EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Kaur**

Respondent: **Chera Food Company Limited t/a Anand Sweets**

On: **4 January 2024**
17 January 2024 (in Chambers)

Before: **Employment Judge McAvoy Newns**

Heard at: **Leeds Employment Tribunal**

Appearances:

For the Claimant: **Mrs B Kaur, Lay Representative**

For the Respondent: **Ms G Chera, Lay Representative**

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed. Her claim is well-founded and succeeds.

2. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is just and equitable to increase the compensatory award by **17.5%.**

3. The Claimant is entitled to a basic award of **£1,875.60.**

4. The Claimant is entitled to a compensatory award of **£15,281.59.**

5. These are gross sums and the Claimant is responsible for the payment of any income tax and/or national insurance contributions that may be due on them.

WRITTEN REASONS

Issues

1. At the case management preliminary hearing which took place on 3 October 2023, it was agreed that the issues were as follows:

Unfair dismissal

2. The parties accept that the Claimant was dismissed. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct and capability. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct or was not capable of carrying out her role.

3. Was it a potentially fair reason?

4. If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

    a. there were reasonable grounds for that belief;

    b. at the time the belief was formed the Respondent had carried out a reasonable investigation;

    c. the Respondent otherwise acted in a procedurally fair manner; and

    d. dismissal was within the range of reasonable responses.

5. If the reason was capability, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

    a. the Respondent adequately warned the Claimant and gave the Claimant a chance to improve; and

    b. dismissal was within the range of reasonable responses.

Remedy for Unfair Dismissal

6. The Claimant confirmed that she does not wish to be reinstated or reengaged.

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

    a. what financial losses has the dismissal caused the Claimant?

b. has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

c. if not, for what period of loss should the Claimant be compensated?

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

e. if so, should the Claimant's compensation be reduced? By how much?

f. did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

g. did the Respondent unreasonably fail to comply with it? In this regard the Claimant relies upon the fact that she was allegedly dismissed via WhatsApp without being invited to attend a disciplinary meeting.

h. if so, is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?

i. if the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

j. if so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

k. does the statutory cap apply?

l. what basic award is payable to the Claimant, if any?

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

Evidence

8. The Claimant served a witness statement and was cross examined on that statement. The Respondent served witness statements for Ms Gagandeep Chera who was also cross examined.

9. I also had sight of a bundle of documents totalling 140 pages.

10. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

11. The Claimant commenced employment with the Respondent on 6 April 2019. Her job title was Kitchen Assistant. The Respondent accepted that the Claimant's gross weekly pay was £468.90 and her net weekly pay was £396.24.

Relevant contractual provisions

12. The parties entered into a written contract of employment on 1 April 2019. This contained the following provisions:

    a. The holiday year begins on 1 April of each year;

    b. "The actual dates of leave must be approved in advance by the Employer, taking into account the interests of efficiency of the Employer"; and

    c. "No more than two weeks' holiday may be taken at any one time unless written permission is obtained from the Partner".

New holiday approval process

13. In or around late January 2023 (there is a dispute between the parties regarding the exact date which does not need to be resolved), the Respondent provided the Claimant and her colleagues with holiday forms to complete when they wished to take holidays. There is a dispute between the parties as to who gave this form. Ms Gagandeep Chera's evidence was that she did. The Claimant's evidence was that Mrs Chera did. However, the relevant point is who the Claimant gave the completed form back to and, as stated below, both parties agree that the completed form was given to Mrs Chera.

14. It is worth noting at this stage, to avoid confusion, that Ms Gagandeep Chera and Mrs Chera are not the same person. Ms Gagandeep Chera is the person who represented the Respondent at this hearing and also gave evidence about the Respondent's decision to dismiss the Claimant. She is the manager of place at which the Claimant worked. Mrs Chera is a director. She did not attend this haring.

15. Ms Gagandeep Chera's evidence was that, during this meeting, she had told staff that:

    a. only once the form was returned to the employee confirming the Respondent's approval was the holiday request approved; and

    b. they would only be able to have two weeks continuous holidays at a time. The reason for this was that operational issues had resulted from employees taking three or four weeks holiday at a time.

16. This evidence was not challenged by the Claimant. As a result of this and for the following reasons, I have accepted Ms Gagandeep Chera's evidence:

a. as stated earlier, the contractual position is that only two weeks holiday could be taken without written consent; and

b. both parties agreed that the Claimant (as well as others) had taken more than two consecutive weeks holiday in the past. It is understandable that this may cause the Respondent operational challenges and therefore changes may need to be made.

17. Both parties agreed that, before this change, the process for requesting holidays was less formal. There was no need for a form to be completed and signed. The Claimant gave several examples of her going on holiday, prior to January 2023, and those holidays being approved of orally by Ms Gagandeep Chera and/or Mrs Chera.

