Case No: 2206593/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms L. Okninski
Respondent: Johnsons Financial Management Ltd

London Central

Employment Judge Goodman **Hearing: 30, 31 March 2023**

Representation:
Claimant: Andrew Carter, counsel
Respondent: Stuart Thomson, director

JUDGMENT having been given on 31 March 2023 with oral reasons, and written reasons having been requested under rule 62(3), the following reasons are provided:

REASONS

1. This is a claim for unfair dismissal.
2. The reason for dismissal was capability. The respondent was dissatisfied with the claimant's job performance. The tribunal must decide whether a reasonable employer would have dismissed for this reason, having regard to whether the employer's belief was genuine and what investigation had been carried out. If we conclude the dismissal as unfair and we are considering what remedy to order, the claimant argues any award must be increased for failure to comply with the ACAS Code and the respondent argues the claimant contributed to her dismissal, that if unfair she would have been fairly dismissed in any event, and that the claimant has failed to take adequate steps to mitigate her loss arising from dismissal.

Evidence

3. To decide the claim the tribunal heard live evidence from Edmund Cartwright, the respondent's regional director, from James Thomson, director, who dismissed her, and from Lidia Okninski, the claimant. We permitted additional evidence to be called on remedy where the initial witness statements omitted information. The witnesses were each questioned by the opposing party and by the tribunal.

4. There was a hearing bundle of 127 pages, including the pleadings, witness statements, and a schedule of loss.

Findings of Fact

5. Based on this evidence the tribunal makes these findings of relevant fact.
6. The respondent is a firm of chartered accountants. At the time of dismissal there were 45 employees. It is understood there are now 60.
7. The claimant, aged 64 at dismissal, was hired by the firm in 2001 or 2002. Neither side had a letter, contract, or other record to establish the precise date. At the start she worked as receptionist and administrator. Over time, payroll support was added to her duties. The 2015 website shows her supporting the payroll department. The respondent provided payroll services to client companies. Much of this was CIS work – that is, tax deduction for construction industry workers otherwise classed as self employed. This was largely automated. The claimant also ordered office supplies, answered the phone, and took post to the Post Office.
8. The claimant worked at the Ealing office. As at dismissal she earned £26,000 per annum.
9. There had been a series of mergers with other small firms.
10. Mr Thomson joined the firm in 2015. He alluded to "historic concerns" about the claimant but we do not know what they were. When new legislation required employers to automatically enrol employees in a pension scheme unless they opted out, which added to the payroll services clients required, someone called Rahul was employed to help. He was one of succession of payroll assistants. There was also very intermittent supervision. The claimant was only the long-term employee. She and Rahul reported to N, who had taken over from Mandy in March 2021, being said by Mr Thomson to have "struggled" during lockdown. N left at short notice in March 2022, said to be for sleeping at work. Meanwhile Claire Nancarrow became involved in payroll. She was employed by a different firm acquired by the respondent in September 2021. She worked from a different office and from October 2021 was engaged introducing new software and integrating the offices in its use.
11. Soon after N was dismissed, on 31 March 2022 Edmund Cartwright, director, who worked out of a different office, sent the claimant a letter listing some concerns about her performance. The respondent's case is that this was a first written warning about performance. There were three bullets – the first stated that on two occasions when asked to transfer a call, she had said "it's not working, bye", and she was told that if she did not know how to transfer she must find a solution. The second was that when clients queried their payroll liability, she had replied that this was what the computer said, rather than trying to investigate or explain a discrepancy, and she should ask Claire for help. Thirdly, an important parcel she had been asked to have delivered urgently to an address in Germany some weeks earlier had been delayed because a line of the address had been misspelled , and although sent recorded delivery there had been no attempt to track it down. She should be more careful hand writing addresses and if asked to send it recorded delivery, should check it had been delivered.

