EMPLOYMENT TRIBUNALS

Claimant: Mrs S Loofe

Respondent: Tamicare Ltd

Heard at: Manchester **On:** 4-5 November 2019
13 -14 October 2020

Before: Employment Judge Ainscough

REPRESENTATION:

Claimant: Ms Quigley (Counsel)
Respondent: Ms Elvin (Consultant)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal is successful.

2. The claim for wrongful dismissal is successful

REASONS

Introduction

1. The claimant was dismissed from her role as Director of Administration and HR Manager for the respondent, a company specialising in fabric manufacturing, on 29 November 2018. The claimant commenced early conciliation on 26 December 2018 and received an ACAS early conciliation certificate on 2 January 2019. The claimant presented her claims of unfair dismissal and wrongful dismissal to the Employment Tribunal on 20 February 2019. On 29 March 2019, the respondent submitted a response denying all claims.

Issues

2. There was an agreed list of issues:

   (1) What was the principle reason for the claimant's dismissal?

(2) Was the reason for the claimant's dismissal one of the potentially fair reasons in accordance with section 98(2)? The Respondent contends it was gross misconduct.

In particular, the respondent alleges that there were incidents of theft/fraud and ultimately a fundamental loss of trust and confidence due to the following allegations:

(a) falsification of holiday request forms, namely those dated 3 January 2018, 12 July 2017 and 21 November 2017, resulting in the claimant taking and receiving payment for annual leave that was not authorised;

(b) failure to calculate holidays on a Friday correctly (the respondent says the claimant calculated half a day when a full day should have been submitted);

(c) Failure to calculate the time taken off correctly in respect of May 2018 – July 2018 when the claimant's father was unwell and further not deducting this time from the claimant's holiday entitlement;

(d) Failing to devote the whole of the claimant's working time and attention to working hours;

(e) As a result of the above allegations, an abuse of power/position.

The claimant denies the above allegations and asserts that the actual reason for her termination was redundancy.

(3) Did the respondent hold a genuine belief in the claimant's misconduct, based on reasonable grounds following a reasonable investigation?

(4) Did the respondent carry out a sufficient investigation and was the decision pre-determined?

(5) Do the allegations against the claimant amount to gross misconduct and therefore a summary dismissal?

(6) In all the circumstances, including the size and administrative resources of the respondent, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant in accordance with section 98(4)?

(7) Was the claimant entitled to receive notice pay?

(a) the respondent says she was not as she was dismissed for gross misconduct;

(b) the claimant states she is entitled to 9 weeks' notice pay.

(8) What level of basic and compensatory award is the claimant entitled to?

(9) When should the compensatory award be calculated from, taking into account any award for notice pay?

(10) Has the claimant taken all reasonable steps to mitigate her losses?

(11) If the Tribunal find any flaws in the procedure, in accordance with Polkey what is the likely percentage that the claimant would have been dismissed in any event?

(12) Did the claimant contribute to the dismissal by way of culpable conduct? If so, what level of reduction to both the basic and compensatory award should be made in accordance with section 122 and section 123?

(13) Should there be any uplift in the award for failure to comply with the ACAS Code of Practice?

Evidence

3. The parties agreed a joint bundle of evidence. On 4 and 5 November 2019 Mr Shtrosberg, the Chief Operating Officer and Mrs Giloh, the co-owner of the respondent company, gave evidence. The hearing resumed part heard via cloud video platform (CVP). On 13 October 2020 the claimant gave evidence. I deliberated and gave oral judgment to the parties on 14 October 2020. The respondent's representative asked for written reasons in accordance with rule 62 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

The Law

4. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

5. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 and**
>
> **(b) that it is either a reason falling within sub-section (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 reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".

6. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

7. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

8. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

9. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Relevant Findings of Fact

10. Prior to the claimant working for the respondent she was self-employed. The claimant worked as the Director of Administration and HR Manager, 4.5 days per week. Between 2014 and 2016 the respondent did not have an Operations Manager. The respondent discussed with the claimant, the possibility of the claimant taking over this role. However, the claimant declined because it was not a role for which she had the skill set. The respondent needed an Operations Manager to develop the production side of the company.