Holiday requests

18. The Claimant completed the form and requested that she be permitted to take leave between 1 and 28 April [43]. Her evidence was that she gave the form back to Mrs Chera and that Mrs Chera told her that a decision would be made at the end of February or the beginning of March 2023. Ms Gagandeep Chera agreed, in response to questions asked from me, that the Claimant gave the completed form to Mrs Chera.

19. Ms Gagandeep Chera's evidence was that:

a. upon seeing the form, she instantly noticed that the holiday request was for 28 days so she immediately asked the Claimant if there was any particular reason why such a long period of leave was required. Her evidence was that the Claimant said that there was not and the flight was cheaper. Her evidence was also that the Claimant and her colleagues were discussing the Claimant's holiday plans in the kitchen;

b. on 1 February 2023, she and the directors discussed the Claimant's holiday request and decided to refuse it;

c. she returned the completed form back to the Claimant the next day (considered below); and

d. during the second week in February, the Claimant asked her whether she could have two weeks continuous holiday, which was agreed to. She says the agreed dates were 9 April 2023 with the Claimant returning to work on 25 April 2023.

20. Ms Gagandeep Chera accepts that there is no record of her giving the completed form back to the Claimant, save as for CCTV footage which they don't have access to. She says she took a copy of this form before giving it to the Claimant and her own copy was disclosed as part of these Tribunal proceedings. The Claimant's position regarding this form is outlined below.

21. The Claimant disagrees with the Respondent's position outlined above. Her evidence was that:

    a. in mid-February, Mrs Chera told her that because her contract started on 6 April 2023, she could not take holidays before that date. It is relevant to note here that Ms Gagandeep Chera relied upon the fact that Mrs Chera would not know when the Claimant's contract started (meaning she would not know whether the Claimant could have holidays prior to 6 April) and that management of matters such as these are dealt with by Ms Gagandeep Chera herself. Mrs Chera did not however give evidence herself of any such lack of understanding;

    b. as a result of the above, she requested holidays between 9 April 2023 and 4 May 2023. She said that Mrs Chera told her that she would discuss with Ms Gagandeep Chera and revert; and

    c. after a few discussions, in early March 2023, Mrs Chera had spoken with Ms Gagandeep Chera and the holidays were approved.

22. At page 43 of the bundle is a form which had been partly completed by the Claimant and partly completed by Ms Gagandeep Chera. The Claimant accepted in evidence that she had completed her part but strongly denied that she had been provided with a copy of the form containing the part completed by Ms Gagandeep Chera. She said that she saw this completed form for the first time as part of these Tribunal proceedings.

23. In that part of the form, which had been dated 2 February 2023, Ms Gagandeep Chera had stated that the holidays were not approved, the reason being: "we can't give you 28 days holiday, you can only take 2 weeks holiday together, please change your dates and come back to us". As stated above, Ms Gagandeep Chera accepted in evidence that there was no objective evidence of this completed form having been given back to the Claimant.

24. All parties accepted that no further holiday approval from was completed, when the revised holiday days were agreed, and when I asked the Claimant why, bearing in mind the discussions which took place in or around late January 2023, her response was: "I wasn't aware that I needed to change the form or complete a different form. They were going to inform me".

25. From the Claimant's perspective, an agreement had been reached orally between Mrs Chera and the Claimant that the Claimant would take holidays between 9 April 2023 and 4 May 2023 and she should return to work on 6 May 2023, to ensure she had sufficient rest following her journey home.

26. Strangely, Mrs Chera did not give evidence at this hearing. I asked Ms Gagandeep Chera why this was the case and she replied with words to the effect of: "She is in India, back on the 9th January. She doesn't want to get involved. She always needs to be in the kitchen. I suggested that she come with me. She had to go to India and be there for a month, so back on the 9th".

27. Ms Gagandeep Chera said that, on 8 April 2023, the Claimant told her and Mrs Chera for the first time that she would not return until after 4 May 2023. She said that they were shocked to hear this as this was contrary to what had been agreed. She said that they did not challenge this with the Claimant on the day because they felt as though they were "on the spot". This was denied by the Claimant and her account is as stated above. It's worth repeating that I had no such evidence from Mrs Chera about her alleged shock during this conversation.

28. I have summarised my conclusions regarding this significant dispute between the parties in the conclusions section of these Reasons.

Alleged performance concerns

29. Ms Gagandeep Chera's evidence was that, from August 2022 to April 2023, she noticed a deterioration in the Claimant's performance. Specifically, the Claimant refused to do work, refused to complete her important daily tasks (including cleaning her kitchen station) and she was mostly late for work. She said that monthly meetings with the Claimant took place for around eight months to discuss her performance and timekeeping. In respect to timekeeping, Ms Gagandeep Chera's evidence was that the Claimant said that she was late due to the bus or her partner. Ms Gagandeep Chera said she felt that the Claimant's interest in her job was fading.

