EMPLOYMENT TRIBUNALS

Claimant: Ms E Greenaway-Evans

Respondent: Countryside Properties (UK) Limited

HELD AT: Manchester **ON:** 8-10 August, 10 October (by CVP) 2022

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: Mr Daniel Walker, solicitor
Respondent: Ms Laura Callaghan, solicitor

REASONS FOR JUDGMENT MADE ON 10 OCTOBER 2022

Preamble

1. In a claim form received on 13 November 2020 following ACAS Early Conciliation that took place on 18 October 2020 the claimant, who was employed has brought complaints of unfair dismissal and wrongful dismissal. I gave judgment on 10 October 2022 that the claimant's claims for unfair dismissal and wrongful dismissal are well-founded. I was asked for written reasons.

Evidence

2. I heard evidence from the claimant on her own behalf. I also heard from Jennifer Dillon, a previous employee of the respondent who gave evidence on the claimant's behalf.

3. For the respondent I heard from Mr Gordon Innes, former Managing Director, Ms Helen Judson, senior Human Resources executive, and Mr Adam Daniels, a current Managing Director.

4. In the bundle there were *inter alia* copies of notes and documentation from the claimant's disciplinary process and termination, the claimant's employment contract, and copies of the respondent's disciplinary bullying policies.

Agreed issues

5. The issues were agreed between the parties:

Unfair Dismissal

A) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("the ERA")?

B) Was it related to the claimant's conduct?

i) Did the respondent genuinely believe the claimant to be guilty of misconduct and/or gross misconduct?

ii) Did the respondent have reasonable grounds upon which to sustain that belief?

iii) At the stage the belief was formed had it carried out as much investigation into the matter as was reasonable in the circumstances?

C) If yes, was the decision to dismiss the claimant fair in all the circumstances?

Wrongful dismissal

A) Did the claimant commit gross misconduct and therefore was the respondent entitled to dismiss her without notice?

6. The Tribunal was referred to an agreed bundle of documents totalling 341 pages, together with additional documents and case law. Having considered the oral and written evidence and oral and written submissions presented by the parties, I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

Facts

7. The respondent is in the business of building houses in the UK and employs around 1950 employees. The claimant started her employment there on 29 March 1999. At the time of her dismissal for gross misconduct on 29 June 2020, her title was Progression Manager.

Policies & Procedures

8. The respondent's "Harassment and Bullying Policy & Procedure – August 2019" and two versions of the "Disciplinary Policy and Procedure" are in the bundle.

9. Harassment is defined as including "verbal and written harassment through jokes, offensive language, gossip and slander or remarks that are stereotypical about a particular group;". Bullying is defined as including: "threats, abuse, teasing, gossip and practical jokes... humiliation and ridicule either in private, at meetings ...name calling, insults, devaluing with reference to age, physical appearance..."

10. In any event the claimant does not dispute the rules or her knowledge of them.

The claimant's act of misconduct

11. The allegations against the claimant arose after an exit interview on 12 March 2020. An employee named Bethany Keeley was recorded as making various

allegations of misconduct against the claimant, who had been her line manager. The interview was conducted by Ms Emma Breuilly in the respondent's human resources department.

12. There were four discrete allegations made at this time that were eventually upheld as gross misconduct, though the sources for each are not equal. There is no one comprehensive source of the allegations, or even of the exit interview itself. The sources include the respondent's exit interview form, handwritten notes that are accepted to be Ms Keeley's, and an email sent after the exit interview by Ms Emma Breuilly to Helen Judson and Molly Rooney containing Ms Breuilly's purported understanding of the allegations. Ms Breuilly did not give evidence or provide a witness statement.

13. The first allegation was set out only in the email by Ms Breuilly after the exit interview and is purported to be that the claimant inappropriately asked Ms Keeley the purpose of a medical appointment and upon Ms Keeley's return, said, "'how did you get on at your smear Beth, bet they didn't f''king find it''. In Ms Keeley's notes it states, "smear test" and there is no mention of this in the exit interview form.

14. The second allegation exclusively appears in Ms Breuilly's email and states that the claimant commented on Ms Keeley wearing the same shoes to work and commenting, "I bet you stink".

15. The third allegation comes from Ms Keeley's notes from the exit interview. The notes record, "When booking a holiday at Valentine's Day she proceeded to tell everybody I was 'shagging about'."

16. The fourth allegation also appears in the handwritten notes, and states that the claimant "Thinks it is appropriate to ask what age I lost my virginity in front of the whole team. When I didn't answer she said I must have been young and a 'slag'."

17. In the exit interview form, it is recorded that Ms Keeley claimed that she had lost significant weight, her hair was falling out and she had stopped going out due to anxiety from being bullied by the claimant. Other than one witness in the disciplinary process several months later stating that she thought Ms Keeley looked unwell, there is no corroboration for any of this. I observe that in Emma Breuilly's email sent to Helen Judson on the day of Ms Keeley's exit interview, 12 March, it states, "Beth gave a lot more examples"; none are given.

