# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Christine Hinnells

**Respondent:** A J Ripley Limited t/a Minster Cleaning Services

**Heard at:** Leeds **On:** 4 April 2024

**Before:** Employment Judge D N Jones

**REPRESENTATION:**

**Claimant:** Mr Ryan Trueman, Son-in-law
**Respondent:** Mr Ripley, Managing Director

**JUDGMENT** having been sent to the parties on 8 April 2024 pursuant to a requested by the respondent under Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal sends the following:

# REASONS

## Introduction

1. This is a complaint of unfair dismissal. The claimant gave evidence. The respondent called Mr Ripley and Ms Jacqueline Cummings, Office Manager.

2. The Tribunal was provided with a bundle of documents which ran to 20 sections including two statements from the respondent's witnesses. The claimant did not submit a witness statement, but the Tribunal accepted her confirmation of the claim form as her evidence in chief and her account was as summarised in the documents in the bundle.

## The Law

3. 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).

4. 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.*

5. 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 the fairness of the process overall.

6. 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.

7. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

8. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

9. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[4]. This is often referred to a *Polkey* after the name of the case which established the principle.

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[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.
[4] Polkey v A E Dayton Services Ltd [1988] ICR 142.

10. Under Section 123(6) of the ERA, 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 the finding.

11. Section 207A(3) of the Trade Union and Labour Relations Consolidation Act 1992 provides, "*If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies, the employee has failed to comply with that code in relation to that matter and that failure is unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%*".

**Background/Facts**

12. The respondent is a company which offers cleaning services. It is part of a franchise with Minster Cleaning. The respondent employs approximately 100 staff. Mr Ripley is its Managing Director. It has no other managerial staff, but Mrs Cummings is the Office Manager.

13. The claimant commenced work for the respondent on 30 April 2014. She worked as a cleaner. I did not see her written terms and particulars, but I am told and accept that she was contracted to work for two hours per day from Monday to Friday in the cleaning of a GP surgery in Eccleshill, Bradford. That work had to be undertaken outside surgery hours, which would be before 8.00am or after 6.00pm.

14. On 27 September 2023 at just after 2.30pm the Practice Manager of the surgery where the claimant cleaned sent an email to Mr Ripley. It was a complaint about the standards of cleaning, and she said that there had been complaints more frequently and she specifically identified six matters. One concerned a tea mug mark on the floor of the clinical room and some uncleaned surfaces on desks, the fridge and microwave. She also made reference to the fact that the previous Saturday a gentleman and a young boy had attended with the claimant, and she expressed concerns from a security perspective.

15. Mr Ripley telephoned the claimant to arrange a meeting that day to discuss these concerns. The meeting was to be at 6.30pm. Mr Ripley arrived at 6.40pm. The claimant did not arrive on time and arrived at 6.45pm. They had a conversation about the concerns of the Practice Manager. The claimant did not accept the criticisms. The claimant says she gave an explanation as to why her husband and grandson had attended but Mr Ripley had called them "bastards" and told her she would be immediately dismissed if she brought them to the surgery again. He denied referring to them in that way.

16. At 7.30pm there was a conversation about cleaning the surgery before it opened the following day. There is a dispute as to what was said. It is that discussion which led to the disciplinary allegations, finding and dismissal.

17. Mr Ripley says that the claimant refused to continue with her work, left the premises and refused an instruction to clean the premises that day or before it opened. The claimant says that she had asked Mr Ripley to help because it was by

then getting late and that she would not be able to finish the work until it was very late. He refused and so she decided to leave. The claimant says she was tired and unwell. She says she took an inhaler for chronic pulmonary disease.

18. The claimant was suspended. A letter in confirmation was sent on 2 October 2023. Mr Ripley invited the claimant to a disciplinary hearing on 4 October 2023 at 6.30pm to address two allegations:

> *(1) that on the evening of 27 September 2023 at 19:30 you left your place of work without permission; and*
> (2) *that on that evening you failed to follow a reasonable management instruction in refusing to undertake the cleaning at your place of work*.

