EMPLOYMENT TRIBUNALS

Claimant: Mrs R Sweet

Respondent: Fairford Opticians Limited

Heard at: **Bristol (via VHS)** **On: 12 January 2023**

Before: **Employment Judge Leith**

Representation
Claimant: In person
Respondent: Mr Handscombe and Mr Worthington (Directors)

JUDGMENT having been sent to the parties on 24 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claim and Issues

1. The Claimant claims unfair dismissal. Having been listed for a final hearing in September 2022, the proceedings were stayed pending the outcome of parallel criminal proceedings.

2. On 25 October 2022, the Claimant emailed the Tribunal to indicate that the criminal proceedings had concluded, and asked when the final hearing could be rescheduled. On the same date, the Respondent applied for the claim to be struck out. On 7 November 2022, EJ Livesey directed that the claim be listed for an open Preliminary Hearing to consider:
    a. The Respondent's application to strike out the claim and/or whether, in the alternative, a Deposit Order should be made if the Employment Judge considers that any allegation or claim pursued by the Claimant has little reasonable prospect of success (see Rule 39 of the Employment Tribunals Rules of Procedure 2013).
    b. If that should not succeed, the listing of a final Hearing, with case management directions.

3. I heard submissions from Mr Handscombe and Mr Worthington for the Respondent, and from the Claimant. Before hearing from the Claimant, I

reminded her that she ought not, in addressing the Tribunal, to do anything which would cause her to breach the terms of the restraining order upon her.

4. I have considered the ET1 and the ET3, the Case Management Orders, and the correspondence on the Tribunal file including the evidence filed by the parties.

The Law

5. Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with application to strike out. It provides as follows:

> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;
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> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
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> (d) that it has not been actively pursued;
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> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
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> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

6. Strike out is a draconian step that should be taken only in exceptional case.

7. In considering whether a claim has no reasonable prospect of success, the Tribunal must consider whether there is a "more than fanciful" prospect of the claim succeeding (*A v B and another* [2011] ICR D9).

8. The Claimant's case must be taken at its highest. The tribunal must be particularly careful not simply to ask a litigant in person to explain their case while under the stresses of a hearing, but must take reasonable care to read the pleadings and any other key documents (*Cox v Adecco and ors* [2021] ICR 1307).

9. In the context of an unfair dismissal claim, guidance was given by the Court of Session in the case of *Tayside Public Transport Co Ltd v Reilly* [2012] IRLR 755. Almost all unfair dismissal claims are fact-sensitive. Where the central facts are in dispute, the claim should be struck out in only the most exceptional circumstances. Where there is a serious dispute between the parties, it is not for the Tribunal to conduct an impromptu trial of the facts. That said, the Court of Session recognised that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue, such as where they are conclusively disproved by disclosed documentation.

10. The EAT held, in *HM Prison Service v. Dolby* [2003] IRLR 694 EAT, at para 15, that the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. *Dolby* was decided under a previous version of the Employment Tribunal Rules, but the important part of the wording of the relevant rule was the same, in that it provided that the Tribunal may strike the claim out.

11. Applications for a deposit order are governed by Rule 39 Employment Tribunal Rules of Procedure 2013 which provides as follows:

> 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
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> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
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> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
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> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> > (a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

12. The purpose of a deposit order is to week out claims which are unlikely to succeed but do not meet the strike out criteria, and to give a clear warning that costs may be payable if a claim succeeds (*Hemdan v Ishmail and anor* 2017 ICR 486). The Tribunal retains a discretion even where the test in rule 39 is met.

13. In considering whether to strike out or make order a deposit, the Tribunal must bear in mind the overriding objective, in rule 2 of the ET Rules:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues;

and

(e) saving expense."

14. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.

15. Section 98 of the 1996 Act deals with the fairness of dismissals.

16. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

17. Misconduct is a potentially fair reason for dismissal under section 98(2).

18. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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.

19. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell v British Home Stores* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563)

Discussion

20. The Claimant was employed by the Respondent from 1 May 2011 to 9 June 2021 as an optical assistant.

21. The Claimant accepts that, on 26 May 2021, she made a telephone call from the Respondent's phone line that lasted approximately 3 minutes. The call was made to a Ms Satchwell, her ex-husband's current partner.