30. She said that, during the last meeting which took place in March 2023, she told the Claimant that her performance and timekeeping were very concerning and referred the Claimant to the relevant part of her contract of employment which said that persistent lateness could lead to dismissal.

31. All of these points were vehemently denied by the Claimant.

32. In cross examination, Ms Gagandeep Chera accepted that there was no evidence in the bundle of any of these meetings taking place. She said that the only evidence they had was CCTV footage but that no longer existed as it was only saved for two months. She also accepted that there was no evidence in the bundle of the Claimant's allegedly poor timekeeping (e.g. no clocking in and out records because no clocking in machine had been installed).

Dismissal

33. Ms Gagandeep Chera's evidence was that, on 2 May 2023, she and the directors decided to dismiss the Claimant. When asked in cross examination who made the decision, Ms Gagandeep Chera said: "Board of Directors. I don't make anything I just follow their direction".

34. On that date, Ms Gagandeep Chera sent the Claimant a dismissal letter via WhatsApp [46]. This stated that the directors of the Respondent had decided to terminate the Claimant's employment immediately because:

a. The Claimant had taken more than two weeks holiday when the Respondent had informed her (and others) verbally that employees could not take more than two weeks leave. They said this had an impact on the business;

b. In the past few months, they had noticed a change in the quality of the Claimant's work which was important because it affected business continuity; and

c. Despite numerous verbal notices, the Claimant was "most of the days, never on time".

35. They summarised: "All these factors affect our business. We cannot afford to keep unreliable employees who cannot commit to the job. We wish the best for your future, thank you for your collaboration".

36. In cross examination, Ms Gagandeep Chera said that the holiday issue was the "last straw" and was, therefore, the catalyst for the Claimant's dismissal.

37. Ms Gagandeep Chera said in evidence that this was the only form of communication that she could use whilst the Claimant was outside the country.

38. It was put to Ms Gagandeep Chera that the dismissal letter did not mention that the holiday request was rejected. She acknowledged this and said, "I didn't mention the form because she knew she shouldn't take more than 2 weeks holiday".

39. It was also put to Ms Gagandeep Chera that if the holiday was the reason for dismissal, why did the Respondent wait until 2 May 2023. Ms Gagandeep Chera's evidence was that "the director took that long to make the decision".

40. During this time, on 3 May 2023, the Claimant sent a message stated: "I just checked the termination letter you sent in attachment and get shocked and disappointed. Is anything changed in my absence". She also relayed to Ms Gagandeep Chera that the holidays had been agreed with Mrs Chera and it had been specifically agreed that she could return to work on 6 May 2023. She said: "So I don't know where the misunderstanding comes from". The Claimant also said that no one had raised issues with her regarding the quality of her work and she normally arrives into work 10 minutes before the beginning of her shift.

41. As Ms Gagandeep Chera did not respond to this message, the Claimant chased her two days later, on 5 May 2023.

9 May 2023 meeting

42. On 8 May 2023, it was agreed between the Claimant and Mrs Chera that a meeting could take place on 9 May 2023 at 2pm [51]. However, Mrs Chera did not attend this meeting. Ms Gagandeep Chera did instead.

43. The Claimant's husband covertly recorded this meeting and, at the case management hearing mentioned earlier, I decided that the recording and transcript were admissible.

44. An argument made by the Respondent at the case management hearing was that the recording was not genuine and that it had been manipulated in some way.

45. In particular, the Respondent said that the contents of the recording were not from the conversation on 9 May 2023 but were, instead, an amalgamation of multiple conversations she had had with the Claimant over the preceding months. During the case management hearing, I heard evidence from the Claimant and the Respondent was permitted to cross examine her. After the evidence was heard I deliberated and gave an oral decision that the transcript and the recording could be admitted. In my oral reasons, I stated:

    "Ms Gagandeep Chera directed me to several parts of the recording where she believed that there was an overlap, suggesting that two recordings has been put together. I listened to these carefully and cannot hear such overlap myself. Neither could the Claimant. Indeed, having listened to the recording in its entirety, it does not appear as though it is a mixture of different recordings put together. Although the language used changes, there is nothing obvious about the recording suggesting that it has been manipulated in any way. Ms Gagandeep Chera also directed me to several points which she believed appeared out of context. One point concerned the Claimant telling her that not taking her back would affect her career. The response was that the business was affected because, to cover the Claimant's shift, two more people were needed. Another concerned a letter to HMRC. Mrs Chera believed the conversation was from April, when she and the Claimant discussed her P60. However, the comment about the letter to HMRC appeared to flow from the Claimant's request to be permitted to resign. The Respondent appeared to be effectively saying that the Claimant could not resign because the termination paperwork had already been processed".