12. The email did not mention it was a warning or that failure to improve might have consequences. She was not asked to meet Mr Cartwright to discuss it. They did not discuss what had happened. The claimant simply replied by email: “I have taken your concerns on board and will try my best to improve my work performance”. She says it was well known Mr Cartwright was concerned about detail.
13. By now the firm was busy with the end of the tax year. N having just left, Claire Nancarrow reviewed with the claimant what work had been left undone. A list of CIS subcontractors was filed late – the claimant blames the client for an incomplete list. Two weeks of submissions to HMRC were missing from a few months back– the claimant blamed N. The claimant had many P60s (end of year tax statements for individual employees) to do. At the same time the migration of payrolls from the old software (IRIS) to the new (Qcat) threw up errors such as missing dates of birth, NI numbers, and employee leaving dates.
14. On 9th May Stuart Thompson sent the claimant a long e-mail setting out causes of concern. He listed eight major issues: for the client ICE she had incorrectly claimed an employment allowance for a director leading to underpayment of national insurance; the state of payroll data on IRIS was terrible; work on pension contributions was late and the claimant said she had done it when she had not. Feburary payments on FPS had been done in April. There were defective P 60s, for example there were three for an employee (who seemed to have three spellings of his name), who the employer believed had left but who showed up on the role of current employees. The claimant said he had been entered as a new starter because the different spelling, it seems there was no complaint until the employee did not get a P45 on leaving. Next there was a complaint about underpayment of pensions at a particular company, another on late submission of CIS returns, as some were outstanding on the 5th April 2022, and finally, that she had told Claire she was doing payroll and pensions for April when she had not logged in. The claimant said that she had only had access to Qcat until the 19th April, and had not been able to log in on IRIS. The e-mail concluded “we need to talk as something is not right”.
15. The claimant was sited next to his office, so she went to see him and they spoke for about 10 minutes. There is no note or other information about what they spoke about. She was told she was not required to work.
16. Next day Mr Thomson checked the claimant’s date of birth and start date with another member of the payroll team.
17. On 10 May Clare Nancarrow provided Mr Thomson with comments on his criticism and some documents setting out the evidence for the conclusions of her investigation.
18. On 13th May Mr. Thompson met the claimant and they spoke about Clare Nancarrow’s report. The claimant had not seen it, only thee 9 May email on which it was based. Mr. Thompson had a copy of it in his hand. One of the pension matter charges had been dispatched dropped as it was not clear the claimant had been responsible. She was told that she was guilty of dereliction of duty, poor attention to detail, being slow, and misleading colleagues and directors. Training would not eliminate their concerns. She was dismissed.

19. A letter confirming the dismissal was sent to her on the 15th May. It confirmed that as stated on 13th May she was dismissed. Her last day of employment was 12th June, but she was not got required to work until then. She was also to be paid an additional two months' salary. Mr. Thompson referred to Mr Cartwright 's e-mail of the 31st May, described as "first warning letter", and to her brief reply. She had not taken the opportunity to challenge those concerns "and they are therefore considered to be acceptive by you". They went to the heart of her performance of duties and showed lack of attention to detail and dedication to working as a team player. In one particular instance (a reference to the delayed parcel): "this directly cost the firm money and the firm's client a substantial sum of money". He moved on to the criticisms of the 9th May. She had responded that she was busy doing payroll six hours a day, none of these issues were her responsibility, and arose through the fault of two colleagues. He had investigated her response and they had discussed it on Friday. All but one of his eight criticisms had been upheld. He made comment on the criticisms that were upheld. He added that it was hard to see how she was doing payroll six hours a day when she had not logged on to Qtac until the 9th May, apparently because passwords had been changed some weeks before, which she did not know. "These points show a combination of dereliction of duty, poor attention to detail, careless or disinterest in your work and being slow at processing the required information. Johnsons provides professional services. This means that not only is technical competence required but a professional attitude and an ability to process matters quickly. Most worrying is that there is evidence of misleading clients and colleagues". He did not think training would eliminate the concerns.
20. Mr Thomson states that when told she was going to be dismissed the claimant asked if she could be made redundant instead. Mr Thomson rejected this suggestion. In his witness statement he said the claimant "tried to entice me to fraudulently make her redundant".
21. The letter makes no mention of a right of appeal. Mr Thomson's evidence was that he understood her request to be made redundant to mean that she accepted his findings, and did not wish to appeal. Had she said she did he would have made arrangements.
22. After leaving, the claimant looked for work as receptionist/administrator, saying she was too dejected by the criticism to consider herself capable of working as a payroll administrator. She also had a restricted travel to work area. She had looked at a job website on and off. She had applied for work as an administrator for a GP practice, but had not attended for interview because of the difficulty, having researched the location of the practice, of getting there by public transport. There is no sign that she looked for work after August 2022. The respondent pointed out that she had been on holiday in the Canaries in June (apparently pre booked some time before)and again in France in August,(also apparently pre booked), had visited Poland to see family in December, and then early in 2023 had travelled to Australia for five weeks. The claimant said this was to see her son who lived there, and to see a new grandson born during COVID when she could not travel.