22. Ms Satchwell complained to the Respondent about the telephone call. The Respondent suspended the Claimant and invited her to a disciplinary meeting. Following the disciplinary meeting, the Claimant was dismissed by a letter dated 9 June 2021.

23. The Claimant contacted ACAS on 2 July 2021. The Early Conciliation certificate was issued on 15 July 2021. The Claimant issued a claim on the same day, claiming unfair dismissal.

24. In box 8.2 of the ET1, which requires the Claimant to set out the details of her claim, she said this:

"I made a person phone call from work to my ex husbands partner lasting 3 minutes. She then complained to my employer and I was dismissed after a weeks suspension."

She included no other details.

25. The Respondent filed their response within time. They applied for the claim to be struck out.

26. A Preliminary Hearing took place before Employment Judge Lang on 17 March 2022. That hearing was to consider the Respondent's application for the claim to be struck out. EJ Lang did not strike out the claim.

27. EJ Lang clarified the issues in dispute between the parties. He set them out in his Case Management Order in the following terms:

"Unfair dismissal

1.1 Was the Claimant dismissed?

1.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The Claimant does not accept it was for the reason given.

1.3 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? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

1.3.1 The Claimant does not consider she was given an opportunity as part of the investigation to explain what happened and considers that when she tried to explain was given no answer.

1.4 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?

1.5 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects;

1.5.1 She does not consider that the process was fair, in particular she considers that there was a breach of the ACAS code in that she asserts only Mr Handscombe dealt with the process when two people are required by the code and that the Respondent did not listen to her (for the avoidance of doubt this is denied by the Respondent).

1.5.2 She also feels that consideration has been put on a previous conviction which she does not consider weight should have been put on and states that the Respondent knew of this conviction at the time (the Respondent denies this).

1.6 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?

1.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

Remedy
Unfair dismissal

1.8 The Claimant does not wish to be reinstated and/or re-engaged.

1.9 What basic award is payable to the Claimant, if any?

1.10 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

1.11 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.11.1 What financial losses has the dismissal caused the Claimant?

1.11.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.11.3 If not, for what period of loss should the Claimant be compensated?

1.11.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.11.5 If so, should the Claimant's compensation be reduced? By how much?

1.11.6 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 through failing to follow the correct procedure for investigation and disciplinary procedure? 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%?

1.11.7 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

1.11.8 Does the statutory cap of fifty-two weeks' pay or £89,493 until April 2022 apply?

28. The Claimant had apparently attended the first half of the hearing before EJ Lang, but not the second half. EJ Lang made an order that, unless the Claimant provide a statement confirming whether she was continuing with her claim, and setting out what compensatory loss she claimed, her claim would be struck out.

29. There was some dispute over whether the Claimant had complied with that order. A further Preliminary Hearing was listed before EJ Hogarth to consider that issue. EJ Hogarth concluded that the Claimant had complied with the unless order.

30. It is apparent from EJ Hogarth's CMO that at some point, the Claimant had contacted the Respondent directly to suggest that the real reason for her dismissal was that she had previously been in a relationship with Mr Handscome, one of the Directors of the Respondent. EJ Hogarth recorded that on 15 May 2022, the Claimant emailed the Tribunal asserting that the reason she was dismissed was due to a previous relationship with one of the owners of the respondent company. The Respondent denies that such a relationship existed.

31. EJ Hogarth further recorded that the Claimant did not wish to claim a compensatory award. He recorded that the list of issues remained as set out by EJ Lang, save that paragraph 1.11 would be deleted.

32. EJ Hogarth listed the case for final hearing on 12 and 13 September 2022. Order were made for disclosure of documents, the preparation of a hearing bundle, and the preparation and exchange of witness statements. Disclosure took place, and the resulting bundle of documents was before the Tribunal.

33. Thereafter, there was some correspondence between the parties and the Tribunal regarding concerns that the Respondent had about exchanging witness statements in light of pending criminal proceedings. The Respondent intended to call Ms Satchwell as a witness, but they expressed reservations regarding the fact that the Claimant was due to appear in the Magistrates Court charged with harassment against Ms Satchwell, with one of the alleged acts of harassment being the telephone call for which the Claimant had been dismissed. The Respondent additionally drew to the Tribunal's attention that the Claimant was subject to bail conditions which prevented her from having any contact, directly or indirectly, with Ms Satchwell.

