EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Karaqica

Respondent: Leeds Teaching Hospitals NHS Trust

Heard at: Leeds **On:** 16 November 2023

Before: Employment Judge Jones

REPRESENTATION:

Claimant: In person
Respondent: Ms C Souter, Counsel

JUDGMENT having been sent to the parties on 10 October 2023 and written reasons having been requested by the claimant, the Tribunal provides the following:

REASONS

Introduction

1. This is a claim for unfair dismissal brought by Mrs Karaqica against her former employers the Leeds Teaching Hospitals NHS Trust.

Evidence

2. I heard evidence from the claimant and also from Mr Jonathon Lockwood who is a General Manager for the Trust's Head and Neck Department, formerly General Manager at the Leeds Dental Institute and from Ms Ruby Ali, Associate Director of Operations for the Trust. Mr Lockwood was the officer who dismissed the claimant and Ms Ali conducted the appeal against that decision.

3. I have been provided with two bundles of documents, to which I have had regard, from both the claimant and the respondent.

Strike out

4. At the commencement of the hearing the Tribunal heard the application of the claimant to strike out the response on the ground the respondent had failed to comply with the Tribunal's orders. Because of limitations of time, I approached the application on the assumption that the respondent had breached a number of orders as alleged by the claimant, namely by not providing witness statements by 19 October 2023 (they were sent on 24 October 2022) and failing to send her the Tribunal bundle by 5 October 2023. She complained that the respondent had refused to agree relevant documents and providing a file which included them.

5. If there is a breach of orders or a party has unreasonably conducted the proceedings a Tribunal may strike out a claim under rule 37, but it must consider whether that is a proportionate sanction. If a fair trial remains possible, a Tribunal should not strike out a claim or a response as it is a draconian sanction, see **Blockbuster Entertainment Ltd v James [2006] IRLR 630**.

6. Although later than ordered, the statements had been served in time for the parties to prepare for this hearing and the claimant had received the respondent's proposed bundle. The claimant produced a separate, additional file of documents for the Tribunal and a copy for the respondent. Both parties were able to draw my attention to any relevant documents. Both parties were able to call witnesses and ask questions about the documents and issues. I was satisfied that the parties had sufficient time to prepare for this hearing and there could be a fair trial on the evidence and it could be determined the merits of the case. To strike out the response in those circumstances would not have met the overriding objective.

The Issues

7. What was the reason, or if more than one, the principal reason for the dismissal? Did it relate to conduct, as argued by the respondent?

8. If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
    - 8.1 Were there reasonable grounds for that belief?
    - 8.2 At the time the belief was formed had the respondent carried out a reasonable investigation?
    - 8.3 Had the respondent acted in a procedurally fair manner?
    - 8.4 Was dismissal within a range of reasonable responses?

Background/facts

8. The claimant was employed by the respondent as a Clerical Officer within its Radiology Department at the Leeds General Infirmary from 26 November 2018. Her role included providing administrative support to the department, manning the reception desk, appointment scheduling and processing sensitive and confidential information.

9. By a letter dated 27 September 2019 Ms Montague-Miller, Patient Services Co-Ordinator, wrote to the claimant with the formal outcome to a grievance made against her by a work colleague, Ms Wilson. She found that there had been inappropriate behaviour on the part of the claimant by raising her voice on 14 March 2019. There were mitigating circumstances surrounding that matter which she considered. Ms Montague-Millar discounted a second incident on 25 March 2019 because it did not involve Ms Wilson. She found that there were difficulties in the relationship between the claimant and Ms Wilson. She suggested mediation and, having discussed a Dignity at Work course which the claimant was happy to attend, agreed to book her on that training.

10. On 22 April 2020 Ms Wiorowska, Business Manager, wrote to the claimant by email to say she wished to have an informal meeting in respect of a few matters which had arisen. She observed that the claimant had refused previously to meet her.

11. On 27 April 2020 Ms Wiorowska met with the claimant. They discussed some concerns about behaviours of the claimant to other members of staff. Ms Wiorowska wrote following the meeting, included an informal action note and asked the claimant to attend a Dignity at Work course after Covid. She described it as a management request. She said the note would be placed on the claimant's file for twelve months and recorded that the claimant had refused to sign it.

12. On 15 May 2020 the claimant wrote to Ms Wiorowska and informed her she was not accepting her request to go on the Dignity at Work course as it was unjustified and she would not volunteer for that. She gave her account in the letter about some recent issues and said she was not at fault.

13. Chasing that up on 3 July 2020 Ms Wiorowska contacted the claimant by email to ask to meet the following week. She referred to the claimant having declined to attend the Dignity at Work course which had been discussed at the earlier meeting in April and said she would like to discuss coaching, attaching a document. She informed the claimant that that would be an informal meeting.