46. Notwithstanding this decision, and these reasons, the Respondent maintained this argument during today's hearing.

47. Having considered this again as part of reaching this decision, this is quite clearly a recording of one conversation which took place after the Claimant's dismissal. The majority of the points raised concern the end of the Claimant's employment with the Respondent.

48. The following pertinent conversations are recorded in the transcript of this meeting:

    Ms Gagandeep Chera:

    "You came and told us that you need leave (holiday) from the date to date 4. Is that right? If you ask us that you need leave we cannot force you to come here and work. Because if you have already decided and you have already booked

your ticket we cannot force you to come here and work, right? So you gave us your decision and then you asked me downstairs in the kitchen that you will come back on the date of the 4th, then asked whether you would have to come the work the next day? I said yes. Then, we talked to mummy, you said that you cannot come to work on the 4th, you will come on the 5th or 6th".

Claimant:

"No, I did not say that…I told you in February that I need three weeks' leave. You said that was fine. I also asked Didi (sister) before. She also said that was fine. We will make a decision before the end of February as to from when you can take your leave. You said you can take three weeks off. Didi also told me that. I asked Didi and Didi said no you cannot take three weeks off. Then I asked you and you told me that I can take three weeks off. I can take them together but I cannot take 4 weeks off. Right. I decided afterwards and got my ticket as well. The I told Didi that I will come back on the 4th. We will arrive in Birmingham on the night of the 4th. So we will travel from Birmingham on the Friday afternoon. Therefore could I come to work on 6th? She said yes; she laughed and then said you can come straight away. Then said, it is OK you come to work on the 6th".

Ms Gagandeep Chera:

"This is what I am saying; because you already planned your thing accordingly we cannot force you to come here you know".

49. The discussion then turned into a debate between Ms Gagandeep Chera concerning the amount of leave that was authorised. Ms Gagandeep Chera said she had only authorised two weeks whereas the Claimant said three weeks had been authorised. Ms Gagandeep Chera referred the Claimant to her contract and said this prevents her from taking more than two weeks leave. The Claimant said three weeks was also written into the contract. The Claimant was wrong in this regard, bearing in mind the extract from the contract that I quoted earlier.

50. The conversation then moved back to the holiday approval process. The Claimant said that she had spoken to Ms Gagandeep Chera about the holidays beforehand. Ms Gagandeep Chera replied: "Yes, you did talk about it but the thing is… I told you that you can take 2 weeks' leave but we can make an exception for you". The Claimant disputed this and said, had she known this, she would not have taken the leave because her job was her priority.

51. The Claimant asked Ms Gagandeep Chera to take the dismissal letter back. Ms Gagandeep Chera refused stating: "No, the letter is already followed up. We already sent the letter to the Home Office, sorry not to Home Office to HMRC and to accountant to audit. So things are sorted. So P45 should be issued in the next few days and the last payslip also". Concerningly, in her sworn witness statement, Ms Gagandeep Chera said: "Additionally, the claimant mentioned in her form that I said in this meeting that I have already sent the dismissal letter to HMRC, I have never said this, you never send a dismissal letter to HMRC so I am not sure where she got this information from".

52. Finally, the Claimant's husband raised the fact that the Claimant had taken three weeks off to go to India in the past. Ms Gagandeep Chera responded: "That is what I am saying, because at that time they had agreed to it, but now she just came to us, she told us only the date, but we cannot force ourselves to tell that we cannot do that. You (SS) understand that. So if you are thinking about yourself we need to think about our business too, simple as that. It goes both ways. I am really sorry".

53. In her witness statement, Ms Gagandeep Chera says that, during this meeting, she discussed every point that was raised in the dismissal letter. However, there is no evidence of the Claimant's allegedly poor performance or timekeeping being discussed in the earlier mentioned transcript.

54. She also said, in her statement, that the Claimant had said that she had booked these tickets because they were cheaper. However, there is no evidence of this being raised in the earlier mentioned transcript.

Subsequent recruitment

55. The Claimant's evidence was that, after she was dismissed, she heard that the Respondent was hiring new people and paying them £5 per hour cash in hand.

56. A review of the Respondent's restaurant, which was posted online, was contained in the hearing bundle [53]. This stated: "We was working here and they said they give us £9.50 p/h on NI but they give is only £5 p/h only £290 per month we waste our time for working here".

57. Within their disclosure, the Respondent provided wage slips for numerous employees. This showed that these employees were being paid £10.42 per hour or £10.18 per hour with one employee being paid £7.49 per hour. These wage slips were not challenged by the Claimant in cross examination.

58. Ms Gagandeep Chera also strongly refuted these allegations in her witness statement.

Job search

59. The Claimant's evidence was that she had looked for alternative paid work but she had not been successful save as for the fact that she had undertaken some temporary work which she gave credit for her in her schedule of loss.