11. In January 2016 Mr Shtrosberg was employed by the respondent as the Operations/Site Manager. The respondent operated an employee handbook which outlined the holiday entitlement of the employees. However, the handbook did not outline any particular procedure for requesting such holidays. It was established during the claimant's evidence that the respondent did operate a detailed holiday procedure but I was not provided with a copy of that procedure during the course of the hearing.

12. Throughout the claimant's employment she maintained control of the clocking on/off system and the Outlook calendar. Prior to Mr Shtrosberg joining, Mrs Giloh authorised employee holidays, but in 2016 this responsibility was transferred to Mr Shtrosberg. From 2016 Mr Shtrosberg was also responsible for the operational purchasing and finance. Mr Shtrosberg took the lead on HR interviews and control of the incoming post. In addition, he took over all marketing initiatives.

13. As a result, in July 2016 the claimant expressed concern to Mrs Giloh that her role had been reduced, and she informed Mrs Giloh that she was completing personal work when she had nothing to do. Mrs Giloh assured the claimant that the business would grow and she would have work to do.

14. The established procedure for requesting annual leave required a person to complete a holiday form, providing the cumulative total of holidays taken and to detail the requested period of leave. Once that form had been completed and discussed with Mr Shtrosberg, he would authorise it and the dates would be entered onto the system by the claimant.

15. In late 2017 and early 2018 the claimant was engaged on converting and updating the respondent's standard procedures. In 2018 for a period of two weeks, the claimant was responsible for sourcing packaging for products.

16. From May 2018 the claimant's father suffered a serious illness. The claimant was absent from her role for some hours of the working day to assist with his care. The claimant made up some of these hours by working some lunch breaks. Other hours were recorded on an absence form and placed in a file. The claimant had Mrs Giloh's authority for this absence. The claimant also took every Friday morning as annual leave, and she recorded this absence as half a day's annual leave.

17. During this period, when the claimant had completed her work for the respondent she completed personal work to assist her husband's business.

18. In July 2018 Mrs Giloh sent the claimant an email and asked if she was writing down all of the hours from which she had been absent to care for her father. The claimant ensured Mrs Giloh that she was adding them up and deducting the equivalent day's holiday from her cumulative total.

19. In September 2018 the claimant was on holiday in Spain and Mrs Giloh asked Mr Shtrosberg to investigate Mrs Loofe's leave entitlement.

20. In October 2018 Mr Shtrosberg asked the claimant to join the production line.

21. On 23 October 2018 the claimant attended a meeting with Mr Shtrosberg in which she was asked questions about her duties, the clocking system, the hours taken to care for her father and personal work. At that meeting the claimant stated she had correctly deducted the hours from her leave record and had conducted personal work in the respondent's time without permission.

22. Following the meeting Mr Shtrosberg suspended the claimant for wrong reports of holiday taken and private work during office hours. As part of the investigation Mr Shtrosberg looked at the claimant's holiday request forms.

23. Mr Shtrosberg identified three forms he considered to be fraudulent and took the view that the claimant was amending forms from previous years to take

unauthorised leave. Mr Shtrosberg also took the view that the claimant had not deducted hours she had taken when caring for her father as annual leave, and that the claimant had erroneously recorded her Friday leave as half a day rather than a full day. Mr Shtrosberg also found personal files on the claimant's computer. Mr Shtrosberg produced a report which included additional allegations.

24. Mrs Giloh received the report and instructed a third party consultant, Mr McCabe, to convene a disciplinary hearing.

25. On 20 November 2018 the claimant received a letter inviting her to this hearing on 23 November 2018. The claimant was informed of four allegations:

(1) The falsification of holiday sheets: the inaccurate recording of Friday leave;

(2) Leave taken for care of father and the failure to deduct leave taken for this reason;

(3) The personal work undertaken whilst working for the respondent; and

(4) A general abuse of power.

