Case number: 1400968/2022

EMPLOYMENT TRIBUNALS

Claimant: **Janet Spargo**

Respondent: **Real Estates (Cornwall) Limited**

Heard at: **Bristol** **On:** **16-17 January 2023**

Before: **Employment Judge Oliver**

Representation
Claimant: In person
Respondent: Mr Andy Pickett, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.

2. The claim for unpaid holiday pay is dismissed upon withdrawal.

REASONS

1. This is a claim for unfair dismissal and unpaid holiday pay (deduction from wages). The Claimant confirmed at the start of the hearing that she was no longer pursuing a claim for holiday pay and she withdrew this claim. I confirmed that this meant the claim would be dismissed upon withdrawal.

2. The hearing was conducted by the parties attending by video conference (VHS). It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so. Judgment was reserved as there was not sufficient time remaining on day two of the hearing to consider and deliver an oral decision.

Issues

3. I discussed the issues with the parties at the start of the hearing and these were agreed as follows.

4. What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct and in the alternative some other substantial reason (breakdown of trust and confidence), which is are both potentially fair reasons for dismissal under s. 98(2) of the Employment Rights Act 1996.

5. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

6. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

7. Did the Respondent adopt a fair procedure?

8. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

9. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?

10. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

Evidence

11. There was an agreed bundle of documents and I read the documents that were referred to by the parties in their witness statements or during the hearing.

12. I had written statements from the witnesses and read these in advance of the hearing. I heard evidence from the Claimant. For the Respondent, I heard evidence from Mr Ian Datson (managing director) and Mrs Debbie Datson (office manager). I heard oral submissions from both parties.

Facts

13. I have considered all of the evidence and submissions, and find the facts necessary to decide the issues in the case.

14. The Claimant was employed by the Respondent as an accounts manager. She began employment as an office administrator on 1 June 1999. She was dismissed with immediate effect on 10 December 2021.

15. The Respondent is a small letting agency based in Cornwall. The two

directors of the Respondent are Ian Datson (Mr Datson) and Larry Datson (his father). Mr Datson is the managing director, and his father is described as a "silent partner" who is not involved in the day to day running of the company. Mr Datson's wife, Debbie Datson (Mrs Datson) is the office manager and began working for the Respondent in April 2018. During the time of the relevant events there were two other members of staff.

16. All staff apart from Mr Datson were furloughed from April 2020 due to the Covid-19 pandemic. They were paid 100% of their salary. The office reopened with a closed-door policy on 26 May 2020, and the Claimant returned to the office on 1 July 2020 (initially part-time, and then full-time on her usual hours).

17. There was an incident in the office on 2 July 2020 involving the Claimant, Mr Datson and Mrs Datson. The Claimant says that Mr Datson suggested her work emails should be diverted to Mrs Datson to ease her workload. She refused this suggestion, and this led to a verbal outburst from Mrs Datson towards her and an argument between Mr and Mrs Datson. Mr Datson's oral evidence was that the Claimant asked to be made redundant after this incident. This was not challenged by the Claimant in cross-examination. Mr Datson says that he did not agree to make the Claimant redundant because he wanted and needed her to continue to work.

18. The Claimant was asked to work from home in November 2020. She preferred working from the office and said this to Mr Datson. The Claimant returned to work in the office in December 2020, and there were no restrictions on her being able to go into the office.

19. There was a WhatsApp group used by the office. On 4 January 2021 Mr Datson sent a message which said, "*As you all know we are in Tier Three now so this morning can you not come in until I have decided what we are doing in terms of staffing levels and our personal safety*". Later that day he confirmed he would run the office on his own for the week and see what happens.