These were stated to be serious allegations which would be deemed to be gross misconduct if proven and might lead to the claimant's summary dismissal. The claimant was informed she could attend the hearing with a work colleague or trade union representative.

19. The claimant attended the hearing and expressed the wish to be represented by Mr Trueman. As he was neither a work colleague nor a trade union representative permission was refused. The claimant did not sign the records of the hearing either in respect of not having been accompanied by a suitable representative or confirmation of the short minutes of what had been said.

20. The evidence of the parties about this meeting is rather scant. Mr Ripley's witness statement in total runs only to three quarters of a page. The claimant has no witness statement at all. The minutes of the meeting were taken by Mrs Cummings who attended. She did her best to record what was said, but clearly this is only a short extract of what happened. They comprise a 1½ page document of a meeting which lasted at least half an hour and include the outcome. The claimant accepted in her evidence that what was there reflected part of what had been said. Her complaint is that they are woefully incomplete and do not contain many of the things which were said.

21. The short note records that the claimant said that she had asked Mr Ripley to stay and help with the cleaning, to which Mr Ripley had said no. She had said she was upset, felt unwell and wanted to go home. The claimant said she repeated this. There was some discussion about the issue concerning her husband and grandson and how Mr Ripley had referred to them. The claimant said that she had never gone out of her way not to clean and would have done the cleaning if it was not so late.

22. Mr Ripley took time to consider what action to take. He concluded that the claimant had not disputed the allegations, was culpable of gross misconduct and should be dismissed.

23. Mr Ripley wrote to the claimant on 5 October 2023 confirming his decision. He included an account of what she said in the meeting: That she had worked for the surgery for 9½ years without a problem. That there had been the discussion about the complaint from the Practice Manager which led him to visit the surgery on 27 September 2023. That he had called her husband and her grandson bastards. That she had alleged that Mr Ripley had bullied her. In respect of the allegations

themselves he recorded, *"You stated at the hearing that you brought our meeting of Wednesday to a halt and that by then you were tired and upset and that it was late. You also stated that you asked me if I would help you with the cleaning and that I'd refused. You also stated I suspended you and took the keys off you.*"

24. In his reasoning Mr Ripley acknowledged that the claimant had worked for the respondent for many years and had been a competent and reliable cleaner, although he qualified that by saying that there had been complaints about standards from the Practice in recent months. He said that the claimant had admitted she had not cleaned the floor. "*You did not call a halt to our meeting as you suggested. I did, just before 19:30. I concluded by telling you that I wanted to see an immediate improvement to the cleaning standards and that I would be undertaking a weekly inspection to ensure this was happening. You told me you would not be cleaning that evening as it was now late and when I asked you to confirm that you would be cleaning earlier the next morning you told me you would not be and would be continuing the cleaning the next evening as it was getting late. I made it clear that I expected you to undertake the cleaning that evening, and certainly before the surgery opened in the morning. You refused. You certainly did not ask me to help you with the cleaning. I suspended you and asked for the keys which you duly handed over… Christine, I do not accept your explanation that you were tired and upset as a reasonable excuse for refusing to undertake the cleaning at Eccleshill Village Surgery*."

25. He stated that the meeting should have only taken 15 minutes not 45 and that all that was needed was for her to apologise and then get on with it. He said that 7.30pm was not an unreasonable time for her to have to start the cleaning and that she knew someone else would have to do it. He had to arrange for two mobile staff to attend at 5.00am the following morning to clean the surgery. He concluded, "*Failing to follow a reasonable management instruction is very much a matter of gross misconduct and the manner in which these events have unfolded and your conduct throughout has been totally unacceptable. Accordingly I am dismissing you from the company with immediate effect. You will be paid up to and including today and you will also be paid for any holidays that are outstanding*."