26. Prior to the start of the meeting Mr McCabe met with Mr Shtrosberg for half an hour.

27. During the meeting the claimant alleged that the allegations were a sham to avoid her redundancy. The claimant explained that the error on the holiday form dated 3 January 2018 was due to the fact that she had completed it in 2017, for 2018 leave, and had put 2017 by mistake. The claimant also highlighted that the form dated 12 July 2017 contained a similar error, but denied that the form was from 2017 because the leave would have been taken over the Jewish holidays.

28. The claimant asserted that she was told by the Plant Manager that she should record half a day’s holiday for Friday leave. The claimant explained how she had recorded the hours for the leave taken to care for her father, and had intended to deduct a day. The claimant admitted the failure to deduct the day and said this was an oversight. The claimant explained that the rest of the leave she had taken for this reason, had been made up in her lunchtime.

29. At the end of the hearing the claimant gave Mr McCabe a document setting out her response, which is recorded in his report.

30. Following that meeting Mr McCabe spoke to Mr Shtrosberg and Mrs Giloh. Mr McCabe was given two reports by Mr Shtrosberg.

31. Mr McCabe concluded that the claimant had falsified forms to obtain additional leave. He also concluded that the claimant had intentionally failed to calculate her Friday leave correctly and had intentionally failed to record the leave she had taken for caring for her father. Mr McCabe concluded that the claimant had conducted personal work during the working day and had generally abused her power.

32. Mr McCabe recommended the dismissal of the claimant for gross misconduct. Mrs Giloh accepted this recommendation on the basis that she did not trust the claimant, and the claimant was dismissed.

33. On 4 December 2018 the claimant appealed on the grounds that there had been a failure to interview witnesses, that not all allegations had been put to her, that her dismissal was unreasonable, mistakes were not seen in the context of the claimant's lack of training, that the respondent should have dealt with the issues informally, there was an avoidance of a redundancy situation and that no account had been taken of the claimant's previous good record.

34. On 7 December 2018 the claimant was invited to an appeal hearing by a third party consultant, Mrs Satterley.

35. On 10 December 2018 the Plant Manager sent an email saying that he had not advised the claimant about recording a half day for her Friday leave.

36. On 12 December 2018 the claimant attended the appeal hearing with Mrs Satterley.

37. On 18 December 2018 Mrs Satterley produced a report which concluded that the claimant had produced no new evidence to support her appeal, but Mrs Satterley did agree to look at the original holiday forms. The disciplinary appeal had raised issues that Mrs Satterley felt she had to speak to relevant witnesses about, but such discussions would have no bearing on the outcome of the appeal.

38. Mrs Satterley determined that the allegations in the letter of 20 November, had been discussed at the disciplinary hearing, and the finding was not unreasonable. Whilst Mrs Satterley could not find all the 2017 holiday forms, she was satisfied that there was sufficient evidence to support the decision to dismiss, notwithstanding that at the end of the appeal hearing, Mrs Satterley recommended that the sanction be downgraded.

39. Mrs Giloh accepted these findings and dismissed the appeal on 21 December 2018.

Submissions

Claimant's submissions

40. It is the claimant's case that her role had been eroded and the disciplinary was a sham to cover up a redundancy situation. The claimant contends that her suspension was pre-determined and there was no investigation of the allegations.

41. The claimant points to the existence of a report, the provenance for which the respondent could not account, as evidence of the lack of credibility on behalf of the respondent's witnesses. In addition, the claimant points to the alteration of the Outlook calendar and the lack of evidence justifying the respondent's explanation as further evidence of a lack of credibility.

42. It is the claimant's case that the respondent accepted the rationale of the third party consultant without question, despite knowledge of historical conversations and practices.

43. The claimant points to the lack of comparison of holiday forms as evidence of the sham allegations. It is the claimant's submission that both the disciplinary and appeals managers decided not to check the substance of the allegations, despite having clear evidence that they needed to do so. The claimant contends that the fact that neither manager gave evidence is telling of the respondent's deception.

44. In contrast the claimant submits that her account is truthful because she accepts that there were errors and that she performed personal work but, that the errors were redeemable and the personal work was authorised.