20. On 25 January the Claimant sent a group WhatsApp message saying she and her colleague Rachel Cortis were going to do a couple of mornings in February to catch up and get back in the loop. On 28 January Mr Datson sent a series of messages about what was going to happen in February. He said, "*No one apart from me is going into the office, I am still adamant that households must not mix at any cost*". He said that the Claimant and Ms Cortis could work from home part-time for four hours a day (with the remainder on furlough), another employee would be furloughed, and he could drop round any paperwork they needed. Mr Datson said he did not want any doubt on where he stood on household mixing, and the Claimant replied "*No problem, I'm clear on it all*". Mr Datson's oral evidence was that he was doing this for health and safety reasons, as there was a lockdown and the Covid rates in Cornwall were very high.

21. Mr Datson changed the lock on the office in early February because it was faulty. The Claimant sent a WhatApp message on 6 February asking if he had changed the lock. She confirmed that she and Ms Cortis were going into the office to catch up with gas checks and contractor payments. Mr Datson reiterated that he did not want any staff in the office until lockdown was over and he decided it was safe for everyone to come back. Mrs Datson returned to the

office in March 2021 as this did not involve mixing different households.

22. During March to May 2021, there was a big increase in calls to the Respondent's office, with people complaining that they had emailed several times and had no response. The Respondent pays around £1,000 a month for listings on Rightmove and Zoopla. Lettings enquiries from these sites were directed to the Claimant's work inbox. A major part of her role was dealing with these emails. Mr Datson diverted these emails to the office from June 2021 onwards as it appeared the Claimant was not dealing with them effectively.

23. On 21 May 2021 Mr Datson sent the Claimant a letter about the road back to work, aiming for 21 June. This letter also said he was disappointed that she had booked a week's holiday a month after the planned return without asking permission or informing them. The letter said, "*Going forward, all holiday requests will have to be in writing and approved by one of the Directors before being added to the official staff holiday calendar*". The Claimant added two days of holiday to the calendar on 24 May, which Mr Datson then cancelled as both were when Ms Cortis was also off. On 3 June Mr Datson requested the Claimant to take 8 days of holiday for the weeks of 7 and 18 June 2021.

24. Staff did not come back to work in the office in June 2021 because Covid infections had increased significantly in Cornwall. The Respondent installed a new ventilation system in August, and planned for staff to come back in September. In the meantime, the Claimant and two other employees were put back on full furlough from 21 June 2021. I have seen an email from Mr Datson dated 21 June which says, *"…we feel we are not getting full value for the 16 hours a week we asked you to work from home…After a lot of consideration we have decided to put both of you back on full furlough from 21 June 2021 until we decide to being you back. You will still receive 100% of your salary as you have from the start of the pandemic*".

25. Mr Datson sent the Claimant a letter about return to work on 13 September 2021. This proposed 4 October for a return to the office on normal hours of work. It dealt with various other matters including mandatory Covid testing and holiday entitlement. There were various emails about these issues and the Claimant did not return to the office until 1 November. She was asked in an email of 27 October to attend a "Back to Work" meeting on 1 November with Mr Datson and Mr Larry Datson.

26. The Claimant sent an email on 1 November to Mr Datson saying that she and Ms Cortis "…*will be together for this meeting…The whole situation is becoming intimidating. As we have the same concerns it makes sense to do this*." Mr Datson replied, "*The timing of your individual meeting is not up for debate. You are expected at 10.45am tomorrow as per the previous instruction*."

27. The meeting took place on 2 November. The Claimant and Ms Cortis arrived at the same time and wanted to have their meeting together, but the Claimant was asked to wait in the car during Ms Cortis' meeting. At the meeting, they discussed various matters including why the Claimant had not opened lead emails and why she had turned on two-step verification for her work emails. The notes of the meeting taken by the Respondent record the Claimant confirming that she did not answer the emails, and denying that she had turned on two-step

verification. They also discussed testing, Covid protocols, holiday entitlement and an updated contract of employment.