14. On 21 July 2020 Ms Wiorowska wrote again to say that the meeting would be informal and she would not be required to have a representative, but if she wished she could bring someone in support.

15. On 6 October 2020 Ms Wiorowska wrote again to the claimant and said that she wished to discuss the outcome of the meeting which she had had in April and asked her to attend a meeting. The claimant replied the same day to say she was still saying no and thanked her for her request. Ms Wiorowska in turn replied the same day and stated that due to the refusal to meet her as well as a fact finding in respect to an internal Governance matter, a decision had been taken by the General Manager, Kathryn Cotton, to start a formal investigation. An investigation officer would get in touch.

16. The claimant did not participate in any investigative meetings. She stated that the superintendent DL had advised her that she could decline to attend

meetings and that was her right. This was consistent with her earlier stance of refusing to attend any meetings to which Ms Wiorowska had invited her to after 27 April 2020.

17. The claimant was invited to attend a disciplinary hearing on 3 June 2021 to address three allegations. The first was a failure to follow a reasonable management instruction by refusing to meet with a manager on 22 July 2020 and refusing to attend the dignity at work course. The second was a breach of information and governance on 25 June 2020. The third was displaying continued inappropriate behaviour to colleagues which was rude and of a bullying nature dating back to April 2020. The claimant did not attend the hearing. All of those allegations were found proven by the disciplining officer, Cathryn Cotton. Ms Cotton required the claimant to attend a Dignity at Work course within two months. She was also required her to provide evidence she had completed an Information Governance mandatory training course. She imposed a final written warning. This was communicated to the claimant by letter of 2 July 2021. It was effective for twelve months to 3 June 2022. Full reasons for the decision were provided in the letter.

18. In October 2021 Mr Lockwood appointed a manager, Ms Kay, to undertake an investigation into further allegations. Ms Kay sent to the claimant a series of invitations to investigation meetings. The claimant declined them all. Ms Kay prepared an initial report in December 2021. She thought it right to give the claimant a further opportunity to attend a meeting to discuss the matters. A number of further invitations were sent to the claimant to attend meetings. There was some delay due to an operation the claimant had. The claimant declined to attend any further meetings and by September 2022 Ms Kay submitted her investigation report. She expressed the opinion there was sufficient evidence to warrant a disciplinary hearing.

19. The claimant was invited to attend a disciplinary hearing on 13 December 2022. There were five allegations, firstly a refusal to deal with the outcomes of a hearing on 3 June 2021, secondly, a failure to comply with a reasonable management instruction including meeting a manager on 8 June 2021, thirdly, a failure to comply with the respondent's code, the Leeds Way Value and Behaviours, and fourthly, unsatisfactory conduct and inappropriate behaviour towards colleague during the period from July 2021 including inappropriate emails and on 11 November 2021 behaving rudely towards a porter in front of staff.

20. The claimant did not attend the hearing. All but the last allegation were found proven, although in respect of unsatisfactory conduct that was only partially upheld. Mr Lockwood found that it could be interpreted as performance or behaviour related conduct. It overlapped with the failure to comply with the respondent's code, the Leeds Way, Values and Behaviours. That allegation had been upheld in respect of six incidents between June 2021 and November 2021 in which the claimant was found to have discussed sensitive information about colleagues, aggressively communicated with colleagues, behaved rudely to colleagues and to have sent inappropriate emails. The claimant was found to have failed to comply with the outcome of the earlier hearing by failing to attend a Dignity at Work course and failing to meet with a manager on 8 June 2021 following an instruction so to do.

21. Mr Lockwood dismissed the claimant and gave her 2 months' notice. He took into account the previous final written warning. In the letter Mr Lockwood explained his decision: *"It is my judgement that your repeated offences over a substantial period of time have resulted in significant harm, distress and upset to colleagues and patients who interact with you, and it is the repeated nature of your offences that have led to the outcome of this case. Taking into consideration all of the incidents and evidence presented I believe dismissal from the organisation is the only option to safeguard others against any further incidents. The process was made significantly more difficult by your lack of engagement and acknowledgment of the formal process, and whilst I have sympathy for you and the impact this will have, I believe this is the best decision for all parties".*

22. The claimant appealed the decision. The appeal was heard by Ms Ali on 9 June 2023. The claimant attended the appeal. The hearing lasted 2½ hours with a 45-minute break. Ms Ali dismissed the appeal. She and the panel were satisfied that there had been proper procedures. The claimant had failed to attend meetings and the panel considered the decision of Mr Lockwood to give her two months' notice was a relatively lenient one.