45. It is the claimant's case that the respondent failed to follow a fair procedure. The claimant submits that allegations were not put to her and the respondent failed to independently consider the conclusions of the process before reaching the decision to dismiss.

Respondent's submissions

46. It is the respondent's case the respondent had a genuine belief of the claimant's gross misconduct. The respondent believed the claimant had falsified her annual leave forms without credible explanation.

47. The respondent denied altering the Outlook calendar and contended that the claimant took advantage of the responsibility she had in maintaining an accurate record of leave.

48. It is the respondent's case that the claimant took unauthorised leave and conducted personal work during the working day. The respondent maintained that the claimant's role was not eroded and she performed important functions for the respondent.

49. The respondent submits that the claimant's role was not redundant because she worked alongside Mr Shtrosberg for three years and the business was expanding.

50. The respondent contends that it followed a fair procedure in accordance with the size of the business.

Discussion and Conclusions

The claimant's role

51. Prior to 2016 the claimant's role was so pivotal that the respondent asked her to be the Site Manager. For her own reasons, the claimant decided not to take this position.

52. Mr Shtrosberg was recruited, predominantly to push through the production side of the respondent's business, but also, Mrs Giloh admitted in evidence, to make managers work properly.

53. Following Mr Shtrosberg's recruitment the claimant's role drastically reduced to an administrative and HR function. The claimant told the respondent about this in 2016 and informed the respondent that she would be doing personal work when she had no other work to do. No objection was raised by Mrs Giloh. It was the claimant's evidence that her personal work had previously been encouraged by the

respondent when it suited the respondent to have the claimant on site in whatever capacity.

54. Mr Shtrosberg admitted in evidence that the claimant had been asked to work on the production line because she had nothing more to do, and this was evidence of the fact that the claimant's role had been reduced. The respondent had no objection to personal work conducted by the claimant until Mr Shtrosberg raised it directly with Mrs Giloh.

55. Authorisation of holiday requests passed from Mrs Giloh to Mr Shtrosberg. The procedure was a verbal discussion with Mr Shtrosberg, completion of the form, an Outlook invite and once accepted by Mr Shtrosberg, the entering of the dates by the claimant, onto the clocking on system. Mr Shtrosberg admitted that he only looked at the dates on the form not the tally. There was no evidence that the respondent's procedure required paper authorisation to change any dates that had already been authorised.

56. The claimant's evidence was that she always sent an invite to authorise leave, to which Mr Shtrosberg always responded. It was also the claimant's evidence that all leave she had requested was reflected on the Outlook calendar. The evidence I have seen is that the Outlook calendar was altered on 4 June 2019. It was the respondent's evidence that the change was needed to protect confidential client information but no such evidence was provided. The respondent was unable to rebut the claimant's assertion that her holiday records had been deleted.

57. The respondent's procedure was contained in an employee handbook. There is also an ISO procedure which the claimant said in evidence set out more detail of the annual leave procedure but this is not something that was produced by either party in evidence.

58. The claimant's desk was near to Mr Shtrosberg's desk and they agreed that they had a verbal discussion before the claimant entered the leave dates. Mr Shtrosberg admitted he had no issues with the claimant's leave until Mrs Giloh raised it with him. Mrs Giloh raised the concerns with the claimant initially in July 2018 and then with Mr Shtrosberg in September 2018.

59. In the run-up to July 2018 the claimant's father was seriously ill and the respondent had allowed the claimant to take ad hoc leave to care for him, provided the claimant deducted it from her leave allowance. The claimant had forgotten to deduct one day but had recorded the hours on a form and put the form in her leave record.

60. The claimant was self-employed prior to employment with the respondent and had no HR qualifications. The claimant admitted that her half day deduction for her Friday leave was based on her misunderstanding of pro rata hours. The Friday hours were not a concern to Mrs Giloh, at the outset of the investigation and only became an issue after Mr Shtrosberg queried the claimant's calculations.