34. On 26 August 2022, EJ Cadney directed that the Tribunal proceedings be stayed pending the outcome of the criminal proceedings. The parties

were directed to update the Tribunal regarding the progress of those proceedings.

35. On 25 October 2022, the Claimant wrote to the Tribunal in the following terms:

> "This email is to update the tribunal of the result of the court case I attended. Mrs Rachel Sweet.
>
> The outcome was I received a small fine and a restraining order against Ms Satchwell.
>
> I would like to know when the tribunal can be rescheduled."

36. The Respondent responded, asking that the Claimant's case be struck out:

> "As the Respondents in this case, we wish to apply for the claimant's case to be struck out for the following reasons:
>
> In his record of the Preliminary Hearing of the 16th June 2022, point 62, Judge Hogarth determined: 'The third matter was the imminent criminal proceedings against the claimant which were described to me. If she did the things I was told those proceedings related to, that would have been a reason not to give relief from sanctions, and would also be highly relevant to subsequent decisions that may fall to be made in this case'
>
> The claimant indeed pleaded guilty to the charges brought against her by the Crown Prosecution on the day of the criminal proceedings admitting that she had done those things that the proceedings related to. According to Judge Howgarth, relief from sanctions may not have ben granted to the claimant has Mrs Sweet not denied her guilt during the Tribunal Hearing.
>
> The serious nature of Mrs Sweet's harassment of Mrs Satchwell has resulted in a two year restraining order being placed against her. Wilshire police assert that 'Mrs Sweet is to have no direct or indirect contact which includes comments to Mr Sweet or any 3rd party about Mrs Satchwell whether face to face or via social media'
>
> As Mrs Satchwell is our key witness in our defence against the claim brought against us by Mrs Sweet, we consider that it may no longer be possible to have a fair hearing given the nature of the Claimant's restraining order against our witness. Mrs Satchwell's involvement in our case is key to our defence as it is Mrs Sweet's actions against Mrs Satchwell which led to our investigation and subsequent dismissal. Mrs Sweet's harassment of Mrs Satchwell from our workplace was also police evidence in the CPS's case against the claimant.
>
> We attach a copy of the outcome of the criminal proceedings which confirm the claimant's sentencing and guilty plea as well as the

details of the restraining order. It equally confirms the sum declared by the claimant as a 'small fine' to in fact be over £500 including CPS costs which relative to the financial circumstances that Mrs Sweet has declared in a previous Tribunal Hearing where a deposit order was discussed, seems less than insignificant."

37. The attached document referred to was a letter from Wiltshire Police to Ms Satchwell, updating her regarding the outcome of the case. It noted that the Claimant had pleaded guilty to harassment without violence, and had been fined £416 (plus CPS costs of £85 and a victim surcharge of £42). It further noted that the Claimant had been subjected to a 2 year restraining order in the following terms:

> "No direct or indirect contact which includes comments to Mr Sweet or any other 3rd party about Ms Satchwell whether face to face or via social media."

38. The Claimant responded to the Respondent's that application on 25 October 2022, as follows:

> "The guilty plea was advised by my solicitor as it was the best course of action to minimise putting myself through anymore court action. Plus my mother attended court and it was all too much for her to cope with after losing my father 2 months ago.
>
> If the case had continued to trial on the day I may well have proved the reason for my contact with Ms Satchwell was a means to an end in that I needed to contact my sons father to assist when Jacob was in trouble.
>
> I should not be refused a hearing in the tribunal. Ms Satchwell need only supply a statement. She does not need to be included in the video hearing.
>
> Once again I am being prejudiced against.
>
> Legally I am entitled to make a complaint about unfair dismissal and once again Fairfird Opticians are using anything to wriggle out of a judge making a decision as to whether the termination of my employment was fair which it was not.
>
> Does not all this show the determination of Ms Satchwell to make things difficult for me. I emailed the tribunal two days ago to inform them of the result of the case
>
> Ms Satchwell then saw fit to email Fairford Opticians with the same information.
>
> This is all totally unfair and just shows what lengths Fairford Opticians are prepared to go to not to face a tribunal.

If they have no reason to believe what they did by sacking me was correct and not unjust why are they so hell bent on stopping the tribunal?"