60. In the bundle there was evidence of the Claimant looking for a range of roles (Warehouse Operatives, Support Workers, Live-in Care Assistant, Office Administrative Assistants/Receptionist, Kitchen Porter, Housing Assistant) from May 2023 until August 2023.

61. The Respondent criticised the Claimant in this regard, suggesting that the Claimant ought to have focused on roles similar to those she had undertaken in the past.

The Law

Liability

62. The relevant parts of s.98 Employment Rights Act 1996 (**ERA**) state:

> *(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…*
> *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.*
> *(2)*
> *(a) relates to the capability of the employee;*
> *(b) relates to the conduct of the employee;*
> *(3) …*
> *(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.*

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

Compensation

64. S.119 of the ERA states:

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.
(2) In subsection (1)(c) "the appropriate amount" means—
(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for a year of employment not within paragraph (a) or (b).
(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

65. The relevant parts of s. 123 of the ERA states:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal.
(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

66. In ***Cooper Contracting Ltd v Lindsey 2016 ICR D3, EAT***, Mr Justice Langstaff (then President of the EAT) summarised a number of principles drawn from the earlier case law that should be used to guide tribunals when considering whether there has been a failure to mitigate loss. He observed that there were

considerable dangers in approaching the matter as though the duty to mitigate required the taking of all reasonable steps to lessen loss. Such an approach risked diverting focus away from the legal principles that applied to mitigation and might lead erroneously to the conclusion that if the employer could show a single reasonable step that was not taken it would inevitably succeed in its submission that there had been a wholesale failure to mitigate. To avoid such a mistake, it was imperative that the following guidance be firmly borne in mind:

a. the burden of proof regarding a failure to mitigate is on the wrongdoer. A claimant does not have to prove that he or she has mitigated the loss;

b. if evidence as to mitigation is not put before the employment tribunal by the wrongdoer, it has no obligation to look for that evidence or draw inferences. This is how the burden of proof works in this context: responsibility for providing the relevant information belongs to the employer;

c. the employer must prove that the claimant has acted unreasonably. The latter does not have to show that what he or she did was reasonable. What is reasonable or unreasonable in this regard is a question of fact, to be determined after taking into account the wishes of the claimant as one of the relevant circumstances, although it remains the tribunal's own assessment of reasonableness — not the claimant's — that counts;

d. the tribunal should not apply a standard to the claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault, given that the central cause of those losses was the act of the employer in unfairly dismissing the employee;

e. the relevant test can be summarised by saying that it is for the wrongdoer to show that the claimant has acted unreasonably in failing to mitigate; and

f. in a case where it might be reasonable for a claimant to have taken a better paid job, this fact does not necessarily satisfy the test: it is simply important evidence that might assist the tribunal to conclude that the employee has acted unreasonably.

67. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 states:

'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent".

68. In ***Slade and anor v Biggs and ors 2022 IRLR 216, EAT***, the EAT set out a four-stage test to assist employment tribunals in assessing the appropriate percentage uplift for failure to comply with the ACAS Code:

    1. is the case such as to make it just and equitable to award any ACAS uplift?

    2. if so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent?

    3. does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? If so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

    4. applying a 'final sense-check', is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

Submissions

69. Both parties provided written submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions on Liability

What was the reason or principal reason for the Claimant's dismissal?

70. Ms Gagandeep Chera said that the Claimant was dismissed because of her performance and timekeeping and because the Claimant took more than two weeks annual leave which was considered to be the "final straw". The Claimant disagrees and says that she was dismissed because the Respondent no longer needed her. In this regard they had recruited individuals who would accept an hourly rate of £5, paid cash in hand.

71. I am not satisfied, on the evidence before me, that the Claimant was dismissed because the Respondent had recruited individuals who would accept an hourly rate of £5, paid cash in hand. Ms Gagandeep Chera vehemently denied this allegation and disclosed wage slips showing that her staff members were paid in excess of £5 per hour and that their pay went through payroll. Furthermore, the Claimant has adduced no persuasive evidence of this being the case, including the review.

72. However, the Respondent's actual motivations for dismissing the Claimant are unclear. This not helped by the fact that Ms Gagandeep Chera, the only witness for the Respondent, was not the decision maker. As she said herself during

evidence, she didn't make the decision, she just followed the direction of the directors.

73. Considering:

    a. the contents of the dismissal letter;

    b. the discussion which took place on 9 May 2023;

    c. Ms Gagandeep Chera's evidence, and

    d. bearing in mind, my findings in respect to the Claimant's belief about the reasons for her dismissal,

    I have concluded that, on the balance of probabilities, it is more likely than not that the Claimant was dismissed primarily because she took more than two consecutive weeks holiday and, secondarily, because it was perceived that there were shortcomings in her performance and timekeeping. Whether these were reasonable beliefs or not, or whether it was reasonable for her to be dismissed for them, are entirely separate matters considered in greater detail below.