18. It is inexplicable that there is no single comprehensive record of the allegations. The respondent's case is cobbled together from the various sources and no attempt was apparently made to follow up or clarify any of the information with Ms Keeley. None of the allegations are dated.

19. Upon receipt of Ms Breuilly's email, Ms Judson then emailed Deborah Hughes, the Regional Sales and Marketing Director who was described as the claimant's manager, and suggested that Ms Hughes speak to Ms Keeley. Ms Judson also stated to Ms Hughes that, "I suggest we leave any kind of follow up until you are back in the business as any kind of action will be like lighting a box full of gunpowder and I think we need to discuss the next steps carefully."

20. Ms Judson gave evidence that her reference to “a box full of gunpowder” was a reference to Ms Hughes, who was on 12 March off work with a back problem, being back at work when the allegations against the claimant were investigated. This makes no sense and I reject it. I find that the “box of gunpowder” was a reference to the claimant’s disciplinary process, which at that stage had not begun. I find that at a minimum, Helen Judson and Deborah Hughes formed a view on the substance of the alleged allegations as early as 12 March 2020, the day of Ms Keeley’s exit interview. I find that from this stage through to the appeal stage, the seriousness of the allegations was treated as evidence that they happened, irrespective of the lack of any substantive corroboration.

21. Ms Hughes did respond to Ms Judson’s email on 12 March, and stated that she would arrange to meet with Ms Keeley. There is no evidence that this happened. There was no further clarification of Ms Keeley's purported complaints from her. No-one spoke to Ms Keeley about the allegations at any stage after the exit interview.

The disciplinary process

22. I accept that the onset of the COVID pandemic in March 2020 could have delayed the timing of the investigation process. The business continued trading during that time and none of the relevant employees were furloughed.

23. Ms Hughes sent the claimant an email on 11 June 2020 inviting her to a meeting “to discuss Beth’s exit interview”. There is no indication that it is related to any disciplinary process.

24. The next day, Ms Hughes confronted the claimant with Ms Keeley’s allegations. According to the minutes of that meeting, it was only after putting the allegation regarding the smear test to the claimant that the “exit interview notes” were handed over to the claimant. It is unclear which document this refers to, since the smear test allegation does not appear in the respondent’s exit interview form. The other allegations were put to the claimant, with no clarification of whether they arose from the interview itself, Ms Keeley’s handwritten notes, or Ms Breuilly’s interpretation of what she had purportedly been told. The allegations were put as they had been set out in Ms Breuilly’s email of 12 March, and therefore were significantly hearsay.

25. The claimant denied the specific allegations and explained the context of some of the conversations that had taken place out of which the allegations may have arisen. Some other allegations purportedly arising from the exit interview that were not ultimately upheld against the claimant were also discussed and the claimant denied them.

26. After the disciplinary hearing, meetings were held with two employees who worked with or near the claimant and Ms Keeley. One of the interviewees, Ms Samantha Bolshaw, preferred to remain anonymous at that stage, but later consented to her name being unveiled.

27. In summary, neither of the people interviewed in the respondent’s initial disciplinary process provided substantive corroboration for Ms Keeley’s allegations.

They did give some context for the purported conversations in which some of the allegations were based, but the information given was dissimilar to Ms Keeley's allegations. Ms Billie Cannon's responses confirmed that the conversation about Ms Keeley's shoes had taken place, but quoted the claimant as saying something quite different than what Ms Breuilly recorded Ms Keeley to have claimed. The interviewees were asked leading questions and the claimant's version was not put to them.

28. The witnesses were also asked leading questions such as whether they felt that the claimant gave them adequate praise, what the claimant's telephone manner was like and similar questions. No questions about the allegation regarding Valentine's Day was put to the interviewees at all. That was the entire extent of the investigation at that stage.

29. The claimant was invited to a disciplinary hearing to take place on 26 June 2020, conducted by Mr Gordon Innes with Helen Judson present. The claimant invited Ms Clarie Onions, a Senior Sales Administrator, to support her and the respondent accepted this. The claimant was also accompanied by Ms Jennifer Dillon, an Executive Assistant. The minutes of this meeting state that it was put to the claimant that there were discrepancies between the responses the claimant gave to Ms Hughes on 12 June 2020 and what Ms Cannon and Ms Bolshaw said. It was also put to the claimant that the interviewees, referred to as "witnesses", confirmed Ms Keeley's version of events. I find that this is not accurate or fair; the interviewees did no such thing. The agglomeration of allegations derived from the various exit interview documents were never systematically put to the interviewees, or indeed anyone in the disciplinary process, and they did not confirm Ms Keeley's version. The claimant denied the allegations when they were put to her.