39. That is the context in which EJ Livesey directed the case be set down for this Preliminary Hearing.

40. In determining the question of whether the claim should be struck out, I must be careful not to relitigate the case put before EJ Lang. However there the case has evolved in a number of significant ways since EJ Lang considered the question of strike-out. In particular:
    a. The conduct for which the Respondent says that it dismissed the Claimant has now been held by a criminal court, operating to the criminal standard of proof (albeit on a guilty plea), to have constituted harassment.
    b. The Claimant has now offered an alternative reason why she says the Respondent may have dismissed her; namely, her (claimed) relationship with Mr Handscombe. In that regard, the Claimant has not formally applied to amend her claim, but the Respondent has had the opportunity to adduce evidence to rebut that assertion (which it strenuously denies).
    c. The parties have completed disclosure, and there are a number of documents before the Tribunal which were not before the Tribunal on the previous occasion.
    d. As a result of the criminal proceedings, the Claimant is now the subject of a restraining order towards Mrs Satchwell.

41. The first ground on which a strike out is sought is that it was inherent in EJ Hogarth's decision that he may not have grated relief from sanctions (in respect of compliance with EJ Lang's unless order) had the Claimant's criminal case been heard by then; and that consequently the case ought to be struck out now. I can deal with this point relatively shortly. What I am not doing, and cannot do, is hearing an appeal against EJ Hogarth's decision. That decision was made at the time that it was made, based on the evidence before EJ Hogarth. I cannot look behind that. In any event, the point is based on a misreading of EJ Hogarth's judgment. EJ Hogarth's primary finding was that the Claimant had complied with the unless order. He had then gone on to consider, in the alternative, whether he would have granted relief from sanctions if he had found that the Claimant had not complied with the unless order. It was in that context that the comment regarding the criminal proceedings was made. That comment formed no part of his primary finding, which was that the unless order had been complied with and so the claim was not struck out.

42. The second ground is, in my judgment, in two distinct parts. The first is that a fair trial is no longer possible, on the basis that the terms of the restraining order would inhibit the parties' taking part in the proceedings. The second is that in light of the outcome of the criminal proceedings, the Claimant has no reasonable prospect of succeeding in her claim.

43. Taking first the question of whether a fair trial is possible, the Claimant told me that she would take some advice from the Police regarding how the restraining order would limit her ability to put her case. She had not

done so in advance of the hearing before me. I can certainly see that, on the face of it, the order would give her some difficulty in presenting her case. But I am not satisfied on the evidence before me that it would reach the high hurdle of rendering a fair trial impossible. Significantly, it would be the Claimant whose ability to present her case would be impaired, not the Respondent. The Respondent would not be prejudiced.

44. Finally, I will deal with the question of prospects.

45. In considering that, I must take the Claimant's case at its highest. I take as a starting point the way the issues were captured by EJ Lang in the list of issues, together with the other documents before the Tribunal. I discussed the Claimant's claim with her. With reference to the issues as set out by EJ Lang, she amplified and explained to me that her case is as follows:

    a. "The phone call did not justify her dismissal." Consequently, she believes that it was not the real reason for her dismissal [LoI 1.2]. She has, since the PH before EJ Lang, suggested that the real reason for the dismissal was the fact that she was previously in a relationship with Mr Handscombe, and that he would be uncomfortable with her seeing his wife now that he is married. She explained that there was nothing specific that Mr Handscombe had done or said to suggest that, but rather than she was trying to find some rationale for the dismissal given her view that the phone call did not justify it. She could not tell me when Mr Handscombe got married, but she said that her relationship with him took place between 2014 and 2016. In previous correspondence with the Tribunal, she indicated that their relationship overlapped with Mr Handscombe's relationship with his (now) wife by approximately 3 months.

    b. "The Claimant does not consider she was given an opportunity as part of the investigation to explain what happened and considers that when she tried to explain was given no answer" [LoI 1.3]. The Claimant explained that her case was that she was given the opportunity to explain her position, but rather that her explanation was rejected by the Respondent.

    c. "There was a breach of the ACAS code in that only Mr Handscombe dealt with the process when two people are required by the code and that the Respondent did not listen to her" [LoI 1.5.1]. The Claimant explained that both Mr Handscombe and Mr Worthington were present at both the disciplinary meeting and the appeal meeting, but that both meetings were led by Mr Handscombe. The Claimant explained that, other than that, the Respondent followed a fair procedure.

    d. "Consideration was given to a previous conviction which she does not consider weight should have been put on and states that the Respondent knew of this conviction at the time" [LoI 1.5.2]. This related to a previous conviction for behaviour towards Ms Satchwell.

