claimant's mind, this issue had been left with that manager to deal with. The Claimant had also asked for a start date for the individual which was not given to her. The Claimant explained that she did not expect the individual to start so quickly. However, the Tribunal finds that this email misled the Respondent and, as a result it could have faced civil or even criminal sanctions.
44. Most of the other alleged failings in relation to pre-employment checks were of a less serious although still important nature, such as an individual starting work with a reference that was not from their most recent employer and copy CVs not being retained on all staff files. The Tribunal finds that it was not always made sufficiently clear to the Claimant what the CQC's precise requirements were in relation to these aspects of the pre-employment checks. The Claimant had also carried out a type of DBS check for several new starters which had been permitted during the pandemic but

was no longer sufficient. Again, the Tribunal finds that the change to the rules was not clearly understood by the Claimant.

45. The second category of allegations against the Claimant related to the confidential documents that were found in and around the reception desk after she was suspended. The Respondent alleged that the Claimant had breached the GDPR and its clear desk policy by storing these documents in unlocked drawers and boxes under the desk rather than in lockable storage elsewhere in the office. The Claimant had repeatedly complained to the Respondent about the drawers of the reception desk not being lockable as the lock was repeatedly broken. She stated that the alternative storage was not convenient and, she did not always have access to it. However, the Claimant maintained that she did return confidential documents to lockable storage at the end of each shift but had been prevented from doing so on the day of her suspension by the Respondent. She explained that there were some older documents on her desk because she had been in the process of checking and updating staff files as instructed by her manager. The Claimant had not provided this explanation prior to the hearing. Ms Such in her evidence did not accept that this explained all the specific documents which had been retrieved from the drawers of the reception desk. The Claimant accepted that she had been storing staff sign in sheets under the reception desk but claimed that managers had been aware of this and had never raised a concern about it. The Respondent's witnesses disputed this.
46. It may well have been the case that the Claimant stored at least a few documents of a confidential nature in or around the reception desk. Given the difficulties the Claimant faced in accessing the other storage available to her, it is possible that she would have on occasion either put off or forgotten to file all documents each day. The Tribunal preferred the Claimant's evidence in relation to the staff sign in sheets being stored under the desk. The Tribunal finds that this would have been obvious to the Claimant's managers on even the most cursory inspection and if they had seen this as a significant issue it would have been raised with the Claimant at an earlier date.
47. The fact that the Respondent instructed the Claimant to leave without having an opportunity to clear the reception desk on the day of her suspension, fundamentally undermined the evidence relied upon by the

Respondent in support of these allegations. In those circumstances, the Respondent was only able to speculate about whether the Claimant had in fact breached its clear desk policy on previous occasions and, whether she would have done so on the day in question, had she not been suspended.

48. The third category of allegations against the Claimant related to the deletion of certain computer files. The Respondent concluded that the Claimant was the employee who had most frequent access to the computer on the reception desk and therefore it was most likely to have been her that deleted these files. The Claimant maintained that other employees had access to the computer both during her shifts and on other days when she was not working. The Claimant also stated that employees did not have individual log in IDs. The Respondent did not investigate the possibility that another employee could have deleted the files. The Tribunal finds that the Respondent simply assumed that the Claimant had deleted the files. However, the Respondent's witnesses were clear in their evidence that these allegations were not the main reason for the Claimant's dismissal.

Conclusions

49. Applying the law to the finding of facts above, the Tribunal has made the following conclusions.

50. The primary reason for the Claimant's dismissal was conduct, which is a potentially fair reason. The Tribunal is satisfied that the Respondent had an honest belief that the Claimant had committed acts of misconduct. Some of the allegations should have been more properly categorised as poor performance rather than misconduct. This is a classic example of a Respondent unnecessarily over-complicating a disciplinary process. However, the Respondent's witnesses were clear as to the key allegations which led to its decision to dismiss the Claimant, which were allegations of misconduct.

51. Was this belief based on reasonable grounds? The Tribunal's conclusion is yes, but only in part. Firstly, the allegations relating to deletion of computer files were upheld because of an assumption made by the Respondent of the Claimant's guilt. This was not based on reasonable grounds and the

Respondent failed to carry out a reasonable investigation into these allegations.

52. Secondly, the belief that the Claimant breached GDPR and/or the Respondent's clear desk policy was also not based on reasonable grounds. The evidence relied on by the Respondent was rendered unreliable by the circumstances in which it was obtained. The Tribunal agrees with the Claimant's contention that it was unreasonable of the Respondent to deny her the opportunity to clear her desk and then discipline her for this.
53. Finally, the allegations relating to failings made by the Claimant in carrying out pre-employment checks were based on reasonable grounds, following a reasonable investigation. Considering the Tribunal's findings in relation to the lack of training and support provided to the Claimant, a significant proportion of these allegations amount to poor performance rather than misconduct. However, the Claimant's action in sending an email informing the Respondent that all checks had been carried out on an individual when she knew this was not the case was undeniably an act of misconduct. The consequences for the Respondent were serious and could have been much more so.
54. Was it reasonable to dismiss the Claimant? The Respondent's witnesses were clear in their evidence that the decision to dismiss the Claimant was primarily based on the pre-employment check failings and the GDPR/clear desk policy breaches. They also emphasised that the most serious was the Claimant's actions, which led to an individual who did not have the right to work in the UK being employed by the Respondent. In the absence of this incident, the Tribunal would have reached a different conclusion, given the findings made on the other allegations. The Tribunal has considerable sympathy for the Claimant who did not receive the right level of training and support to carry out the responsibilities placed on her. It is evident that several individuals within the Respondent's organisation failed in their obligations and bear some responsibility for what transpired. It is understandable that the Claimant feels she was unjustly made into a scapegoat. The Tribunal was particularly concerned by the fact that a copy of the disciplinary hearing notes had been hand amended with pejorative comments about the Claimant throughout. This document was disclosed by the Respondent but neither of its witnesses nor its counsel could say who

had written the comments. Clearly this is entirely unprofessional behaviour on the part of the author.

55. However, the Tribunal has reminded itself that the legal test is whether dismissal was within the range of reasonable responses. The Tribunal must not substitute its own judgment for that of the Respondent. Given the seriousness of the Claimant's actions in sending that email, the Tribunal concludes that dismissal was within the range of reasonable responses open to the Respondent.
56. Did the Respondent follow a fair procedure? The Tribunal is satisfied that the Respondent carried out a reasonable investigation in relation to the fundamental case against the Claimant. The Claimant was informed of the allegations in advance and, was given an opportunity to defend herself at the disciplinary hearing. She was also given the right of appeal and the appeal manager was changed at her request. Although the appeal was somewhat peremptory, it did consider the Claimant's grounds of appeal.
57. The Tribunal therefore concludes that the Claimant's dismissal was both substantively and procedurally fair.

Employment Judge Rea
Date: 13/01/2023