The Law

23. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

24. Under Section 98(4) of ERA "*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) – 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.*

25. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair[2]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction but will include the investigation[3]. With regard to any procedural deficiencies the Tribunal must have regard to

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.

the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[4].

26. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code.

Analysis

27. The respondent invites me to find that the reason for the dismissal related to conduct. I have to decide what was in the mind of the decision maker. Was it genuinely the case that Mr Lockwood and Ms Ali believed that the claimant had acted in a way which contravened the respondent's disciplinary procedure?

28. The nature of the allegations as described in the evidence and as recorded in the findings are properly categorised as conduct issues. The claimant had been found by Mr Lockwood to have chosen not to attend a series of meetings, not to attend a Dignity at Work course, conducted herself contrary to the respondent's code, the Leeds Way, as described in the investigation report of Ms Kay and the findings of Mr Lockwood. Mr Lockwood did not accept the last allegation. It was not seriously suggested to him in evidence, that in his own mind he did not believe these were acts of misconduct committed by the claimant. Frankly, it is difficult to see what else he could have concluded in the absence of the claimant at all the fact findings meetings or at his hearing. I am satisfied that Mr Lockwood genuinely believed that the claimant had committed a series of acts of misconduct in the ways he expressed them in the outcome letter.

29. The next question, and in respect of this there is no burden on either party, is whether dismissal for that reason was reasonable in all the circumstances of the case having regard to the size and administrative resources of the respondent, equity and the substantial merits of the case. The respondent is a public health trust with a significant HR function. I have specifically to consider whether the belief that Mr Lockwood reached (having satisfied myself that it was honest for the reasons set out above) was reasonable and whether the investigation was reasonable. I must consider whether the procedure was reasonable.

30. The investigation report of Ms Kay is thorough and detailed. It runs to eighteen pages. The dismissal letter, which addresses each of the allegations, runs to five pages. Ms Kay had made numerous attempts to meet the claimant and discuss the allegations, even to the extent of preparing an initial report and deferring its completion until the clamant had the chance to meet with her to discuss it. The respondent had plainly taken care and addressed the investigation with the thoroughness required. The investigation was reasonable.

[4] Taylor v OCS Group Ltd [2006] ICR 1602

31. The claimant says that these matters had been formalised and that was inappropriate. She says matters had been closed or were simply not made out. She says that this was clear back in 2020. She says they had then been formalised quite inappropriately and contrary to the terms of the respondent's disciplinary policy. That policy includes a flowchart of the informal and formal procedure, which is further explained in the narrative at sections 4.31 and 4.51.

32. Section 4.31 of the policy provides that where an allegation of a comparatively minor breach of discipline is made, the line manager should attempt to resolve the matter informally. The manager should discuss their concerns with the employee and ensure the employee is aware of the expected standard of conduct. The manager should advise the employee that if the standard is not maintained formal action may be taken in accordance with the policy. This will not be viewed as a formal action or sanction. The matter should be recorded as an informal action note which will be filed in the employee's personnel file. Both the manager and the employee should sign the informal action note.

33. Section 4.51 of the policy states that serious disciplinary allegations and minor disciplinary issues which have been previously raised with the employee informally and where expected standards have not been achieved will be subject to a formal disciplinary investigation.

34. Much of the focus in this case was on whether the respondent had acted properly and appropriately in respect to matters which led to the final written warning. It is clear that the claimant had lost confidence in her employers even before that final written warning was imposed. That is apparent from the fact that she did not attend the hearing in respect of which that matter was dealt with and thereafter did not attend any further fact-finding meetings or the disciplinary meetings in respect of which she was dismissed.

35. In ***Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374*** the Court of Appeal provided guidance to Tribunals in respect of how to consider earlier disciplinary procedures which led to a final written warning, in the context of a later dismissal which is alleged to be unfair. Mummery LJ said, "*in answering that question, it is not the function of the ET to re-open the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a "nullity." The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent* misconduct". "*It is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to*, *inter alia, the circumstance of the final* warning". Beatson LJ said, "*The appellant's arguments in this appeal, if accepted, opens up the prospect of tribunals, the EAT, and this court, when considering the lawfulness of a dismissal, later and sometimes often considerably later than the earlier disciplinary process which led to a formal warning, considering and*

unpicking the details of that process and having to inquire into the adequacy of the evidence. It would involve doing so even when the earlier process and the formal warning has either not been challenged, has been unsuccessfully challenged, or where a challenge has not been pursued. There is, however, a need for finality. Where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, I consider there would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect re-opening it" [emphasis added]. In summary, the Tribunal should not ordinarily investigate and reopen previous written warnings in the absence of specific allegation of lack of good faith or that they were manifestly unjust. They are background material and in the absence of specific accusations the Tribunal should focus upon the disciplinary proceedings which led to the dismissal and not earlier written warnings.