61. Mr Shtrosberg had no knowledge of the ACAS Code of Practice and was reliant on external advice. He admitted that Mrs Giloh had not been concerned about personal work and he was the one that was concerned following observing the claimant stood at the scanner for over 40 minutes.

62. The claimant was not told that the meeting she was attending was an investigation meeting. The decision of suspension came immediately after that meeting and was predetermined. I am not convinced that the investigation report was prepared by Mr Shtrosberg. He does not recall writing it and it does not contain all of the allegations, yet was relied upon by Mrs Giloh to justify discipline. The report that was given to Mr McCabe at the meeting has not been separately produced and I am unaware as to when that was produced or whether Mrs Giloh relied upon that to justify the disciplinary hearing.

63. It is clear from the additional document that was given to Mr McCabe (page 122), that Mr Shtrosberg carried on the investigation after the investigation meeting, because that additional document contained new allegations that were not put to the claimant during the meeting. Mr Shtrosberg admits there was no comparison of the holiday forms and he was not aware of the existence of the 2017 forms until after the appeal.

Disciplinary Hearing

64. The claimant had approximately three days to prepare for the disciplinary hearing. Mr McCabe spoke to Mr Shtrosberg before the start of that hearing but there are no notes of that discussion. The claimant provided explanations to Mr McCabe and asked him to check the records. Mr McCabe did not do this. Mr McCabe also did not check when the Jewish holidays fell in 2017 and he did not speak to the Plant Manager to ascertain whether he had advised the claimant about the recording of Friday leave.

65. Mr McCabe spoke to Mrs Giloh but there is no note of that discussion, so I do not know if Mrs Giloh rebutted the claimant's explanation about the personal work or whether she agreed that the claimant had been allowed to make up her time in lunch hours. Mrs Giloh admitted in evidence that she did sanction personal work by the claimant at the respondent's place of business. It appears no account was taken of the claimant's personal difficulties from July 2018 onwards.

The Dismissal

66. The respondent simply rubberstamped the recommendation that came from Mr McCabe. There was no critical analysis or reflection of the claimant's explanation based on Mrs Giloh's own knowledge. Many of the practices the claimant is accused of performing were in place before 2016. Mr Shtrosberg was brought in to sort the managers out. There was no consideration of this context by Mrs Giloh when she took the decision to dismiss. Mrs Giloh believed what she was told by Mr Shtrosberg and Mr McCabe despite the claimant's previous good service.

67. The appeal did not correct all of Mr McCabe's defects. The forms were found, but there was still no comparison. The Plant Manager was spoken to; Mrs Giloh was spoken to but there is no record of the conversation, of what was discussed, or whether it would have made any difference to Mr McCabe's findings.

68. The reason for the claimant's dismissal was conduct. It was not a redundancy situation. The claimant and Mr Shtrosberg had worked together for three years and this had been an ongoing state of affairs from as early as 2016 when she complained to Mrs Giloh about the reduction in her role. There was a new production line and the respondent did believe that and the business would expand.

69. Mrs Giloh had concerns about the claimant's leave. Mrs Giloh had had a fraught year managing the claimant's leave to care for her father. Mr Shtrosberg was concerned about what the claimant was doing at work. He had been put in place to sort the managers out.

70. I have considered the case of **British Home Stores Ltd v Burchell [1978] ICR 303.**

71. There was no reasonable investigation. Neither Mr Shtrosberg nor Mr McCabe made any attempt to check any of the holiday forms or the Outlook calendar. Mrs Giloh was not spoken to about the previous working practices. There was no check of the Jewish holidays or a discussion with the Plant Manager prior to dismissal. Mrs Giloh simply rubberstamped the recommendations at each stage, including the appeal. There is no evidence she informed Mr McCabe or Ms Satterley of what practices existed before Mr Shtrosberg's employment. There was no account taken of the claimant's previous record or her lack of training.

72. The respondent did not have a genuine belief on reasonable grounds that the claimant was guilty of misconduct, and therefore the dismissal is unfair.

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Employment Judge Ainscough

Date 1 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 December 2020

FOR THE TRIBUNAL OFFICE