Was that a potentially fair reason for dismissal?

74. Yes, this could give rise to both conduct and capability reasons which are both potentially fair reasons.

In respect of the conduct allegation (namely that the Claimant took more than two consecutive weeks holiday and her timekeeping), did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? In particular:

Were there reasonable grounds for that belief?

75. In respect to the first point, yes, the Claimant did take more than two consecutive weeks holiday.

76. In respect to the second point, no, there was no objective evidence before the Respondent, that I have seen, when the decision to dismiss was made, confirming that the Claimant's timekeeping was poor. The person who made the decision to dismiss on that ground also did not give evidence at this hearing. The Claimant also vehemently denied that her timekeeping was poor.

At the time the belief was formed, had the Respondent carried out a reasonable investigation?

77. In respect to the first point, yes, as above, the Claimant did take more than two consecutive weeks holiday.

78. In respect to the second point, no, there does not appear to have been any investigation into this allegation before the decision to dismiss was made. If there was such an investigation, no evidence of the same was presented to me.

Had the Respondent otherwise acted in a procedurally fair manner?

79. No, in many respects and this applies to both conduct related allegations. In particular:

    a. The Claimant was not invited to a meeting at which the allegation could be put to her and she could give her representations. As there was no meeting, she was not given a right to be accompanied;

    b. No evidence supporting the Respondent's concerns was presented to the Claimant;

    c. As a result of the above, there was no transparent investigation into the Claimant's assertions that:

        i. she had been given consent to take more than two consecutive weeks of holiday; and

        ii. her timekeeping was good; and

    d. She was not invited to an appeal hearing. The meeting which took place on 9 May 2023 did not serve the purpose of an appeal meeting. It was simply Ms Gagandeep Chera relaying to the Claimant the reasons why she was dismissed and refusing to consider any alternatives to that dismissal.

Was dismissal was within the range of reasonable responses?

80. No.

81. The Claimant's contract of employment does state that more than two weeks consecutive annual leave must not be taken without the written consent of a partner. Both parties agree that no written consent to the Claimant taking annual leave from 9 April until 4 May 2023 was ever received.

82. I have also found, as stated earlier, that the Claimant and her colleagues were informed, at the meeting in or around January 2023, that holiday forms would need to be completed and signed before the holiday was approved. However, this has little relevance as there was no completed form in respect to the 9 to 25 April 2023 dates that the Respondent says was approved.

83. It is however relevant that, at the meeting mentioned above, the Claimant was also informed that more than two weeks' consecutive leave could not be taken as doing so may affect the efficiency of the business. It is unclear therefore why she did continue to request this duration of leave.

84. Notwithstanding the above, the central issue is whether the Claimant had received oral consent to take more than two weeks holiday on this occasion. There is a dispute between the parties regarding this and it is important that I resolve that dispute. For the following reasons, I conclude that the Claimant had received such oral consent:

    a. The Claimant says that Mrs Chera gave her such consent. Mrs Chera did not give evidence at the hearing about the discussions, if any, that she had with the Claimant regarding this;

    b. Mrs Chera's apparent decision to not give evidence is curious. Ms Gagandeep Chera told me that she did not want to get involved. It could be inferred from this that Mrs Chera did not feel comfortable with how the Claimant had been treated, hence her avoidance of the process. Given the factual allegations concerning Mrs Chera made by the Claimant, and Mrs Chera's role in the organisation as a director, it is reasonable to expect Mrs Chera to want to give evidence, if she was able to challenge the assertions that the Claimant made. The same could be said about Mrs Chera's decision to not attend the 9 May 2023 meeting, when the Claimant had thought she had arranged for this to take place with her. (For completeness, in respect to Mrs Chera's lack of attendance at this hearing, I recognise that Ms Gagandeep Chera also said that Mrs Chera was in India at the time of the hearing. However, it appears that this booking was made after the final hearing date was set by me during the October preliminary hearing. Otherwise, I would have expected Ms Gagandeep Chera to ask me to list the final hearing on another date. Therefore, it is likely that Mrs Chera had no intention of giving evidence at this hearing regardless of the trip to India);

    c. The recording of the 9 May 2023 meeting suggests that Ms Gagandeep Chera was aware of the Claimant's holiday dates long before 8 April 2023. The Claimant referred to the discussion which took place in February and Ms Gagandeep Chera responded: "This is what I am saying: because you already planned your thing accordingly we cannot force you to come here you know";

    d. It is evident from the messages that the Claimant sent, soon after receiving her dismissal notice, that the reasons given for her dismissal had taken her by surprise. She said that it had specifically been agreed between her and Mrs Chera that she could return to work on 6 May 2023. She said "has anything changed in my absence" and "I don't know where this misunderstanding comes from". This is the most contemporaneous objective evidence that we have of what the Claimant says was agreed before she went on holiday; and

    e. The Respondent did not dismiss the Claimant until 2 May 2023, despite saying that it became aware for the first time, on 8 April 2023, that the Claimant was taking this period of leave. I expect that, had the Respondent genuinely become aware for the first time, on this date, that the Claimant planned to take more than two consecutive weeks holiday, it would have dismissed her before 2 May 2023.