26. The claimant submitted a notice of appeal on 12 October 2023 in which she said she was apologetic for her actions on 27 September 2023 and remorseful. When I asked her in evidence what she meant by that she said for having not done her duties that day. She explained her medical condition. The claimant did not pursue the appeal. One was arranged with Mr Goddard who works for another franchised company of Minster. It is not uncommon for Mr Ripley or Mr Goddard to exchange their services for the purposes of an appeal, and this had happened on a number of occasions in the past.

27. The claimant contacted ACAS for early conciliation and wrote to say she would not pursue the appeal because she was taking the matter to the Tribunal.

**Analysis of the Facts by reference to the Law**

28. The reason for the dismissal is what was in the mind of the decision maker, Mr Ripley, for ending the employment of the claimant? I have heard Mr Ripley's evidence and I accept that he believed the claimant had been culpable of a serious

act of flouting his instruction and not discharging her duties, by leaving the surgery on 27 September 2023 at 7.30pm and by not accepting his instruction to do the work.

29. That being the case, I have to consider the factors set out in section 98(4) of the ERA, set out above. Many of the allegations made by the claimant in this case concern inadequate procedures, and they are set out in the claim form at section 8.2 items 1-6.

30. In this respect I have regard to section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, set out above. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out basic standards for conducting disciplinary hearings. I deal with the four complaints in the claim form in order.

31. The first is that the claimant was given two days' notice to prepare for the hearing and legally she should have had ten. In that respect the relevant passages of the Code state:

> *"(9) If it is decided that there is a disciplinary case to answer the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence and may include any witness statements with the notification.*
>
> *(10) The notification should also give the time and the venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.*
>
> *(11) The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case*."

32. There is no reference in the Code to how many days are necessary or appropriate. That is because much will depend on the facts in issue. In this case I accept the submission of Mr Ripley that the allegations were straightforward. They were whether the claimant had left work when she should not have and whether she had unreasonably refused to do the work requested.

33. I do not consider that ten days would have been necessary for the claimant to prepare this case. The facts were relatively straightforward, and she would have been able to answer the allegations in any hearing two days later. The Code requires the meeting to be held without unreasonable delay so long as there has been reasonable notice. I am not satisfied the procedure in that respect was inappropriate.

34. The second allegation is that no investigation pack was sent prior to the hearing. I do not consider that the allegations were sufficiently complicated that the provision of an investigation pack was essential. It would have been better if Mr Ripley had made a witness statement and written down what he said had happened on the occasion so that the claimant could address it specifically. I shall come to the problems that led to in due course. However, he did send a notice in which the

allegations were set out and that was adequate for the purpose, in that it fell within a range of approaches that could be regarded as reasonable.

35. The third allegation was that "*Mr Ripley made the allegation against me, yet he chaired the hearing which is a major breach*". The Code does not specifically deal with this, but it does state, at paragraph 6: "*In misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing*". The Code is identifying the desirability of independence in decision making. This is a fundamental principle of natural justice which is recognised throughout the common law. He who accuses should not be the judge. He should not be a judge in his own cause. Rejecting one's own account in favour of another who contradicts it is unlikely. Wherever possible it is better if somebody who has not been involved in the events leading to the disciplinary hearing to be the decision maker.

36. That is not always possible. Small employers may have no one else to hold the hearing. Mr Ripley says this is one such case. This is a small company with a small management and no internal Human Resources function. Mr Ripley says there was really nobody else who could have made the decision. Mr Trueman says that that cannot be right because Mr Ripley had managed to ask an independent person to undertake the appeal.

37. Mr Ripley could have outsourced to specialist Human Resource advisors to provide an outsider to conduct a disciplinary hearing. Such an individual could only make a recommendation because they would not have the authority to impose any sanction. Mr Ripley would have that ultimate responsibility. But as with the appeal (whether it was Mr Goddard or anybody else), he could have committed to abiding by the recommendation. That is a course the Tribunal sees in other cases and is done to avoid the allegation that the employer was a judge in his own cause and therefore the hearing was unfair. Nevertheless, whilst other employers might reasonably have taken that step, I would not find to fail to do so was unreasonable. I must have regard to the fact that a broad range of approaches may be reasonable.