28. A major issue for Mr Datson was the Claimant's failure to open enquiry emails between March and May 2021. Although he discovered there was an issue at the end of May, he explained in evidence that he did not address it the time because they were so extremely busy with enquiries from people wanting to rent properties in Cornwall. He described it as the busiest rental market he had seen. This was caused by a combination of people wanting to move to Cornwall and work from home, and people wanting to holiday in Cornwall as it was not possible to travel overseas. In October he checked the email account and found that almost 2,000 emails had not been opened by the Claimant. He was also locked out of the Claimant's work email account when he wanted to log in to check a property repair, as she had added two-step verification which redirected to her personal phone number and email address. This meant Mr Datson could only access the Claimant's work emails on her own computer in the office, not remotely.

29. Mr Datson suspended the Claimant from work from 4 November 2021, after discussion with Larry Datson. He sent a letter on that date saying this was "*pending investigations into your unacceptable attitude, your decision not to carry out your normal work duties whilst working from home, compromising the security of a company email account, insubordination and refusal to comply with direct instructions from your employer*."

30. After suspending the Claimant, he collated the evidence he had gathered. They employed an independent HR specialist from Peninsula Face2Face to chair a disciplinary hearing, Mr Joseph Gill. Mr Datson explained that he did the initial gathering of evidence, and Mr Gill completed the investigation and held a disciplinary hearing with the Claimant. Mr Gill produced a report with findings and recommendations, but Mr Datson would make the final decision on the outcome based on these findings.

31. On 8 November 2021 Mr Datson sent the Claimant an email inviting her to a disciplinary hearing on 11 November. This set out three main allegations, which were described as gross misconduct if substantiated:

a. Activities that have caused the company to lose trust, faith and confidence in your ability to carry out your role of accounts manager – failing to reply to almost 2,000 emails while working from home, and setting up 2-step verification which prevented Mr Datson from accessing emails.

b. Failure to follow reasonable management instructions – arriving with Ms Cortis for the return to work meeting after being instructed to attend individually, and breaching covid regulations and ignoring a direct instruction by going into the office on 6 February 2021.

c. Failure to follow company rules and procedures with respect to booking holidays, by not seeking prior approval from management.

32. The invitation letter enclosed various supporting documents, including 8

screenshots of unopened emails from the Claimant's account. Mr Datson did not provide screenshots of all 2,000 emails that he said had been left unopened, as he said these were some 189 pages in total. I have seen an example screenshot of the Claimant's work email inbox. This shows a list of emails from Rightmove and Zoopla dated 31 March 2021 with the title coloured blue (indicating that they had not been opened), and one email from elsewhere that does appear to have been opened. The number "2753" is shown against the Inbox, indicating that this number of emails are unopened. The Claimant suggested in cross-examination and in answer to my questions that someone could have marked opened emails as unopened and then taken screenshots, but I find this explanation implausible.

33. The disciplinary meeting was conducted by Mr Gill of Peninsula HR on 11 November 2021. The Claimant was accompanied by her daughter. I have seen a transcript of this meeting. It lasted around an hour and 45 minutes. All of the allegations were discussed with the Claimant. Mr Gill then obtained some further information from Mr Datson and Mrs Datson before finalising his report.

34. Mr Gill's report concluded the following:

a. The allegation of failure to open or reply to almost 2,000 emails was well founded and should be upheld. On balance, the evidence suggests that the Claimant simply stopped reviewing most if not all of these enquiries.

b. The allegation of setting up 2-step verification was well founded and should be upheld. He noted there was an apparent lack of maliciousness.

c. The allegation of failure to follow instructions to attend the return to work meeting individually was well founded and should be upheld. The Claimant turned up with Ms Cortis and tried to attend her meeting.

d. The allegation of breaching covid regulations and ignoring a direct instruction by attending the office on 6 February 2021 was well founded and should be upheld. The Claimant understood she was not to attend the office but she accepts she attempted to do so.

e. The allegation of failure to follow company rules and procedures with respect to booking holidays was partially well founded and should be upheld in part. It was not clear that prior approval was required before correspondence in May 2021, but there was a clear instruction in a letter of 21 May 2021.

f. Mr Gill noted that "*the employee handbook states that "not complying with any reasonable direct order or instruction from management" will normally be deemed gross misconduct*." The report recommends a first and final written warning, taking into account the Claimant's 20 years' service with no prior formal disciplinary sanction, and the challenges of the Covid-19 pandemic.