30. In his evidence, Mr Gordon Innes said that the two witnesses had corroborated the allegations Ms Keeley made. But I find that the witnesses did no more than relay what Ms Keeley told them. Mr Gordon gave evidence that the claimant accepted some of the allegations in the disciplinary hearing, but the minutes do not reflect this. The claimant acknowledged that there was a culture of what was described as 'banter' in the office, and that there had been conversations that she accepted were not appropriate. I find that these are not admissions to the allegations made, and were simply explanations of the context in which the allegations may have arisen.

31. The disciplinary hearing was adjourned for Mr Innes to gather further evidence. He later spoke to Ms Tracey Ward, who sat in front of the claimant in the office and said that she heard none of the claimed allegations. Mr Innes also spoke to Ms Hughes, who denied that there was banter in the office of a sexual nature at all. Ms Hughes did not give evidence to the tribunal, but it became clear in the course of the hearing that Ms Hughes had been disciplined some years before for her use of inappropriate sexual language, and admitted to both Mr Innes and Mr Adam Daniels that she had used sexual and other inappropriate language on multiple occasions recently.

32. I reject this thread of the respondent's case. It was clear from the evidence given to the tribunal as well as from the respondent's investigation that there were incidents of language and commentary, referred to as 'banter' by the interviewees, of a sexual or obscene nature in the office. While general use of such language would

not excuse gross misconduct, there is no evidence other than that contained in the exit interview documents, not all of which came from Ms Keeley, that the claimant directed such language at her.

33. Ms Cannon was re-interviewed by Mr Innes and claimed that the claimant was the only person at management level who used sexual language or banter in the office. I prefer the totality of the other evidence including that of the claimant and other employees of the respondent, interviewed in the disciplinary process, who accepted that such conversations took place routinely at higher levels. I also find that on the evidence available to the respondent at the time, there was no reasonable basis for forming a reasonable belief in the allegations of gross misconduct.

34. The disciplinary hearing was reconvened on 29 June 2020. After hearing a short response from the claimant to the further interview evidence, Mr Innes found the four allegations proved, as well as one other allegation that was reversed in the claimant's appeal, and found several other allegations not proved. The result was the claimant's dismissal as of 29 June 2020.

35. Mr Inness gave evidence to the tribunal that he found the allegations proved to the balance of probabilities. I find that with respect Mr Innes' understanding of this standard of proof does not bear scrutiny. In cross examination the various discrepancies between witnesses and lack of evidence generally were put to him, and he accepted in particular instances that his conclusions were unsustainable. He returned to the assertion that the allegations were proved, but I find that the evidence against the claimant was not capable of showing that, and there was no adequate investigation to determine whether they took place in the circumstances claimed by Ms Keeley.

36. Mr Innes evidence, and the respondent's case, depends on maintaining an incompatible dichotomy, which is that on one hand, the number of allegations and their seriousness indicated that they were true, or at least that the claimant was behaving badly enough in some way to merit dismissal for gross misconduct, even if the evidence that the investigation uncovered did not support individual allegations. On the other hand, Mr Innes and the respondent maintains that each of the four allegations were individually proved and capable of resulting in dismissal for gross misconduct. I find that neither is capable of being shown by the evidence available to the respondent at the time. I find that the respondent treated the seriousness of the allegations as evidence *per se*.

37. I further find that Mr Innes was content to make assertions that supported his conclusions that were not credible. For example, Mr Innes asserted that he wrote 80% of the dismissal letter. Helen Judson later confirmed that she, as a senior human resources executive, drafted the letter for his approval. In another example, it was put to Mr Innes that there was no evidence that Ms Keeley's hair was falling out at all. Mr Innes responded that if all the witnesses said it was true then he accepted it. But none of them did.

38. The claimant appealed against her dismissal. Her appeal was conducted by Mr Adam Daniels, a Managing Director at the same level as Mr Innes but from a different region. An appeal hearing took place on 24 July 2020. The claimant provided a

detailed statement setting out her appeal grounds and was again accompanied by Ms Jennifer Dillon. After a short appeal meeting, Mr Daniels adjourned to speak to further potential witnesses.

39. Mr Daniels did not put anything specific to any of the interviewees, but asked what it was like to work with the claimant. Mr Daniels spoke to Mr Tony Clayton, who had nothing to say about the allegations but confirmed there was “workplace banter”. Mr Daniels asked no clarifying questions about what Mr Clayton meant by banter or whether it was of a sexual nature. Mr Daniels then interviewed Mr Rob Sidwell, who said something similar, and who was also not asked to clarify. Mr Daniels spoke to Ms Marianna Knight, who worked in a different office, and she said that she found the claimant rude, but said that she could not comment on any concerns about the way the claimant interacted with her own team. Mr Daniels also spoke to Ms Claire Darby, who had nothing to say about any of the relevant allegations, despite saying that she sat close to the claimant in the office. She related complaints that Ms Keeley and Ms Cannon had reportedly made to her about issues such as commissions and holiday time that were not upheld against the claimant as misconduct. Mr Daniels then spoke to Mr Phil McHugh who said little more than that the claimant’s interaction with him was consistent with the “general humour around the office”.