Relevant law

10.2 Judgment - rule 61

23. The right to unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. capability, conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
24. The reason for dismissal is 'a set of facts known to the employer, or as the case may be beliefs held by him, which cause him to dismiss the employee' **- (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)**
25. Under s. 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'
26. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4) having regard to the guidance by the EAT **in British Home Stores v Burchell**. There are three stages: (1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation? That case was about conduct, but the guidance holds good where an employer relies on poor performance – lack of capability – as there can be an overlap – **UPS Ltd v Harrison UKEAT/0038/11/RN**. For capability an employer must give an opportunity to improve, especially if it has been long term – **Siburn v Modern Telephones Ltd 1076 IRLR 81** and **Sutton and Gates(Luton) Ltd v Boxall 1979 ICR 67.**
27. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of **Burchell** are neutral as to burden of proof and the onus is not on the respondent **(Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).**
28. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.

> "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)**

29. In reaching their decision, tribunals must also take into account the ACAS Code on Discipline and Grievance. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible

in evidence, and if any provision of the Code to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

30. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.
31. The ACAS Code provides that an employer must first establish the facts of each case, which may require an investigatory meeting with the employee, or the collation of evidence to use as a disciplinary hearing. If there is a case to answer, the employee should be told in writing what is alleged about poor performance and its possible consequences to enable the employee to prepare the case for the disciplinary meeting. “It would normally be appropriate to provide copies of any written evidence”. The employee must be told where and when the meeting is to be held, and of their right to be accompanied. The meeting is to discuss the problem. The employer is to explain the complaint and go through the evidence and for the employee to be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. After the meeting the employer must decide whether action is justified and write to the employee to say so.
32. The Code also discusses warnings: a first or final warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with time scale), employees should be told how long that warning will remain current, and of the consequences of failure to improve performance within the set.
33. The Code goes on to state that the employee should be provided with an opportunity to appeal.
34. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so. This can apply to conduct discovered after the decision was made.
35. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.
36. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of **Polkey v AE Dayton Services [1987] IRLR 503, HL,** there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Discussion and Conclusion

37. The respondent’s reason for dismissing related both to capability but also, in its references to “lying” and misleading colleagues about what she was doing, to conduct. Both are potentially fair reasons for dismissing.
38. The tribunal finds that the employer’s process was defective in several ways such as to render the dismissal unfair. Insofar as the employer relies on the e-mail of the 31st March as a written warning, it falls down in that the claimant can have had no idea that the warning had the serious consequences

attributed to it. It was also unfair of the employer to assume that her response was an admission of serious failings, rather than regret for some mistakes made. A fair employer, concerned about lack of capability, and considering whether to give a warning, would have had a face to face discussion with the employee at this stage to establish what was down to personal factors at the time, and therefore a one off mistake, or due to lack of knowledge of the process, which might require training. In this instance, arranging for someone to sit down with the claimant to explain transferring calls, or a more searching investigation of why she had failed to check why the computer figure differed from the HMRC calculation, so as to get her to recognise the need to investigate or refer on, rather than dismiss queries. This was the particularly the case as she had been in post a very long time, apparently satisfactorily. As for the parcel, we could see the package was delayed because the German post did not recognise that “Darmstrasse” was in fact “Ohmstrasse”. This one off e-mail, without a meeting to discuss it, gave her no idea that her apparent failings in performance were so serious as to put her on a path to dismissal.