38. On this issue therefore I would not have found the dismissal to have been unfair. I would add a qualification. There is a responsibility on an employer who makes the allegation and conducts the disciplinary hearing to be at pains to ensure that the hearing is fair and can be seen to be fair. This is to avoid actual or perceived bias. That is necessary is every case, but when the person who is making the decision is having to decide between the account of himself and somebody else, it is very important that that decision maker sees the whole picture and demonstrates he has been objective. To this I shall return.

39. The fourth allegation is that the minutes of the hearing were minimal, which led to the claimant not signing them. I agree they were minimal. That is a concern. I am not satisfied that sufficient thought and consideration was given to what was said in this hearing. Such limited records meant that when Mr Ripley reviewed the case before he made his decision he had an incomplete account. Inadequate notes of a hearing of themselves would not make a dismissal unfair.

40. The fifth allegation is that there was no HR involvement. When an employer is conducting a process which can involve a dismissal of an employee (any

employee, let alone someone who has been there for nine years) they must ensure they abide by minimal standards. If they do not take the option of purchasing HR advice to comply with such standards of fairness, it may be to their cost. Not taking HR advice would not be a reason to find a dismissal unfair. It is whether in the absence of such advice the employer has met the standards required. Generally the respondent did follow the essentials of the ACAS Code of Practice. The claimant was provided with a letter inviting her to a hearing. The claimant was given adequate time to respond. There was a hearing at which she had the opportunity to express her view about the allegations. All of this met the basic requirements of the ACAS Code.

41. The sixth allegation is that there were no previous conduct issues within the workplace, which made the dismissal unfair. That is not really a procedural matter but goes to the consideration of whether the sanction was appropriate in all the circumstances. An employer could reasonably dismiss for an act of gross misconduct in the absence of any previous disciplinary sanctions, see paragraph 23 of the Code.

42. I am not satisfied Mr Ripley was sufficiently objective and fair in his approach and conduct of the hearing. There seems little doubt he was furious with the action of the claimant on 27 September. Mr Ripley had gone to her place of work because of complaints about her cleaning and the claimant had then left, leaving him in difficulty. It meant he could not comply with his client's contract without finding a substitute at very short notice. One can understand the anger Mr Ripley must have felt. Regrettably he was not able to set aside that reaction and deal with the disciplinary hearing dispassionately and fairly.

43. Mr Ripley failed to consider what the claimant had said. She said in the disciplinary hearing that she had been unwell. When I asked Mr Ripley about this during the hearing, he referred to the claimant having said she was upset and he had not considered that to be an adequate excuse. I had to draw Mr Ripley's attention, after two such responses, to the comment the claimant had made about being unwell as well as upset. In the outcome letter there is no reference to the claimant having said she was unwell. Mr Ripley's letter cites the claimant as having said she was tired and upset. The record of the hearing, on the other hand, short though it is, notes she had said she felt unwell and wanted to go home. This leads me to conclude that Mr Ripley had simply not taken on board the claimant's explanation of leaving work because of her health.

44. The failure to consider a significant part of the explanation meant the claimant's case was not fairly heard. Her state of health could have been relevant to the question of whether her actions constituted misconduct or gross misconduct. It could also have been a relevant mitigating factor, if accepted. The meeting on the evening of 27 September had taken 45 minutes. There was a heated disagreement leaving an hour and a quarter left for the claimant to do the work. If the claimant felt unwell as well as upset, adding to the pressure that the work could not be done in the limited time and so would require working longer and later, that would be an important context within which to evaluate the allegations. It would have been open to Mr Ripley to reject the suggestion that the claimant left work because she was unwell or that it was not sufficient mitigation to save her job, but he never put his mind to it at all.

45. For these reasons I have reached the conclusion that this was not a fair hearing. That approach fell outside a reasonable band of responses of a reasonable employer.