35. The Claimant chased Mr Datson for the outcome on 1 and 10 December. The report is actually dated 26 November 2021. However, Mr Datson's

evidence, which I accept, is that the initial draft contained various factual/typographical errors that needed to be corrected after it was sent to his legal team. Mr Datson received the final report on 3 December. He sent the Claimant an email on 3 December apologising that the report had been delayed. I accept his evidence that he sent this email before he received the final report later that day.

36. Mr Datson made a final decision on the disciplinary outcome based on Mr Gill's findings. He sent the Claimant an outcome letter on 10 December 2021. His final decision was that she should be dismissed for gross misconduct without notice. The letter says that he has considered whether a lesser sanction was appropriate, but says he is unable to apply a lesser sanction because of reasons given in the letter, and the number and severity of the upheld allegations. The letter notes that the Claimant did not provide any justification for failing to read the emails, setting up 2-step verification, or attempting to access the office.

37. Mr Datson's evidence was that he had considered whether a warning was appropriate. He felt that the number and gravity of the allegations were too severe, and the Claimant had been treating him with disrespect. The Claimant did not say why she had done these things, and she had not put forward any mitigation or said she was sorry. He felt he was not able to trust her not to behave in this way again. He regarded two of the incidents as the most serious. Firstly, attempting to attend the office – the Claimant had been told very clearly in writing not to do this, and it was serious because it affected health and safety in the office. Secondly, failing to open or deal with the emails – he did not understand why she had not opened them, and she has never provided any explanation for this.

38. The Claimant sent an appeal on 14 December 2021. The appeal complains about the final decision being too severe and disproportionate. She says the issues raised about her are historical. She complains about the back to work meeting and not being able to access her emails to obtain evidence. She also says that Peninsula suggested mitigation.

39. Mr Datson replied on 15 December asking if the content of the email is the basis of the appeal. He says the appeal will need to be done "virtually or in writing" due to health and safety concerns relating to Covid-19 and the increasing numbers of cases. The Claimant replied on 15 December confirming the email is her appeal. She asked him to explain the options of a hearing in writing, and for confirmation as to who would carry out the hearing. Mr Datson replied confirming he would conduct the appeal as they are a small business, and saying they can conduct the hearing in writing by responding to the appeal email. The Claimant replied the same day saying, "*This is to confirm I require a response in writing by the 17th of December 2021*".

40. The appeal was decided by Mr Datson on 16 December 2021. He provided the Claimant with an email at the end of the day which set out responses to all of the points raised in her appeal. He concluded that the matter had been dealt with properly and thoroughly, the correct decision had been made, and he was unable to uphold the appeal.

41. At the hearing, Mr Datson said that in hindsight he should have engaged

someone external to do the appeal. He did consider whether his father could hear it. However, he is not involved day to day with the business, he is 82 with a medical condition and caring responsibilities, and Mr Datson did not think this was appropriate.

42. Mr Datson dealt with the appeal by going through each of the points in the appeal email and looking at them again, asking if he had made the right decision or if the decision was too harsh. There was nothing he felt should be changed. He also considered again the issue of the Claimant's length of service, but still felt she should be dismissed. He said the appeal did not come across as if the Claimant wanted her job back, and she didn't explain or apologise. She showed no contrition and he did not believe she would change her behaviour if her employment continued. Put bluntly during cross-examination, he explained, "*I would tell you to do stuff, and you would not do it. I told you not to do stuff, and you did it*". He said that she would not take instructions from management and was not willing to change. He also said that he did not make the decision to dismiss the Claimant lightly.

Applicable law

43. The applicable law is set out in section 98 of the Employment Rights Act 1996 (ERA). Conduct is a potentially fair reason for dismissal.