46. The Respondent's position is that the phone call to Ms Satchwell was only part of the reason for the Claimant's dismissal, in that there were other non-work-related phone calls made by the Claimant on the same day, and concerns that the Claimant had been dishonest during the disciplinary process. The Respondent's position was, however, that the phone call to Ms Satchwell was the most significant issue. For the purposes of considering the applications before me, I take the Claimant's case in that regard at its highest, and assume that the phone call was the sole reason for the dismissal.

47. While the Claimant has always accepted that she did make the phone call to Ms Satchwell from her employer's phone during working hours, and that it was inappropriate for her to do so, her position has always been that the phone call was justified by the circumstances in which it was made and was not threatening. Her position throughout has therefore been (in essence, and this is my paraphrasing rather than a label applied by the Claimant) a technical breach of her employer's required standard of behaviour, justifying no more than a warning.

48. There is a considerable difference between a private phone call made in work time using the employer's telephone, and a criminal act of harassment carried out from the employer's premises. The first may very well be a breach of the employer's rules. It may be taken very seriously depending on the rigour with which the employer enforces those rules. Depending on the circumstances, it may justify dismissal; but it is certainly arguable that it would not. In respect of the second, I do not consider it could not be properly argued that it would be incapable of justifying dismissal.

49. Of course, I must treat the Claimant's subsequent conviction with some care, given that the focus of the Tribunal at final hearing would necessarily be on the decision made by the Respondent based on the information available to it at that time. But it is clear from the Respondent's pleaded case that they regarded the telephone call as being of a potentially criminal nature, in that:

    a. As part of the investigation, they discussed the matter with the Police, who confirmed that they were dealing with an on-going case of harassment against the Claimant.
    b. They were made aware by Ms Satchwell that the Claimant had previously pleaded guilty to assault by bearing and criminal damage.

50. The dismissal letter was put before the Tribunal, and it was also in my judgment apparent that letter that that was the lens through which the phone call was viewed. The relevant part of the outcome letter said this:

> "You admitted during our meeting that your intention was to deceive Ms Satchwell to answer the call as it came from Fairford Opticians rather than from you personally as all identifiable personal contact numbers for yourself have been blocked. We understand the

> reason for this block is due to your conviction for assault, criminal damage and harassment against Ms Satchwell.
>
> Following a period of suspension and further investigation into this matter, we consider that your conduct constitutes gross misconduct and that your explanation that you needed to speak to Ms Satchwell urgently and had no other means to do so was not acceptable. There is no apparent reason for you to have made this call whilst working unsupervised at the practice using our identifiable business details."

51. While the criminal proceedings remained underway, there remained an outstanding factual dispute regarding the nature of the Claimant's phone call to Ms Satchwell. In light of her conviction, there is no longer any factual dispute on the point. The conviction puts it beyond argument that what the Claimant did, in substance, was to commit a criminal offence using the Respondent's phoneline, during working time. In light of that, her contention that the phone call could not have justified her dismissal is not, in my judgment, an arguable one. It follows that there is no reasonable prospect that a Tribunal would conclude that the phone call alone did not justify her dismissal.

52. I turn next to the question of whether the phone call was the real reason for her dismissal. There is a factual dispute over whether the Claimant was ever in a relationship with Mr Handscombe. Mr Handscombe strongly denies it. The Claimant, in an email to the Tribunal, indicated that she could not prove that the relationship took place, but that she did not need to – her position was that it was for the Respondent to prove that it did not take place.

53. In an unfair dismissal claim, the burden of showing a fair reason for dismissal rests on the Respondent. But there is an evidential burden on a party who raises a factual assertion to make good that assertion. The Claimant appears to accept that the only evidence she has of such a relationship is her own testimony. Given that she says the relationship lasted for three years, that is surprising. Her suggestion that the Respondent would have to disprove the existence of the relationship does cause me some concern. However, this is not a case where her assertion regarding the existence of the relationship could be said, without further evidence being heard, to be obviously entirely untrue. It is a matter which would need to be determined on evidence. So for the purposes of the exercise I must carry out, I take the Claimant's case at its highest and proceed on the assumption that the relationship did take place.