46. There was an additional failure to take a structured approach and consider the appropriate sanction separately to the finding. In the outcome letter Mr Riley made no reference in the penultimate paragraph to the mitigating features. He moved from finding a failure to follow a reasonable management instruction, being gross misconduct, to what he regarded as the inevitable sanction. Mr Ripley referred to the claimant's conduct throughout, which appears to be her accusation that he had accused her husband and grandson of being "bastards" and him being a bully. He did not appear to consider her nine years' service without any disciplinary misconduct at the stage of considering sanction. He had mentioned her length of employment earlier but that was when dealing with what the claimant had said generally. He qualified the claimant's statement that there had been no problems with her cleaning, but the point he did not acknowledge was that there had been no acts of misconduct in the past. A fair hearing requires separate consideration of the proper sanction and that was absent.

47. Applying the considerations in section 98(4) of the ERA the dismissal was unfair. That then means I turn to consider compensation. The claimant did not ask for reinstatement or re-engagement.

48. The parties did not make any submissions on *Polkey* with respect to adjustments to be made to the compensatory award. It had been identified by the Tribunal as an issue which would be considered. I did not need to embark upon an assessment of what might have happened had a hearing been fair in the absence of those arguments, because I was satisfied the other means of adjusting compensation reached the just and equitable sum to award.

49. The claimant walked off the premises when she was supposed to do her work. She seems to accept that she had not acted properly because she apologised and expressed remorse in the letter of appeal. She did not make reference to her health being a factor in her claim form, nor made any great significance of it during the hearing until it was drawn to the parties' attention by myself. It was raised at the disciplinary hearing though and I am satisfied it played a part in her leaving her work on the evening in question.

50. Taking those matters into account I am satisfied that the claimant's conduct by leaving her place of work should be taken into account in reduction of her compensation. Mr Ripley does not seem to have given thought to how the claimant would undertake the work in her contractual hours, given there was only an hour and a quarter left. He seems to assume that the claimant would simply work longer. This would have made her anxious if she felt unwell. But I am satisfied that leaving her place of work was a serious act which it would be inappropriate to ignore when I come to quantify compensation in this case. I have therefore concluded that the compensatory award and the basic award will both be reduced by 50% to reflect that conduct.

51. I am also going to reduce the award by 15% by reason of the failure of the claimant to pursue an appeal. It is said by Mr Trueman that the claimant was

seriously mentally unwell at the end and was not fit to do that, but she was being assisted by her daughter who had compiled the claim form and it may well have been the case that an appeal to Mr Goddard (who would have the fresh mind and objectivity to consider the matter fairly and in an unbiased way) would have led to her being reinstated and the appeal succeeding. The purpose of the ACAS Code of Practice and the obligation on the parties to comply with it is to avoid hearings like this, and it seems to me it is just and equitable therefore to reduce the award by a further 15% to reflect the claimant's failure reasonably to comply with the Code.

**Remedy**

52. The claimant seeks loss of earnings for six months. She says she has sought to mitigate her losses by applying to supermarkets, such as Morrisons and Tesco, and other agencies and has made an appointment with the jobcentre. The claimant has not been successful in any of her applications, and she says she has been hampered by the circumstances of her dismissal. The has extended her work to shop work and store assistants. Although Mr Ripley suggested that there was plenty of work for cleaners and he had a number of vacancies, I am satisfied that the claimant sought reasonably to mitigate her loss. I therefore consider that there are losses attributable to the dismissal of six months' loss of wages, being £2,704, that is £104 per week x 26 weeks to the date of this hearing.

53. I also add loss of statutory rights of £208, that being two weeks' earnings. That will be a subtotal for the compensatory award of £2,912. I must deduct the 15% reduction for failure to comply with the ACAS Code of Practice, being a reduction of £436.80. That leaves a subtotal of £2,475.20. A further reduction must be made of 50% to reflect the contributory conduct. That leaves a compensatory award of £1,237.60.

54. The basic award is £702. The claimant was over the age of 41 throughout her employment. She worked continuously for nine years. Her weekly wage was £104. The basic award would have been £1,404 but that has been reduced by 50% to reflect her conduct.

Employment Judge D N Jones

Date: 2 May 2024