40. Mr Daniels spoke to Ms Hughes, the claimant’s manager, and again asked her about various issues related to the claimant's management practices. Despite making various comments that were unrelated to the misconduct investigation, she had nothing to say about the relevant allegations. Mr Daniels also spoke to Ms Leighton Clare who said that the claimant could be difficult to work with but knew nothing about the relevant allegations. Ms Clare also implied that there was a culture of ‘banter’ in the office and said that the claimant was no worse than anyone else. Mr Daniels finally spoke to Mr Andy Dwyer whose comments about the claimant were positive.

41. Mr Daniels subsequently provided the claimant with the largely irrelevant commentary from the various interviewees. The claimant gave a detailed response. He then went back to Ms Hughes and sought her comments in writing. This exchange dealt with their history and various claims about incidents that purportedly took place over the preceding years. Ms Hughes admitted several instances of using sexualised language and discussing other employees’ personal or medical information in the office. I find that her admissions clearly belie her earlier assertion in her email of 12 March that she was mortified by the allegations about the claimant's language.

42. Mr Daniels wrote to the claimant on 1 September 2020 and found that there was a “pattern of behaviour” by the claimant. Mr Daniels said that some of the interviewees had indicated that “[Ms Keeley] was unhappy” and in terms stated that the seriousness of Ms Keeley’s allegations constituted gross misconduct. He wrote that some interviewees confirmed that the relevant misconduct allegations happened, which I find is not accurate. None of the interviewees were witnesses to the allegations, and were not even asked about them.

43. In his evidence, Md Daniels said that he sought information from people who worked with the claimant at her level or in the “same way” in order to get a broader view on the office culture. The appeal conducted by Mr Daniels failed to ameliorate the defects of the respondent’s investigation. Mr Daniels’ investigation in effect did

nothing more than seek context for the allegations, through further interviews with people who were not witnesses, and did not address the fundamental failures of the investigation up to that point. Mr Daniels' appeal was in my view no more than a consideration of potential mitigating factors and was of no real consequence.

Law

44. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

45. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

46. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

47. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

48. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

49. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In

order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

50. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

51. With reference to the first issue, namely, the respondent can establish that the sole or principal reason for the dismissal was the claimant's conduct, a potentially fair one in accordance with sections 98(1) and (2) of the ERA, I am not persuaded that the sole reason was conduct. I find that at a minimum, Helen Judson and Deborah Hughes formed a view on the substance of the alleged allegations as early as 12 March 2020, the day of Ms Keeley's exit interview. The allegations were based substantively on hearsay, and no attempt was made to distinguish between the allegations actually made by Ms Keeley and those filtered through Ms Breuilly. The respondent had no reasonable grounds for forming the belief that the claimant had committed gross misconduct.

52. With reference to the next issue, namely was the investigation reasonable, I found that it was not. The respondent's investigation was inadequate and not capable of reaching a reasonable conclusion that the claimant was guilty of gross misconduct. The investigation made no effort to clarify which allegations came actually from Ms Keeley instead of Ms Breuilly's hearsay. Perfunctory interviews that, at their highest, gave dissimilar, hearsay information were treated as direct corroboration. At all stages, the unquestionable seriousness of the allegations was itself treated as evidence. Irrelevant issues, such as the claimant's telephone manner or alleged abrasiveness with staff in other offices was also treated as corroboration. The respondent's witnesses were obdurate about the office culture of banter that their own investigation showed was rife. The claimant's explanations were baselessly treated as admissions. The respondent's investigation was inadequate and not capable of reaching a reasonable conclusion that the claimant was guilty of gross misconduct.

53. Having conducted an objective assessment of the entire dismissal process, including the investigation, without substituting myself for the employer, and having regard to equity and the substantial merits of the case, the dismissal fell outside the band of reasonable responses open to employer in all the circumstances of the case. The claimant's claim for unfair dismissal is well founded.

Wrongful dismissal / Notice pay

54. Regarding wrongful dismissal, the issue is whether the respondent can prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice. I found on the balance of probabilities that it could not, based on the shortcomings of the respondent's investigation and disciplinary process set out above. The claimant had not repudiated her contract and it continued to bind the respondent.

55. The respondent was in breach of contract when it dismissed the claimant, and her claim for wrongful dismissal is well-founded.

Employment Judge Ficklin
Date: 3 February 2023

REASONS SENT TO THE PARTIES ON

3 February 2023

FOR THE SECRETARY OF THE TRIBUNALS