85. I recognise that the Respondent had disclosed a completed holiday request form stating that the Claimant's request for holiday had been refused because the requested period exceeded two weeks. The Claimant vehemently denied having ever seen this. It is important that I resolve this dispute and to do so I have compared the credibility of the Claimant's evidence and the evidence of Ms Gagandeep Chera.

86. Throughout the entire hearing, the Claimant gave honest and credible evidence. She was not evasive when I asked her questions about matters which could damage her claim, for example, that no new holiday form was completed when the revised holiday dates were agreed. She also answered honestly when it was put to her that the contract of employment stated that no more than two weeks leave could be taken.

87. On the other hand, I have the following reasons to doubt the credibility of Ms Gagandeep Chera's evidence:

    a. Despite the findings that I made at the converted case management hearing on 3 October 2023, Ms Gagandeep Chera continued to maintain that the transcript of the 9 May 2023 discussion was not genuine. She gave evidence of her belief concerning the same under oath. This issue was, to the extent it could be, resolved at that preliminary hearing and, on the balance of probabilities, I concluded that there was nothing obvious about the recording suggesting that it had been manipulated. This decision was not appealed nor did the Respondent adduce any evidence, between 3 October 2023 and this hearing, of this recording being manipulated. In the circumstances, this was a very peculiar position for Ms Gagandeep Chera to adopt, especially so under oath. She appeared to be clutching at straws, potentially because of what I have concluded in the section below;

    b. There were very clear contradictions between Ms Gagandeep Chera's swron witness evidence about points which were discussed at the 9 May 2023 hearing and the transcript of that meeting. When Ms Gagandeep Chera prepared her witness statement, she had not had the benefit of the recording. Nevertheless, upon receiving and listening to the recording, she did not change her witness evidence before swearing it to be true during today's hearing. For example, in her witness statement, she said, "Additionally, the claimant mentioned in her form that I said in this meeting that I have already sent the dismissal letter to HMRC. I have never said this, you never send a letter to HMRC so I am not sure where she got this information from". However, as I noted earlier, during the 9 May 2023 meeting, the Claimant asked Ms Gagandeep Chera to take the dismissal letter back. Ms Gagandeep Chera refused stating: "No, the letter is already followed up. We already sent the letter to the Home Office, sorry not to Home Office to HMRC and to accountant to audit. So things are sorted. So P45 should be issued in the next few days and the last payslip also". Also, in her witness statement, Ms Gagandeep Chera said that she had spoken with the Claimant about the performance and time keeping concerns during the 9 May 2023 meeting. However, these do not appear at all in the transcript.

88. For these principal reasons, I have concluded that the completed holiday from that the Respondent sought to rely upon was never given to the Claimant. She had not been provided with a written document saying her leave request was refused because it was for a longer period than two weeks.

89. Despite the contractual position, I have concluded that a reasonable employer would have considered the oral agreement reached between the Claimant and Mrs Chera that the Claimant was, on this occasion, permitted to take more than two weeks consecutive leave.

90. Finally, in respect to the timekeeping allegations, a reasonable employer, even of the size of the Respondent, would not dismiss an employee for poor timekeeping without going through a warning escalation process. Although the Respondent says it had around eight meetings with the Claimant, this is denied vehemently by the Claimant and there is no objective evidence of it. Considering the conclusions reached above about the credibility of Ms Gagandeep Chera's evidence, I do not believe these meetings did take place. In any event, the Respondent's evidence was not that these were formal disciplinary meetings after which the Claimant received disciplinary sanctions.

In respect of the capability related allegations (namely the allegations of poor performance) did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? In particular:

Did the Respondent adequately warn the Claimant and gave the Claimant a chance to improve?

91. No, there is no objective evidence of the Respondent doing so. As stated earlier, Ms Gagandeep Chera said that around eight meetings with the Claimant took place however there is no objective evidence of this. Furthermore, the Claimant vehemently denies it. Considering the conclusions reached above, I do not believe these meetings did take place.

Was dismissal within the range of reasonable responses?

92. No. A reasonable employer, even of the Respondent's size and with the Respondent's resources, would not dismiss an employee for poor performance without going through a performance management process and/or some form of warning escalation process.

