



EMPLOYMENT TRIBUNALS

Claimant: Miss Elysia Virrels

Respondent: Contracting Synergy Limited

Heard at: Southampton (by video)

On: 27 February 2023

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Mr N Henry – professional representative

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed by the Respondent as a secretary, from November 2019, to 28 March 2022. She was dismissed by text message on 16 March, on two weeks' notice, with an effective date of termination of 28 March 2022. The Respondent relies on 'some other substantial reason' (SOSR), as the reason for dismissal.
2. The Respondent is a 'service company', now employing only Mr Jake McCabe, its sole director and principal shareholder. It provides utility surveys.
3. The Claimant and Mr McCabe had entered into a personal relationship sometime in late 2016 and began living together in May 2018. They have a four-year-old child. The relationship ended in January 2022.
4. The Respondent states the SOSR is an irretrievable breakdown in the working relationship, whereas the Claimant states that is not the case, as far as any continuing working relationship is concerned.
5. The issues therefore are as follows:

- a. It is not in dispute that the reason is SOSR.
- b. Does the Respondent have a genuine belief that the working relationship is irretrievably broken?
- c. It is not in dispute that there was no dismissal procedure adopted by the Respondent prior to the announcement of dismissal, although, subsequently, an appeal was offered.
- d. Even if such a procedure had been followed, would the Claimant have been fairly dismissed in any event and/or to what extent and when (applying the principle in **Polkey v A E Dayton Services Ltd [1987] UKHL 8**)? In this respect, the Respondent also relies on the authority of **Gallacher v Abellio Scotrail Limited [2020] UKEATS 0027/19/22**.

The Law

6. Section 98 of the Employment Rights Act 1996 (ERA) states (as relevant):

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

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

The Evidence and the Facts

7. I heard evidence from the Claimant and for the Respondent from Mr Jake McCabe.
8. Mr McCabe's evidence (in summary) was as follows:

- a. He was, at the time of the dismissal, effectively a one-man service company, providing his services to larger companies, carrying out utility surveys. He had had other employees in the past, but not for some time.
 - b. He said that until January 2022, the Claimant had carried out minor administrative tasks for him, on a part-time basis, on modest pay.
 - c. He had worked from the home he shared with the Claimant, but on the breakdown of the relationship, he moved out, in order that she and their daughter could have somewhere to live until they found an alternative.
 - d. He said that in January 2022, the Claimant had sent him a text message, in which she referred to not expecting '*you to continue to pay me ...*', which he said indicated that she was looking to work elsewhere [39]. He said that also at the time she had discussed such a possibility with him. She had not been provided with further work from that point.
 - e. He agreed that she and he had continued to communicate (at least until last November), but he said that that was only in respect of their daughter. He denied any closer relationship than that.
 - f. On 14 March 2022, the Claimant obtained a non-molestation order ('the Order') against him, in respect of which, he said, '*the terms of the agreement and the behaviour of the Claimant made it impossible for me to give reasonable instructions to the Claimant ...*' [41]. The Order meant that he faced criminal sanction, if he breached it and which included a term that he '*must not be abusive, intimidate, harass or pester ...*' the Claimant. He viewed that requirement, in particular the risk of innocent behaviour by him being interpreted as harassing or pestering, as putting him at risk in continuing to employ her.
 - g. He dismissed her by text on 16 March 2022, following it up with a letter on 24 March [43], which relied upon the justification of a fundamental breakdown in the working relationship, under the heading of SOSR.
 - h. He raised various matters that arose after the dismissal, but which could not, therefore, have been in his mind at the time.
9. The Claimant's evidence (in summary) was as follows:
- a. Communication was maintained between her and Mr McCabe, following the end of the relationship and not just in relation to their daughter.
 - b. She did not believe that the non-molestation order prevented them from working together, as such behaviour as is set out in the Order should not happen in the workplace, in any event. She said that she had applied for the Order at the end of February. She agreed that certainly, by that point, (as put to her) that '*they were not getting on*'. In any event, also, she worked remotely from Mr McCabe, who was also frequently working away.

- c. She said that she had '*not once behaved or acted maliciously towards Jake and we could have continued to work together*'. She went on to say that '*I am a victim of domestic abuse at the hands of Jake and I have been very manipulated*', which she confirmed was prior to and the reason for her obtaining the Order.
- d. She believes that she has been dismissed to prevent her being aware of the Company's finances (in the context of financial support for her and her daughter).
- e. She said that they had an agreement that she would continue to be employed, on lighter duties and less money, but despite this dismissed her. She did not accept that the January text message implied that she no longer wished to work for him. She said that the situation had been '*amicable until his adverse behaviour*'.

Closing Submissions

10. In closing, Mr Henry, on behalf of the Respondent, said the following:

- a. The Tribunal has sufficient evidence as to the background to this matter from the pleadings and the witness statements, much of which is not in dispute.
- b. The fact that the relationship broke down, to the extent that the Claimant felt she needed the protection of a non-molestation order clearly indicates a complete breakdown in trust and confidence between her and the Respondent.
- c. Unlike in **Gallacher**, this is a small company, affording the Respondent no other options, but dismissal. For the Claimant to assert that the employment relationship could nonetheless have continued is not credible. For any such relationship to work, there has to be trust and confidence between employer and employee. The circumstances in **Gallacher** were not even those of a personal relationship, but a purely professional one. In that case, nonetheless, dismissal was found to be within the range of reasonable responses of the reasonable employer.
- d. Again, as in that case, following any procedure would have simply made the situation worse. By the end of February, the relationship was irretrievable. In the circumstances, what possible procedure could have been followed?
- e. It doesn't matter whether or not the reasons for obtaining the Order were valid, it is the mere fact that it was sought, shows that no trust and confidence existed between the parties.
- f. The ACAS Code is not engaged, as this is not a case involving disciplinary procedures, or the bringing of a grievance.

11. In closing, the Claimant said the following:

- a. She and the Respondent could have worked together, remotely, particularly as he worked away so frequently, with her on lighter duties.
- b. She twice said that they '*could have worked together had it not been for the Respondent's behaviour*'. She got the Order '*to protect herself*'. It was his behaviour that was at fault.
- c. They were still being amicable with each other in January and she was a calm person, who didn't argue.
- d. She had '*done nothing wrong. I've not been unreasonable*'.
- e. She accepted that the situation was '*messy*' and again asserted that she was dismissed so the Respondent could hide money from her.

Conclusions

12. I find that the Claimant was fairly dismissed for SOSR, for the following reasons:
 - a. It's difficult to think of a more graphic indication of a complete breakdown of trust and confidence between an employer and employee, than for an employee to seek and obtain a non-molestation order against her employer, which the Claimant said she got '*to protect herself*'. If an employee could not feel that he or she could work for his or her employer, without the protection of such an order and the criminal sanctions that backed it up, then all trust and confidence has disappeared and is very unlikely to be restored.
 - b. The Claimant said that she and Mr McCabe '*could have worked together had it not been for his behaviour*'. For the sake of argument, let us consider, for a moment that her allegations against Mr McCabe were accurate (and I make it clear I make no such finding), what was Mr McCabe/the Respondent supposed to do? As the Respondent's sole director, he could not dismiss himself, in favour of the Claimant, thus removing him from the scene and thus assuring her that his alleged poor behaviour would no longer occur. In any larger company, it might have been possible, for one or other affected employee to be moved elsewhere, or for one or even both employees to be dismissed, if the employer considered that they were both at 'fault' in some way, but those options did not exist in this case. The only option was to dismiss the Claimant.
 - c. The Claimant said that she could have continued working remotely, but trust and confidence is still required for even that form of working relationship to continue and inevitably some either face to face, or similar, by video or telephone communication would have been necessary. The Respondent could not be expected to avoid all direct contact with its sole employee. I note also the Claimant's assertion that Mr McCabe was hiding money from her, the suspicion of which would

have further worsened the lack of trust and confidence between the parties (from both perspectives).

- d. I accept Mr McCabe's evidence that he feared that if he continued to employ the Claimant that it would have left him open to accusations of breach of the Order, through possible misinterpretation of instructions by him being '*harassing or pestering*'. He pointed out that the Claimant had subsequently made allegations against him to the police. I agree with him that he could not be expected, in those circumstances, to continue to employ the Claimant.
- e. The Claimant argues that she has done nothing wrong and therefore should not suffer the penalty of dismissal. But, even assuming that such assertion by her is correct, it is clear that regardless of whoever was at fault, the relationship could not continue and that in the circumstances of this 'one-man band' company, the only option for the Respondent to continue to function was for her to be dismissed.
- f. As to the lack of procedure, I accept, applying **Polkey** and **Gallacher**, that this is one of those exceptional cases where any procedure would have been of no or little point and may even have worsened matters. In the context of the Claimant obtaining the non-molestation order, even the holding of some form of meeting may have risked breach by Mr McCabe of its terms. Having just been to Court, in respect of the Order, it seems vanishingly unlikely that any meeting between the two would have resolved the working relationship. If this had been a larger company, with some over-arching management, some form of conciliation meeting may have been useful, but this was not the case in this situation.

Judgment

13. Accordingly, therefore, for these reasons, the Claimant's claim of unfair dismissal fails and is dismissed.

Application for Costs

14. Following delivery of Judgment, the Respondent sought what it described as a '*nominal*' costs order, seeking '*what would be fair under the circumstances.*'
15. Mr Henry referred to the following matters:
 - a. He had written to the Claimant on 10 February 2023, making reference to **Gallacher** and explaining why he considered that as a SOSR claim, it was unlikely to succeed. He suggested that the Claimant take legal advice.
 - b. As there had been no response to that letter, he invited the Claimant, on 15 February 2023, to withdraw her claim.
 - c. He warned her as to costs, by letter of 23 February 2023, on the basis that the claim had no reasonable prospects of success or was vexatious.

16. The Claimant responded as follows:

- a. She had gone to the Benefits Agency, in respect of her claim for Universal Credit, as she had been provided with no P45, or other document terminating her employment.
- b. She also has shares in the Respondent Company and was concerned about tax liability on any dividends.
- c. She didn't think it was OK to be dismissed in these circumstances.
- d. As a Litigant in Person (LiP), she was not in the same position as the Claimant in the case of Gallacher.
- e. She had spoken to the CAB, who told her she had a case.
- f. She just did not believe that just because she had had to break up with her former partner, she could then be fairly dismissed.
- g. She did not bring the claim vexatiously, but had, due to her summary dismissal and loss of income, the need to provide for her four-year-old child.

17. Conclusion. I declined to make a costs order, for the following reasons:

- a. I don't believe that the Claimant was vexatious in the bringing of her claim. She said that she brought it in the genuine belief that it had merit and because her dismissal left her in a poor financial position.
- b. Her measured and reasonable tone and manner in her conduct of this Hearing supports, I consider, that finding. She did not strike me as a person looking for revenge for unrelated matters, but somebody who genuinely, if mistakenly, considered herself unfairly dismissed.
- c. As to there being no reasonable prospects of success that is, of course, an exercise much easier to carry out with the benefit of hindsight, particularly for a LiP.
- d. Factors that weigh against a costs order are as follows:
 - i. The Claimant is a LiP.
 - ii. She did make some effort to take advice, within her limited financial means.
 - iii. Dismissals for SOSR are rare and therefore perhaps beyond the scope of most peoples' knowledge. I can see, even though finding to the contrary that the Claimant would feel that she should not have been dismissed due to a breakdown in a relationship with her former partner, when, to her mind, she had done nothing wrong.
 - iv. Because of the nature of the case, no Preliminary Hearing was held, which might have served to alert the Claimant to the weakness of her case.

e. Accordingly, the Respondent's application for costs is dismissed.

Employment Judge O'Rourke

Date: 27 March 2023

Reasons sent to the Parties: 05 March 2023

For the Tribunal Office