39. The tribunal concluded that it was also unfair that she had no detailed knowledge of the criticisms made in various areas in the email of 9 August, such that she would have been unable to engage in a detailed discussion of the extent to which they were caused by her failings or those of others. Some of that has emerged in questioning at this hearing. Some of the mistakes were historic, only coming to light when information was transferred from one system to another; they may have been hers, or they may have been those of another, perhaps the client providing poor information, or, especially bearing in mind the turnover of staff, a colleague. Some delays and mistakes could have been down to the intensification of work caused by the departure of N so soon before the year end, coupled with the claimant having to get to grips with a new software system. This is not to say that she was a competent employee, only that it was unfair to dismiss her with so limited an opportunity to her to explain, such the employer could not step back to consider whether her faults were her own, whether any lack of capability was irremediable or capable of improvement once made to focus on them, whether there should be a period for improvement, which might be followed by dismissal if they did not improve, and whether she needed more training on one or more parts of their systems. A fair employer would also in the circumstances have considered whether the claimant had had adequate supervision, given how intermittent it had been.
40. There was no appeal process which would have put right the defects in the initial investigation, when the claimant may have been able to explain and when another decision maker could consider whether dismissal was fair in these circumstances. We do not think a reasonable employer would understand this as accepting the validity of the reasons for dismissal, rather than an employee recognising they were being dismissed and turning to consider whether a neutral reason could be given to a potential new employer who might want to know about why the last job had ended. That is not to say that a reasonable employer would have agreed to this request, only that it

cannot reasonably be held to indicate she did not disagree she was lacking capability and did not wish to challenge the decision.

41. Of the specifics of this process, the claimant had no idea from the 9th May email that dismissal was contemplated. If she had, she may have engaged in more detail in what was said to be wrong. She was not told of her right to be accompanied to such a meeting, which might have told her that her job was on the line. If she had had a work colleague with her, she may have had a chance to discuss what was being said, and more questions might have been asked about the employer intended.
42. It was not clear why the respondent decided that her explanation amounted to "lying". In submission it was said to be having told a client in April 2022 that they were in credit with HMRC when they were about £200 in debit, but not explained whether this was deliberately misleading or cover up, or whether it was because the claimant did not understand the discrepancy herself – it seems to have been because she omitted a payroll run in January. There was no clear picture of how frequently these errors occurred. There was no attempt to consider the background circumstances, such as whether supervision had been consistent or effective, Rahul had already left, and not been replaced, and it was the end of the tax year when workload is heavy. They did not consider the extent to which faults were the responsibility of the claimant or others, particularly given the rapid turnover of staff. They emphasised that she was the core person in the department because of rapid turnover, but not the extent to which she had never had consistent supervision.
43. Although life teaches us that there are often two sides to a story, the respondent made no attempt to hear her side on this. Nor could she, as she was not given the level of detail to challenge their conclusions. Of course it is possible that the claimant had fallen into sloppy ways, for lack of consistent support and guidance as to the standards expected. It is also possible that the job she was originally hired to do had become more complex, her training had not been adequate. It also possible that she was not up to the job even with training. The employer did not however examine why a long serving employee was all of a sudden unsatisfactory, and whether this was a long term hitherto unrecognised problem, or the result of shorter term circumstances.
44. The tribunal concluded that this was an arbitrary decision. Clearly the respondent was contemplating dismissal, given the suspension and the 10th May check on details that would be required to establish her notice entitlement. The decision to dismiss was based on some evidence from Claire Nancarrow, but the respondent appears not to have checked the detail until after informing the claimant of the problem, and that detail was not shared with the claimant. The respondent stated that payroll is a sensitive service and mistakes could lose the respondent hundreds of clients, and the tribunal accepts this, but that does not absolve an employer from working out why mistakes have occurred, whether fault is remediable, and whether dismissal is fair. It was not shown that clients had been lost.
45. The tribunal next considered whether there should be a deduction from the basic award for conduct, or from the compensatory award for contribution by the claimant.