<u>Conclusions on Remedy</u>

93. The Claimant confirmed that she does not wish to be reinstated or reengaged. Instead, she seeks compensation.

Basic award

94. The parties agreed that the Claimant had four years' continuous service, that her age at her effective date of termination was 35 and that her gross weekly pay was £468.90. Therefore, her basic award is **£1,875.60.**

Compensatory award

95. The parties agreed that the Claimant's net weekly pay was £396.24.

96. The Claimant claimed 35.3 weeks immediate loss of earnings totalling £13,987.27. However, the Claimant gave credit for income she had received undertaking temporary work totalling £1,481.66. Her immediate loss of earnings claim was, therefore, for **£12,505.61.**

97. I have decided to award the Claimant this full amount. I am mindful of the legal test which includes that I need to decide what is just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

98. In particular I am mindful that the burden of proof is on the Respondent to show that the Claimant has failed to mitigate her loss. It is not on the Claimant to show that she has made reasonable attempts to mitigate.

99. There is evidence before me of the Claimant having searched for a range of different roles between her dismissal and August 2023. Subsequently she has undertaken some temporary work and given credit for the income received through such roles.

100. The Respondent criticised the Claimant in cross examination for her decision to apply for roles that were different to that which she undertook for the Respondent. I do not consider this to be a fair criticism. The Claimant has broadened her net to increase the prospects of her securing an alternative role. Additionally, the Respondent has not adduced any evidence of roles which were available that the Claimant ought to have applied for during this time.

101. Had the Claimant not been unfairly dismissed by the Respondent, she would have continued to receive her salary. In the circumstances outlined above, it is just and equitable for the Claimant to be compensated for these lost earnings.

102. The Claimant claims **£500** for loss of statutory rights. The Respondent raised no objection to this. This is in line with the award commonly made by the Tribunal and, in the circumstances, I see no reason why this award should not be made here.

103. The Claimant claims 7.9 weeks future loss of earnings totalling £3,130.30.

104. I have decided to not make this award. There is no objective evidence before me of the Claimant making attempts to find an alternative permanent position since August 2023. Her role is not a niche role and I expect, if she made greater attempts to find an alternative similar role from August 2023 onwards, she would have secured such a role by now. It would not be just and equitable for this award to be made.

ACAS Code of Practice on Disciplinary and Grievance Procedures

105. The Claimant also claims a 25% uplift arising from the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. I have decided that an uplift of 17.5% should be made. This amounts to **£2,275.98.**

106. The starting position is that this Code states that it applies to disciplinary and grievance situations. It states that disciplinary situations include misconduct and/or poor performance. The Code therefore does apply to this situation.

107. Firstly, I have considered whether there was a failure to comply with the ACAS Code. Secondly, I have considered whether that failure was unreasonable. Thirdly, I have considered whether it is just and equitable to uplift the compensatory award. Fourthly, I have considered what uplift I should apply between 0-25%.

108. In respect to the first point, I have considered that there was a failure to comply with the ACAS Code as follows:

a. Contrary to the ACAS Code, the Claimant was not notified in writing that there was a disciplinary case to answer before the decision to dismiss was made. The Code states: "This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification". This was not done at all;

b. The Code also states: "At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this". Again, this was not done at all. As there was no meeting, no right to a companion was offered; and

c. Contrary to the ACAS Code, the Respondent did not inform the Claimant that she could appeal if she was not content with the action taken. It did

not then follow an appeal process. As stated earlier, the 9 May 2023 was not an effective appeal process.

109. Secondly, I have concluded that it was unreasonable for the Respondent not to do the above. I recognise that the Respondent is a small organisation but that does not absolve it of its responsibility to undertake these basic steps before making such a significant decision, affecting the livelihood of an employee.

110. Thirdly, I do consider it is just and equitable to uplift the compensatory award. Had the Respondent undertaken these steps, the Claimant may not have been dismissed. She would at least have been given the opportunity to put up a defence to the allegations that the Respondent subsequently found.

111. Fourthly, I have considered what uplift should be applied. This is not a case where a 25% uplift is appropriate given that the Respondent did take some steps, for example, it did send the Claimant a letter confirming her dismissal and the reasons for it. It did also meet with the Claimant to discuss this, albeit this meeting wasn't an effective appeal meeting. Therefore, considering the Respondent's failures against the steps that the Respondent did take I have decided it is just and equitable to increase the compensatory award by 17.5%.

Contribution

112. The Respondent did not put forward a positive case that, if the Claimant's claim succeeded, a reduction should be made for contributory fault. Nor do I consider it appropriate in this case for such a reduction to be made, given the findings that I have made earlier.

Polkey

113. Similarly and finally, the Respondent did not put forward a positive case that, if the Claimant's claim succeeded, a Polkey reduction should be made. As with the above, nor do I consider it appropriate in this case for such a reduction to be made, given the findings that I have made earlier. There is no evidence before me to suggest that the Claimant would have been dismissed at some point in the future.

Employment Judge McAvoy Newns

9 February 2024