54. What then of the suggestion that the relationship was the real reason for her dismissal? The Claimant's position is that the relationship ended some seven years ago. On her own case, her relationship with Mr Handscombe overlapped with his relationship with his present wife by some three months. It inherently highly implausible that Mr Handscombe would suddenly, after 7 years of being in a relationship while working alongside a former partner, decide that he could no longer stand the risk to his relationship of the Claimant remaining in Respondent's employment. The Claimant did not suggest that there was anything which had

happened which would have increased the risk. In fact, she explained that she had no particular reason to think that the alleged relationship was the reason for the dismissal, other than her firmly held belief that the phone call did not justify it.

55. This is, in my judgment, simply a symptom of the Claimant's unwillingness to accept the seriousness of the underlying phone call. That seriousness must be set against the inherent implausibility of a previous relationship between the Claimant and the Respondent being the real reason for the dismissal. In my judgment therefore, even if the Tribunal at final hearing did find that the relationship occurred as the Claimant says, there is no reasonable prospect that they would find that that relationship was the real reason for the Claimant's dismissal.

56. I will deal next with the consideration allegedly given to the previous conviction, for harassing behaviours towards Ms Satchwell. The Claimant's own case regarding that has evolved somewhat. As Mr Handscombe pointed out to the Tribunal, the Claimant's internal appeal was based on the premise that there had been no conviction. Now her case appears to be that there was a conviction, and that it was inappropriately taken into account by the Respondent. This is, of course, at odds with her stated case, which was (in essence) that she was dismissed for the phone call alone, and the phone call did not justify her dismissal.

57. I have, taking Claimant's case at its highest, already concluded that there is no reasonable prospect of a Tribunal concluding that the phone call alone did not justify her dismissal. I cannot see how taking into account a previous conviction, for criminal behaviour towards the very same person to whom the phone call was made, would render the dismissal unfair.

58. Those points deal with the substance of the dismissal. As this is a claim for unfair dismissal, the Tribunal would consider whether dismissal was within the band of reasonable responses open to a reasonable employer. In my judgment, there is no reasonable prospect that a Tribunal would find that the Claimant's dismissal fell outside that range, and was consequently substantively unfair.

59. The next point then is the Claimant's suggestion that she was not given an opportunity as part of the investigation to explain what happened. I bear in mind the following:

    a. The minutes of the disciplinary meeting of 2 June 2021 were before the Tribunal. Both Mr Hanscombe and Mr Worthington were present. Those minutes showed noted that the Claimant was asked about the allegations outlined, and was given the opportunity to answer. There followed two paragraphs giving the Claimant's response.

    b. Also before the Tribunal was an email exchange between Mr Handscombe and the Claimant, in which Mr Handscombe sent the

minutes to the Claimant and asked her if she had any comment on them. The Claimant replied as follows:

> "I arrived at the practice at 8.50am not 8.55am.
>
> Ms Satchwell didn't just say you have been asked not to call me she also asked why I was calling her. Her son Adam Satchwell said something abusive to me that I couldn't hear properly. I knew it was abusive by his tone.
>
> I said pardon several times after he spoke saying is there someone else there with you I can't hear what they said. Ms Satchwell responded I have a witness to this call. I said OK but i can't hear you properly.
>
> My title is Mrs Rachel Sweet not Ms Sweet"

c. The minutes of the appeal meeting were also before the Tribunal. Again, both Mr Hanscombe and Mr Worthington were present. The Claimant was asked for her grounds of appeal, which she expanded on in the meeting.

d. The Claimant was again given the opportunity to comment on the draft minutes, which she did in the following terms:

> "As usual the minutes of the meeting are incomplete.
> I stated several times that you had no evidence to back up the accusations in the dismissal letter.
>
> You stated I was convicted of a crime which I was not. You have no evidence saying that.
>
> You stated I deceived satchwell by ringing her from work which I stated I did not.
>
> You accused me of intimidating her which I stated I did not. But have take satchwells comments about the content of the call to be true which they were not.
>
> You didn't provide any evidence that PP hasn't used the work phone for private calls.
>
> Therefore I end in saying the reasons for dismissal are still unfair as you have based the decision to dismiss me on no evidence
>
> Rachel Sweet"