44. The burden of proof is on the employer to show a potentially fair reason for dismissal. The test is whether the dismissal was fair or unfair, having regard to the reason shown by the employer, and in particular whether in the circumstances the employer acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the employee (section 98(4)(a)). The question of fairness is to be judged in accordance with equity and the substantial merits of the case (section 98(4)(b)).

45. In cases of dismissal for conduct there is a the three-stage test set out in ***British Home Stores v Burchell*** [1980] ICR 303 – whether there was a genuine belief in the misconduct, whether there were reasonable grounds for that belief, and whether there was a reasonable investigation in the circumstances. The question of the reasonableness of the investigation is to be judged according to the range of reasonable responses test (***Sainsbury's Supermarkets v Hitt*** [2003] ICR 111).

46. The question of whether dismissal was reasonable as a sanction for the misconduct is judged according to the range of reasonable responses test. This means that it is not for the Tribunal to substitute its own judgment for that of the employer. Instead, the Tribunal must consider whether the decision to dismiss was within the range of reasonable responses that a reasonable employer could adopt.

47. Under section 98(4) the Tribunal should also assess the fairness of the procedures used to dismiss the employee. This involves looking at both the requirements of the Acas Code on Disciplinary Procedures (the Acas Code) and the general requirements of a fair procedure. Any provision of the Acas Code which appears to the Tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question

(section 207(2) Trade Union and Labour Relations (Consolidation) Act 1992) (TULRCA).

Conclusions

48. My conclusions are as follows, taking the issues in turn.

49. ***What was the reason for dismissal?*** The Respondent's main position is that the dismissal was for conduct. This is supported by the evidence. A disciplinary process conducted by an independent consultant concluded that the Claimant had committed a number of acts of misconduct. Mr Datson says that he dismissed the Claimant because of these acts, and because he did not believe she intended to change her behaviour.

50. The Claimant's case is that this is not the real reason for dismissal. Her ET1 form alleges that the actual reason was because Mr Datson wanted to replace her with his wife. Having considered the evidence, I do not agree. There was some tension between the Claimant and Mrs Datson, as shown by the incident on 2 July 2020. The Claimant herself asked if she could be made redundant after this incident. However, I accept Mr Datson's evidence that he did not want the Claimant to leave, and in fact needed her to continue to work. I note that the Respondent chose to continue paying the Claimant in full throughout furlough, and implemented a return to work process. The disciplinary process found a number of serious incidents of misconduct had taken place, and I find that this was the genuine reason for the Claimant's dismissal.

51. ***Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?*** I find that the Respondent did hold a genuine belief in the Claimant's misconduct. This was the conclusion of the disciplinary process conducted by an independent consultant. I also find that this was on reasonable grounds. Again, this was the conclusion of the disciplinary process that was relied on by Mr Datson. It was based on written evidence of emails and WhatApp messages, and I also note that the Claimant did not deny that she had failed to open emails and attempted to attend the office after being instructed not to.

52. In relation to the reasonableness of the investigation, I note that Mr Gill conducted a long meeting with the Claimant, follow-up meetings with Mr and Mrs Datson, and reviewed written evidence. The Claimant did not suggest any avenues of investigation that had been missed. Again, the Claimant did not deny two of the key allegations – that she had failed to open emails and had attempted to attend the office after being instructed not to. I therefore find that there was a reasonable investigation in the circumstances, which was within the range of reasonable responses.

53. ***Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?*** The Claimant says that the decision to dismiss was too harsh. She says that more consideration should have been given to her 20 years of exemplary service, lack of any warnings, good appraisals and work record. This is a relatively unusual case, as the consultant who conducted an independent

disciplinary process recommended a first and final warning rather than dismissal. This was because of the Claimant's 20 years of service without prior disciplinary sanction, and the challenges of the pandemic. Nevertheless, Mr Datson decided to dismiss the Claimant.