36. Much of this case involves the claimant challenging matters which led to her final written warning given at a disciplinary meeting she did not attend. Employers must have some procedure whereby they can regulate the behaviour of their staff. Inevitably there will be disagreements between employees and managers, such as whether there has been inappropriate behaviour. Sometimes people will be wrongly accused. Sometimes disciplinary managers have to decide between the word of one employee over another. There must, ultimately, be finality in a decision-making process. Whatever the decisions there will be a need to move on even when, as inevitably will happen because decisions of human beings are fallible, on occasion people may have been wrongly accused and wrongly found to have behaved in a particular way.

37. It is not possible for me, within this framework, to unpick precisely what was or was not done in 2019 and 2020. I have a selection of emails provided by each party which I have carefully considered. The claimant has taken me through some of these. She took me to a couple of emails containing reference to events for which she says she was called to account quite inappropriately in the disciplinary procedure. When I examined with the claimant where they were within the fact-finding or the disciplinary hearing she was unable to identify them. It is quite possible she cannot precisely remember what happened, when and the context in which they may have reappeared and resurrected themselves in a disciplinary process over a year ago, but 2 years after the events themselves. The point is that if the claimant cannot explain this, I will face insurmountable obstacles in doing so, reflecting the concerns made clear by the Court of Appeal as summarised above. From the documents I have seen, there were significant concerns for the claimant to respond to. She refused to meet her manager to discuss them. This led to a formal procedure which the claimant similarly disengaged from. A final written warning was imposed, and instructions given which were reasonable in the light of those findings. I am bound to conclude that the final written warning was one which was imposed following an appropriate investigation. It fell within the respondent's disciplinary procedures, of initial informal steps initiated by Ms Wiorowska under section 4.31 of the policy, to formal steps within section 4.51 of the policy. The claimant did not appeal the final written warning and the outcome. I reject the suggestion a reasonable employer

could not have taken these measures under its policy and had regard to them in the final hearing which led to her dismissal.

38. One of the stumbling blocks for the claimant was that she was required to attend a course which she flatly refused to attend. That was a reasonable management instruction, the history which led to it having been set out in the above background findings. Because she considered herself innocent of what others accused her of, she regarded that as an invalid instruction. For reasons I have set out, it was not an invalid instruction, it was not unlawful and it was not unreasonable. I am satisfied that on the first and second allegations alone the respondent could reasonably have found the claimant to have been culpable of misconduct. She was not, as she believes, entitled to refuse to attend meetings to discuss these matters. She was not entitled to refuse without some plausible reason to attend a course and if she had a plausible reason then she would have had to attend at a meeting with her manager to explain it. To disengage entirely from the process is to play a highwire act from which there can be a catastrophic fall. There was.

39. The final written warning had given the claimant clear advice that any further misconduct could result in dismissal. The misconduct fell within the operational period of the final written warning. The claimant argued that the warning expired on 3 June 2022, but the fact the respondent dismissed her in December 2022 meant the warning had then expired. That is clearly not correct. The claimant was found to have refused to attend meetings and to attend the course between 3 June 2021 and 3 June 2022. Those are the relevant dates, not when the final disciplinary hearing took place.

40. The claimant was given every opportunity to make her arguments and finally did so at the appeal. Ms Ali listened to them, but they were attempts to unravel that which led to the final written warning. The claimant made the argument which has been raised in this case that the process which led to the final written warning was inappropriate as she believed it should have been an informal process. Ms Ali was entitled to conclude she was not dealing with an appeal against the final written warning and the procedural complaints had no substance. I cannot criticise that approach.

41. The claimant suggested there were procedural irregularities. That by using notepaper which is headed ‘The Dental Department’ Mr Lockwood had been misleading. That was a technical oversight and could not possibly invalidate the procedure. The procedure was comprehensive and well within the guidance set out by ACAS for employers to follow.

42. For the above reasons, I find the procedure and the investigation were reasonable. The belief of Mr Lockwood and Ms Ali in the allegations were reasonable. The sanction fell within a reasonable band of responses.

43. In those circumstances the dismissal was fair and I must dismiss the claim. As I have said, there were many matters to which the claimant referred me, but the law simply does not allow an investigation into such stale matters in respect of which inevitably the evidence will not be as cogent and fresh as the later matters for which she was dismissed.

Employment Judge D N Jones

Dated: 4 January 2024

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