60. Considering that documentary evidence, while being mindful of the need to avoid conducting a mini-trial:

a. Both sets of minutes suggest that the Claimant was given the opportunity to comment, at some length, on the allegation against her.

b. Both sets of minutes suggest that the Claimant availed herself of that opportunity.

c. When the Claimant was given the opportunity to comment on the minutes in draft, she did not suggest that they were erroneous in suggestion that she had had such an opportunity. On the contrary, she took it as an opportunity to further expand on her case.

d. The Claimant indicated before me that the issue was not that she was not given the opportunity to explain herself, but rather that Respondent did not take proper account of her explanations. That is consistent with paragraph 1.3.1 of the issues as captured by EJ Lang, which suggests that the Claimant at least had the opportunity to explain, but that she considered that she received no answer or response to the explanations that she gave.

61. In light of that, to the extent that the Claimant contends that she was not given the opportunity to explain her version of events during the disciplinary process, that contention is not a tenable one. What it boils down to, once more, is that the Claimant did not and would not appreciate the seriousness of the phone call.

62. The next challenge is an alleged breach of the ACAS code, in that the Claimant alleges that Mr Handscombe dealt with both her original dismissal and her appeal. This is denied by the Respondent, who says that while both Mr Handscombe and Mr Worthington were present at both meetings, the first was chaired by Mr Hanscombe and the second by Mr Worthington.

63. The Claimant's case was that, but for that issue, the process followed was procedurally fair. As she put it, "anybody can follow procedures".

64. Looking at the parties' respective case then, there is a factual dispute over the question of who chaired the appeal meeting.

65. The appeal minutes appear, on their face, to suggest that Mr Worthington chaired the meeting. The Claimant did not challenge the accuracy of that aspect of the minutes when she had the opportunity to do so. The appeal outcome letter, which was also put before the Tribunal, was signed by Mr Worthington. In my judgment therefore, the Claimant's factual contention regarding the chairing of the appeal meeting is disproven by the available contemporaneous documents. I consider that that argument has no reasonable prospect of succeeding.

66. In any event, I bear in mind paragraph 27 of the ACAS Code which says this:

> "27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."

67. Best practice, according to the ACAS Code would therefore have been for a manager not previously involved to hear the appeal. Mr Worthington could not have satisfied that rubric – he had been present in the

disciplinary meeting. The Respondent is a small employer. Mr Handscombe and Mr Worthington are the joint owners. The question a Tribunal at final hearing would have to decide is not whether the process followed was a counsel of perfection, but whether it fell within the range of reasonable responses open to the Respondent in the circumstances. That would be seen through the prism of section 98(4), which makes explicit reference to the size and administrative resources of the Respondent.

68. In my judgment, there is no realistic prospect of a Tribunal, correctly directing itself on the law, finding that the respective involvements of both Mr Handscombe and Mr Worthington in the original disciplinary meeting and the appeal rendered the process unfair. In my judgment, that would be the case even if the Tribunal had found that Mr Handscombe chaired both stages of the process. So even taking the Claimant's case at its very highest, her criticism of the process could not succeed.

69. It follows from what I have said that I conclude that the claim has no realistic prospect of success.

70. Having reached that conclusion, I must then consider whether it is appropriate to exercise the discretion to strike the claim out. I bear in mind that strike out is a draconian step to take.

71. The proceedings were issued as long ago as July 2021. They have been underway for some time. The parties have already attended two substantive preliminary hearings prior to this one. The act of alleged misconduct at the centre of this claim has also been the subject of criminal proceedings. Indeed, the Claimant's position regarding those proceedings was that she pleaded guilty to avoid putting herself through a further Court appearance, and to avoid putting further stress on her mother.

72. Allowing the proceedings to continue would subject the parties to the time, cost and stress of continued litigation, for no discernible benefit. I therefore conclude that the appropriate course of action is to strike out the claim.

Employment Judge Leith
Date: 21 February 2023

Reasons sent to the Parties on 07 March 2023

For the Tribunal Office