54. A reasonable employer is certainly expected to take these mitigating factors into account before deciding that dismissal is a fair sanction. I am satisfied on the evidence that Mr Datson did so. He considered whether a lesser sanction was appropriate, but decided that dismissal was necessary because of the number and seriousness of the incidents of misconduct, and the Claimant's failure to explain herself, accept that she had done anything wrong or apologise. He had lost trust in the Claimant and did not believe that her behaviour would change. I accept Mr Datson's explanation for why he decided to dismiss. I can see how this is supported by the Claimant's failure to accept that she had done anything wrong, particularly where she does not appear to have denied the two key allegations. I have not considered whether I would have dismissed the Claimant in the same circumstances, but looked at whether this decision falls within the range of reasonable responses of an employer faced with these facts. I find that it does. I therefore find that the decision to dismiss was a fair sanction.

55. ***Did the Respondent adopt a fair procedure?*** The Claimant raised two particular issues with the Respondent's witnesses at the hearing – the failure to provide her with all of the printouts of unopened emails, and the fact Mr Datson dealt with the appeal himself rather than his father.

56. In relation to the printouts of unopened emails, it appears that there were 189 pages of these in total. The Claimant was only provided with eight sample pages. Mr Gill's report indicates that he only considered these eight pages as well (see paragraph 12 of his report). I agree that the procedure might be unfair if Mr Gill had taken into account all 189 pages, while only a sample had been provided to the Claimant. However, this is not what happened. The disciplinary process relied on eight sample pages only. Mr Gull made his findings based on the same evidence as had been provided to the Claimant.

57. In relation to the appeal, Mr Datson made the final decision to dismiss and also dealt with the appeal. The actual disciplinary process had been conducted by an independent consultant. However, Mr Datson was still involved in both decisions. The Acas Code says that "*the appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case*." Mr Datson was not fully impartial. He had some impartiality when dealing with the appeal becasue he had not made the findings himself on the various disciplinary allegations – but he had clearly previously been involved in the case.

58. This requirement is a problem for small businesses where there may not be other senior managers available to conduct an appeal. The Acas Code recognises this by using the words "where possible". Mr Datson did say that in hindsight he should have used another independent external person to decide the appeal. However, procedural fairness does not require a small employer to incur the costs of engaging an external person to hear appeals (although this option is open to employers if they wish to do so).

59. The Acas Guide to Discipline and Grievances at Work suggests that small employers should consider whether an owner or board of trustees should hear an appeal. The only available option in this case was Mr Datson's father, Mr Larry Datson. He is a co-director of the Respondent, but a "silent partner". Mr Datson explained why his father was not appropriate to hear the appeal due to his age, health and personal circumstances. I accept this evidence. I therefore find that it was not possible for someone more senior and/or impartial within the Respondent to hear the appeal. Mr Datson did the best he could by considering and replying to each of the Claimant's points in her appeal, and considering again whether dismissal was the right sanction. I therefore find that, in the circumstances, it was not unfair for Mr Datson to deal with the appeal.

60. The Claimant also complained about how quickly Mr Datson replied to the appeal and suggests he did not consider it properly. I note that the response was sent a full 24 hours after she had confirmed she required a response in writing, and also note that she had imposed a deadline by requiring a response by the following day. The appeal did not raise any new issues that required further investigation. I am satisfied on the evidence that Mr Datson did consider the appeal properly.

61. I have also considered overall whether the disciplinary process met the requirements of a fair procedure, and find that it did. The Claimant was invited to a disciplinary hearing in writing with prior notice (at least two days), and she was provided with details of the allegations against her and supporting evidence. Mr Datson did an initial investigation and then passed the matter to Mr Gill to deal with the disciplinary hearing and findings. She had a hearing with Mr Gill at which she was permitted to be accompanied and had the opportunity to answer all of the allegations. She was permitted to appeal, and she agreed to this being dealt with in writing. Mr Datson considered and replied to all of the points in her appeal.

62. I therefore find that the Claimant's dismissal was fair. Her claim for unfair dismissal fails and is dismissed.

Employment Judge Oliver
Date 3 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
20 February 2023 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS