



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105852/2022

Held in Glasgow on 15 May 2023

Employment Judge P O'Donnell

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Mrs D Haughian

**Claimant
In Person**

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Advance Cleaning Solutions

**Respondent
Represented by:
Ms M Reid –
Friend**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

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1. The claim for redundancy pay is not well-founded and is hereby dismissed.
2. The Claimant was unfairly dismissed by the Respondent. The Tribunal awards the Claimant the sum of £1638 (one thousand six hundred and thirty-eight pounds) in compensation for unfair dismissal.

REASONS

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Introduction

1. The Claimant has brought complaints of unfair dismissal and redundancy pay. These are resisted by the Respondent who says that the Claimant was fairly dismissed for reasons related to her conduct.

Evidence

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2. The Tribunal heard evidence from the following witnesses:-
 - a. The Claimant.

- b. Margaret Bell (MB) – the owner and manager of the Respondent.
 - c. Steven Suttie (SS) – HR and Customer Service Manager at the client of the Respondent where the Claimant was assigned to work.
3. The Respondent had also sought to call Valerie Logan (VL) as a witness. She was the employee of the Respondent to whom the Claimant's conduct was directed. The purpose of calling her was for her to speak to the impact of this conduct on her. The Tribunal did not consider that this was relevant evidence (particularly given that the Claimant did not seek to dispute this) and did not permit her to be called as a witness.
4. There was a bundle of documents prepared by the Respondent. The documents were not paginated but, rather, each document was numbered. A reference below is a reference to a document in this bundle. The Claimant produced her own bundle but this was not referred to in the evidence of any of the witnesses.
5. This was not a case where there was any dispute of relevant facts for the Tribunal to resolve. The Tribunal considers that all the witnesses gave honest evidence of their recollection of events to the best of their ability.

Findings in fact

6. The Tribunal made the following relevant findings in fact.
7. The Claimant was employed by the Respondent as a housekeeper from 4 April 2016 until she was dismissed with effect from 7 October 2022. At the time of her dismissal, she earned £9.10 an hour working 20 hours a week, 4 hours a day from Monday to Friday. The Claimant was a member of the pension scheme provided by the Respondent.
8. The Respondent is a cleaning services company. They have a contract to provide their services at the Slaters menswear store in Glasgow and the Claimant was one of four employees who worked on that contract. The Respondent's employees clean one floor of the store with the other floors cleaned by housekeepers employed directly by Slaters.

9. On or around 22 September 2022, there had been an incident involving the Claimant, VL and an employee of Slaters. It had arisen from VL querying with that employee who was responsible for cleaning a particular set of stairs in the building. There was a subsequent conversation between VL and this employee in the staff canteen which became heated. During this, the Claimant (who was present in the canteen but had not been part of the conversation) interjected a comment that the first floor staff (a reference to the Respondent's employees) were "having the mickey taken out of them". The incident concluded with the Slaters employee pushing past the Claimant to leave the canteen.
10. The Claimant was upset with what had happened taking the view that she had been assaulted and complained to MB indicating that she wished to involve the police. The matter also came to the attention of SS who convened a meeting on 28 September 2022 with MB, VL and the Claimant to discuss the matter.
11. A note of what was discussed at this meeting was prepared by SS and appears at R15:-
- a. It sets out a description of the incident and notes that SS stated that the behaviour of the Slaters employee was not considered acceptable with the matter being dealt with internally.
 - b. SS also stated that the involvement of the Claimant was not required and that this had led to an escalation.
 - c. The Claimant became upset at this comment; she stated that she was getting the blame and asked MB if she was not going to say anything. The Claimant then left the room and returned a short while later.
 - d. The meeting continued in her absence. When she returned she did not say anything further.
 - e. SS concluded the meeting by stating that any future queries about the allocation of work should be made through managers and that incidents of this nature should not happening in the future.

12. After this meeting, MB and SS went to a different meeting with another employee from Slaters to discuss other matters.
13. The Claimant and VL returned to the shop floor where the Claimant had an outburst to VL as set out below. This is taken from a handwritten statement from VL supplied after the Claimant's dismissal but the Claimant did not dispute the accuracy of this.
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- "Don't fucking talk to me, talk about getting stabbed in the back, you and [MB] are nothing but a pair of backstabbing bastards"*
14. VL was distressed by this and left the building. She phoned MB who went to see her outside the building. VL was shaking and stated that she could not work with the Claimant after what she had said.
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15. MB went into the building to find the Claimant. They went to the women's toilet to talk rather than doing so on the shop floor. The Claimant was also upset and MB could not calm her down despite making efforts to do so.
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16. MB returned to VL who was still upset. MB took VL for a cup of tea in the canteen to help her calm down and told her to go home for the day.
17. This incident came to the attention of SS who informed MB that he did not want the Claimant to attend the store until MB had investigated the matter and found out what had happened. MB sought to contact the Claimant that evening (28 September 2022) to inform her of this but could not get hold of her.
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18. The Claimant attended the workplace on 29 September 2022. MB was not present and it had been intended that MB's granddaughter (who also worked at the store) would advise her that she was not to attend work. It was considered by SS that this may not be appropriate and so he agreed with MB that he would inform the Claimant, on behalf of MB, of the position. The Claimant left the premises after meeting with SS.
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19. The Tribunal pauses to note that the Claimant's suspension was not confirmed in writing. Indeed, until the letter of dismissal, nothing was

recorded or confirmed in writing. This is not good employment practice and the Respondent may wish to reflect on how it conducts such matters in the future.

- 5 20. MB spoke to the Claimant later on 29 September to confirm that she was not to attend work and the Claimant confirmed she understood the position.
- 10 21. There was some confusion by both MB and the Claimant as to what discussions they had and the terms of those. It was agreed that there were no face-to-face meetings and all the discussions from the Claimant's suspension until her dismissal were done by telephone. It was not clear from either of them how many telephone discussions they had nor was it clear the precise terms of the discussions. If written records had been made then both parties may have been assisted in their recollection.
- 15 22. What was not in dispute is that the Claimant admitted what she said to VL on 28 September 2022 at some point in her discussions with MB.
- 20 23. Having had that confirmed, MB made a decision to dismiss the Claimant. There was no meeting (by telephone or in person) arranged to discuss the Claimant's dismissal prior to MB making this decision. There was nothing said to the Claimant prior to this that MB was contemplating dismissing her or that her actions were being considered as misconduct (gross or otherwise). The Claimant was not invited to explain her actions.
- 25 24. On 4 October 2022, MB phoned the Claimant to inform her that she was being dismissed with effect from 7 October 2022. This was confirmed in writing by letter dated 4 October 2022 (R4). The letter stated that MB found the Claimant's behaviour to be unacceptable and that she had no other option but to dismiss the Claimant. The letter describes the behaviour as the Claimant being aggressive, using foul language and verbally abusing another employee causing them distress. The Respondent states that they need to protect their employees from such behaviour. The letter goes on to state that the Claimant could not be accommodated in any other part of the business
- 30 but that MB would consider her for a position in the future if one arose. The letter does not mention a right of appeal.

25. Despite a right of appeal not being offered, the Claimant sought to appeal her dismissal by email dated 4 October 2022 (R5) stating that she was not given the opportunity to put her side and that MB had not told her why SS did not want her back in the building.
- 5 26. The Respondent replied to the appeal by letter dated 11 October 2022 (R6) stating that an appeal would be futile as it could only be heard by MB. The rest of the letter effectively repeats the terms of the dismissal letter.
27. The Claimant started a new job on 21 October 2022 earning £9.50 an hour and working 20 hours a week. The Claimant joined the pension scheme
10 provided by her new employer.

Submissions

28. There were short submissions made on behalf of the Respondent setting out the reason for dismissal as being the behaviour of the Claimant to which she admitted and submitting that there had been a sufficient investigation in this
15 case.
29. The Claimant made no submissions.

Relevant law

30. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).
- 20 31. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.
32. The test then turns to the requirements of s98(4) for the Tribunal to consider
25 whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

33. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of *British Home Stores Ltd v Burchell* [1978] IRLR 379.

34. The test effectively comprises 3 elements:-

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- a. A genuine belief by the employer in the fact of the misconduct
 - b. Reasonable grounds for that belief
 - c. A reasonable investigation

10 35. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

15 36. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

20 37. The well known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 has long been authority for the proposition that a dismissal can be unfair on the grounds of procedural failings. Procedure in conduct cases goes beyond just the investigatory stage (in the sense of seeking to establish a reasonable belief that misconduct had occurred) and can include giving an employee the opportunity to explain their actions or provide some form of mitigation.

25 38. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment (“ACAS Code”) in assessing the procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

39. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the “band of reasonable responses” test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess

whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision

40. The first question for the Tribunal is what was the reason for dismissal and whether it falls within one of the potentially fair reasons in terms of s98 ERA.
41. It is quite clear from the evidence that it was the Claimant's outburst to VL on 28 September 2022 that was the cause of her dismissal. This is the reason given by the Respondent in the letter of dismissal and no other reason has advanced by the Respondent at the hearing.
42. Further, the Claimant does not expressly suggest that there was any other reason for her dismissal. She did ask some questions in cross-examination regarding the influence of Slaters on her dismissal and, giving her the benefit of the doubt as a party litigant, it could be said that she was suggesting that commercial pressure from a client of the Respondent was the reason she was dismissed.
43. The Tribunal would reject any such argument, assuming it was being made, for the following reasons:-
- a. The Tribunal considers that the Claimant has misinterpreted what has been said about whether Slaters wanted her to return. It has found above that SS had simply wanted the Claimant excluded from the premises until the Respondent had looked into the incident with VL. There was no evidence that he had dictated what the outcome of that process should be nor had he said that the Claimant was never to return to the premises.
 - b. Even assuming there had been some form of commercial pressure, it was still clear that the operative and root cause of the Claimant's dismissal was her conduct towards VL. Had that not occurred then there would have been no reason for any pressure to be exerted by the client on the Respondent.

44. In these circumstances, the Tribunal finds that the Claimant was dismissed by reason of her conduct and that this is a potentially fair reason for dismissal.
45. This finding, alone, is sufficient to dispose of the claim for redundancy pay. The Claimant was not dismissed by reason of redundancy and so the entitlement to statutory redundancy pay is not engaged. The claim for redundancy pay is not well-founded and is hereby dismissed.
46. Returning to the claim for unfair dismissal, the Tribunal now turns to the elements of the *Burchell* test. In assessing these, the fact that the Claimant admitted to the conduct in question is a significant issue. There can be no question that the Respondent had a genuine and reasonable belief that the Claimant had done something when she admitted that she had done this.
47. Further, this admission lowers the hurdle which the Respondent has to get over in terms of any investigation. If the conduct is admitted then there is little further investigation required in order to establish the evidence from which the Respondent could reach any reasonable belief that the conduct occurred.
48. However, that is not the end of the matter when it comes to the procedural fairness of any dismissal. The procedure is not just about establishing a basis on which the Respondent could form a belief as to whether the conduct happened or not but also to give the Claimant the opportunity to explain their conduct, present any mitigation or otherwise seek to save their job.
49. It is in this aspect that the Respondent has failed, in this case, to follow any procedure at all, let alone a fair procedure. The Respondent has been singularly focused on the fact-finding element of the process and wholly failed to offer any form of disciplinary hearing (or something which could be said to amount to a disciplinary hearing) at which the Claimant could have presented an explanation or mitigation for her actions.
50. There was certainly no meeting in person at all and the evidence from MB and the Claimant about the phone calls between them clearly shows that, at no point, was the Claimant informed that she was at risk of losing her job and

that any particular conversation was her opportunity to explain or mitigate her actions. Rather, once MB had established that the Claimant admitted the conduct, she made the decision to dismiss the Claimant without any further process.

5 51. It was quite clear to the Tribunal that MB's mind was closed as soon as the
Claimant accepted what had been said to VL was accurate. The Tribunal
asked MB a number of questions about what steps she had taken in the
process and her answers were very focussed on emphasising that the
10 Claimant had admitted the comments and so there was nothing else to
investigate. No mention was made in evidence of MB seeking an explanation
or mitigation from the Claimant and so the Tribunal finds that such matters
had not been something which had entered MB's contemplation.

52. The fact that the Respondent did not progress the fact finding stage is
important in a number of respects:-

15 a. There had been no clear and express indication from the Respondent
to the Claimant that her job was at risk. The Claimant had inferred
this but that is different from being told. If the Respondent had
convened some form of disciplinary hearing then it would have been
clear to the Claimant that her job was at risk.

20 b. MB made reference to the Claimant expressing no regret about the
incident; a disciplinary hearing at which the Claimant was aware that
she could lose her job is exactly the forum at which an employee has
an opportunity to express regrets and seeking to save their job. The
Tribunal notes that the Claimant did apologise to VL (R3) and there is
25 no reason to find that she would not have expressed similar regrets to
MB if given the opportunity.

c. The Tribunal notes that the Respondent is a small employer with no
formal policies but that does not excuse a wholesale failure to hold any
form of disciplinary hearing.

53. The Tribunal bears in mind the requirements of the ACAS Code; the Respondent, in this case, has not met those requirements. In particular, the Respondent failed to meet the requirements in paragraphs 7 and 9-12 of the Code.
- 5 54. This procedural defect was not cured on appeal as the Respondent replied to the Claimant's request with what was effectively a repeat of the dismissal letter and nothing more. The Tribunal notes the terms of the Claimant's appeal email which expressly states that she had not been given the opportunity to put her side. An appeal hearing could have been convened at
10 which the Claimant would have had the chance to present an explanation or mitigation. Unfortunately, the Respondent did not take the opportunity to hold such a meeting and remedy the earlier defect.
55. In these circumstances, the failure by the Respondent to hold anything which could conceivably amount to a disciplinary hearing is not a minor defect when
15 looked at in the context of all the relevant facts and, rather, it is sufficiently serious to render the Claimant's dismissal unfair.
56. Finally, there is the issue of whether dismissal was within the band of reasonable responses. The Tribunal reminds itself that it should not substitute its own decision for that of the Respondent and that the question is not
20 whether there were other actions the Respondent could have taken but, rather, whether what they did was a reasonable response.
57. The Tribunal considers that dismissal was within the band of reasonable responses; the Claimant's outburst to VL used very strong and offensive language to describe both VL and MB; VL was deeply upset by what the
25 Claimant said to the extent that, at the time of the Claimant's dismissal, she had indicated that she was not willing to work with the Claimant. In such circumstances, dismissal is clearly an option reasonably open to the Respondent.
58. The Tribunal did find the fact that the Respondent had indicated that they
30 would employ the Claimant again in the future to be somewhat puzzling. If the Claimant had acted in such a way that amounted, in the Respondent's

view, to gross misconduct and that the Claimant's dismissal was necessary to protect its employees from such conduct then it is surprising that they would be willing to have the Claimant return in the future. However, this is not sufficient to take dismissal out of the band of reasonable responses in this case.

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59. In conclusion, there was a potentially fair reason for dismissal (that is, conduct) and the Respondent had a genuine and reasonable belief in that conduct. However, although the Respondent took reasonable steps to investigate what happened, the Tribunal considers that the failure of the Respondent to take the procedure beyond the fact-finding stage and, in particular, the failure to hold something which could be considered to be a disciplinary hearing at which the Claimant, in the express and unambiguous knowledge that her job was at risk, had the opportunity to explain or mitigate her action is sufficiently serious to render the Claimant's dismissal unfair.

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15 Remedies

60. The first element of any compensation for unfair dismissal is the basic award under s119 ERA. The Claimant was 57 years old and had 6 full years' service at the effective date of termination. She is, therefore, entitled to a basic award of 9 weeks' pay. The Claimant worked 20 hours a week at £9.10 an hour giving a weekly wage of £182. The total basic award is therefore $9 \times £182 = £1638$ (One thousand six hundred and thirty-eight pounds)

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61. The second element of any award is the compensatory award under s123 ERA. The Claimant started a new job on a higher wage on 21 October 2022. In these circumstances, the Tribunal finds that her loss of wages ceased on that date. The Tribunal considers that the Claimant's period of loss of wages is from 10 October 2022 (the next working day after her dismissal) to 20 October 2022 (the day before she started her new job). This amounts to 9 working days. The Claimant worked 4 hours a day at £9.10 an hour. The loss of wages, therefore, amounts to $(4 \times £9.10) \times 9 = £327.60$.

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62. The Tribunal would also award the Claimant a sum of £350 to reflect the loss of her accrued statutory rights (for example, notice and redundancy pay).

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63. The Tribunal does not consider that it is just and equitable to award a sum for pension loss as the Claimant secured employment with a pension scheme very shortly after her dismissal by the Respondent.
64. This gives an unadjusted sum of £677.60 for the compensatory award.
- 5 65. However, there are two matters which the Tribunal has to consider in terms of deductions from the compensatory award.
66. The first is the so-called "*Polkey* deduction". This arises because the Tribunal has found that the dismissal was unfair solely on the basis of procedural defects and so has to consider whether the Claimant would still have been
10 dismissed if a fair procedure had been followed.
67. In assessing this, the Tribunal has taken account of the following matters:-
- a. The nature of the conduct was serious with the Claimant referring to VL and MB in offensive terms. It was such that VL considered that she could not work with the Claimant.
 - 15 b. The Claimant and VL had previously had a good working relationship with no previous incidents such as the one on 29 September 2022.
 - c. The Claimant had apologised to VL by way of text message (R3). The Tribunal considers that this shows insight and remorse into her actions. The Tribunal considers that she would, therefore, have been
20 likely to express the same sentiments to the Respondent if she had been given the opportunity.
 - d. In her evidence, MB made reference to the lack of remorse from the Claimant when describing how she had come to the decision to dismiss. The Tribunal, therefore, finds that, had the Claimant taken
25 the opportunity to express remorse in the event a disciplinary had been held, this would have had an influence on MB's decision.
 - e. The outburst from the Claimant came in the heat of the moment after a meeting, which she clearly found upsetting, about an incident in which the Claimant felt she had been assaulted.

68. Taking these into account, the Tribunal considers that there is a very high probability that, had a fair procedure been followed, the Claimant would still have been dismissed. In particular, the Claimant's conduct was very serious and there was no evidence to suggest that an expression of remorse from the Claimant would have persuaded MB to come to a wholly different decision. At most, there was a small possibility that MB would have been influenced by an expression of regret or remorse from the Claimant to impose a disciplinary sanction short of dismissal.
69. The Tribunal finds that, had a fair procedure been followed, there was still a 90% chance that the Claimant would have been dismissed given the seriousness of her conduct and the small possibility that an expression of remorse would have persuaded the Respondent not to dismiss her. The Tribunal considers it would be just and equitable to reduce the compensatory award accordingly to reflect this.
70. The second deduction relates to contributory fault where the Claimant's conduct has caused, or contributed to, their dismissal. It is quite clear that the Claimant's conduct in this case wholly caused her dismissal; there is no reason for the Claimant's dismissal other than her outburst to VL. The Claimant admits to this outburst and so there is no question that it occurred.
71. The outburst is clearly culpable and blameworthy conduct. The Tribunal appreciates that the Claimant was upset by the events preceding the outburst but it is in such offensive and intemperate terms that it goes beyond a simple loss of temper that is quickly recovered or an expression of disappointment in a colleague or employer.
72. Further, it was clear that the Claimant's conduct had its root in the incident between her and an employee of the Respondent's client; this incident arose from a situation into which the Claimant had interjected herself, having not been involved. The Claimant's frustrations with that other individual and how the incident was being handled had boiled over and she had taken these out on VL who was an "innocent bystander" in all of this.

73. In terms of the amount of any reduction, the Tribunal bears in mind the guidance in *Hollier v Plysu Ltd* [1983] IRLR 262 and considers that this is a case where the Claimant's conduct has wholly contributed to her dismissal.

5 74. In all these circumstances, the Tribunal considers that this is a case where it is just and equitable to reduce the compensatory award by 100%.

75. The Tribunal, therefore, makes no compensatory award.

10 **Employment Judge: O'Donnell**
Date of Judgment: 18 May 2023
Entered in register: 19 May 2023
and copied to parties