46. The tribunal did not consider it was just to make a deduction either for conduct or for contribution when the respondent, by its lack of investigation, had left detailed findings on the merits of the claimant's findings to this tribunal, which did not have the benefit of close knowledge of the many particulars, nor much information on supervision or training. We could see there had been some omissions, but not that they had been consistent.
47. As for the ACAS Code, there were several breaches of it. The payment was not given a warning that she much be disciplined if she felt to rectify there as pointed out on 31st of March. She was not invited to a disciplinary meeting, nor aware about the concerns were being treated as a disciplinary issue. She was not told that she could be accompanied. She was not given the detail of the numerous charges against her that was available to the employer. She was not offered a right of appeal, and will have been unaware thought she could. Given the extent of the lack of compliance with the ACAS Code, we had to consider what increase in any award was appropriate. The respondent appears to have been unaware of any Code, or if they had heard of ACAS, that they consulted the website or considered whether that applied to them. The Code is statutory and has been for many years. The current version dates from March 2015. It is "basic practical guidance to employers employees and their representatives and sets out principles for handling discipline and grievance situations in the workplace", written in plain language. Although this was a relatively small employer, where a simplified approach would be reasonable, it was a professional firm with sufficient resource is to be able to grasp and understand the basic principles of performance management and dismissal procedure – it was not an under-the-arches panel beating operation. Unfair dismissal law has been on the statute book for over 40 years. The right to unfair dismissal was provided in order to avoid arbitrary decision making like this. We held this was case where the increase in award should be the maximum 25%.
48. As to the argument that defects of process made little or no difference to the outcome, tribunal concluded that this had not been shown. It was clear from evidence in the tribunal the claimant had arguments of her own to make, and this tribunal does not have the information with which to resolve them. He said that an appeal would have made no difference whatever to the outcome. Nor can it be said that if she had been given a warning and time to improve, she would not have been able to improve her performance. The suggestion of deceit was exaggerated or mistaken. As stated, it is possible the claimant may have made errors, or was out of her depth, or had fallen behind in lockdown or for want of supervision, but it was not shown that she could not have improved with training or supervision, or some resetting of the standard expected. Her performance had been acceptable for many years and it is not shown that it had gone downhill such as to be past putting right.

Award

49. The claimant did not seek reinstatement or reengagement, and the tribunal considered an award of compensation.

50. The basic award is £15,000, the claimant having been employed 20 years (the maximum) after the age of 40, so £500 per week at 1.5 weeks pay per year of service.
51. The tribunal considers it would have been reasonable for the claimant to have found work within 6 months of dismissal, even if her travel to work area was restricted by reliance on public transport. It was low paid work, so it could be expected there would be jobs available, and she had a long record of employment. However, it was reasonable for the claimant to take pre-booked holiday and to travel at Christmas. The journey to Australia was a matter of choice, and it can be seen why she used the opportunity of unemployment to travel, but she was no looking for work by then and it is not just to expect the respondent to pay for it.
52. The award is 26 weeks from the effective date of termination, at £391 net per week, making £10,166, added to which there is £500 for loss of statutory rights as she will have to work for a further two years to regain the right to unfair dismissal.
53. The total compensatory award is £10,666. That is increased by 25%, another £2,667.

Delay providing written reasons

54. On the day the tribunal was minded, given the late hour, to reserve judgment but the parties asked for an oral judgment and oral reasons were given and recorded. The respondent then asked for written reasons. The 40 minute recording was passed to the typing section for transcription. Information about follow up was intermittent, the typist working part time or from home. The administration then established, after several enquiries, that while some recording machines were still usable, the software needed for those issued before 2019 was no longer licensed to the Ministry of Justice. Further, the recordings made on this handset could no longer be played back. The parties to this claim (and to another afflicted in the same way) were then asked if written reasons were still required. The respondent has replied that they are. They have stated at the same time that they are no longer able to appeal the judgment, but that is erroneous. Priority has therefore been given to returning to the handwritten notes and draft in order to prepare these written reasons.

Employment Judge Goodman
7 August 2023

REASONS SENT to the PARTIES ON

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FOR THE TRIBUNAL OFFICE