EMPLOYMENT TRIBUNALS

Claimant:
Ms Clare Louise Bellamy

Respondent:
Denton Nickels (UK) Ltd

Heard at: Sheffield **On: Friday 1 March 2019**

Before: Employment Judge R S Drake

Representation
Claimant: In Person (not represented)
Respondent: Ms Jane Stockton Wood (Office Manager)

JUDGMENT

1 The Claimant's complaint of unfair dismissal succeeds, and she is awarded a Basic Award of £2,700 and a Compensatory Award of £1,540.40 all aa scheduled hereto

2 The Claimant's complaint of breach of contract succeed but her damages are subsumed within the Compensatory Award for unfair dismissal.

3 Because this decision was given extempore after deliberation and is now promulgated in greater detail, I have decided to exercise my power under Rule 62 to set out reasons in full as below

REASONS

Introduction

First, I record my gratitude to the parties for their effective and in some cases disarmingly candid presentation of their respective cases, helpful and co-operative advocacy, and also very helpful preparation of the presentation of documentary

evidence and the presentation of Final Oral Submissions despite the fact both were not legally represented.

Issues

I determine that the issues to be examined (though some were more or less relevant than others as will become apparent) were agreed as follows: -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed.

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts it was a reason relating to conduct under s.98(2)(b) ERA 1996;

1.3 If the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Did the Respondent (i) genuinely believe the Claimant was guilty of misconduct, (ii) did they have reasonable grounds for such belief and (iii) had they identified such grounds after undertaking as much investigation as would be carried out by another reasonable employer?

1.3.2 In short was this decision to dismiss in accordance with the three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondent act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996)?

1.3.4 Was the Claimant, as she alleges, denied her right under section 10 or the Employment Relations Act 1999 ("ERelA") to be accompanied at all relevant stages of investigative and disciplinary procedure by a Trades Union representative or work colleague of her choice and was she given a right to appeal?

2 Wrongful Dismissal/Breach of contract

2.1 What was the Claimant's entitlement to notice, including any provision for payment in lieu?

2.2 Was the Claimant dismissed without due notice?

2.3 Did the Claimant agree to waive any entitlement to work her notice period and be paid in lieu of notice instead?

2.4 Can the Respondents establish that on a balance of probabilities the Claimant herself had committed a breach or breaches of contract such as to justify summary dismissal?

3 Remedy

3.1 If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. This was not a live once I reached my conclusions as set out below.

3.2 The standard of proof required is the usual civil law standard and thus that of a balance of probabilities.

<u>The Law</u>

4. The law applicable to this case is set out principally in Section 98 of the Employment Rights Act 1996 ("ERA") which provides:

"(1) In determining for the purposes of this Part whether 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 subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee…."

(2) A reason falls within this subsection if it

(a) ……..
(b) It relates to conduct … "

5 If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) Depends 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."

6 In the event of a Claimant's complaint under Section 111 ERA being successful, a Tribunal is to consider Section 118 ERA as to what award it should make, either as a Basic Award under Section 119 to 122 and as a Compensatory Award under Section 123.

For the purposes of this case where the provisions of Section 119 most particularly apply, the provisions of Section 122(2) provide as follows:

(2) Where the Tribunal considers that any conduct of the Claimant before the dismissal….was such that it would be just and equitable to reduce or further reduce the amount of the Basic Award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

7 The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office and HSBC Bank –v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

8 Further, the decision of the EAT in **Budgen v Thomas [1979] ICR 344** is authority for the proposition that a dismissal may be unfair if an employee has not been given notice in advance of a disciplinary hearing of the potential consequences such as dismissal.

The Facts and Reasons for the findings thereof

9 The Tribunal made the following findings of fact based upon evidence that it heard from the Claimant herself and the Respondent's Office Manager Mrs Stockton Wood. Each was thoroughly cross-examined, and I commend both parties as their own representatives for giving candid and frank evidence even where it damaged their own positions. The Tribunal also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to it, the contents of two documents bundles comprising over 200 pages. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

10 Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses and documents in bold type page numbers in the Evidence Bundle (**CP** for the Claimant's bundle and **RP** for the Respondents' bundle) or paragraphs in witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

9.1 C was employed by R at their location in Doncaster and at the time of the termination of her employment by them had been engaged (by them or their TUPE transferor predecessor) since 2012 (**Pleadings - P4 of the ET1 and P2 of the ET3**). At the time of dismissal, she held the post of Administration Assistant/Planner, though this role had developed somewhat by the effective date of termination (3 August 2018) and she was engaged in administration of a number of contracts including one for the provision of services to a location called Berneslai Homes in Barnsley ("the Barnsley Contract") which by all accounts did not progress well for R and was the cause of considerable concern because of customer dissatisfaction with finishing of certain works (**RP132**) This gave rise to R calling C to a first disciplinary meeting which took place on 10 July 2018. C was given a brief description of the reason for the meeting in a letter dated 6 July 2018 (**CP12**) and it advised of her right to be accompanied. C was criticised for poor administration of ensuring good finishing of works and the outcome for this was expressed as a final written warning dated 19 July 2019 (**CP13**). There was then a second disciplinary meeting called for 3 August 2018 by letter dated 1 August 2018 (**CP14**) again advising of the right to be accompanied, at which time R made a finding of described as in their words "financial misconduct" and they summarily dismissed C. More details follow.

9.2 R had inherited C's Contract of Employment (**CP1** to **CP10** inclusive) from a TUPE predecessor and that contract refers to a Disciplinary and Grievance Procedure, though none was produced in the bundles before me today and no description of the scope and extent of C's role and in particular her accountabilities and responsibilities has been produced. Therefore, I cannot make any finding as to the degree of responsibility she owed contractually apart from what is implicit in her job title.

9.3 There are few conflicts of evidence in the considerable volume of documentary (200+ pages) and oral evidence before me. I find the accounts of what happened, and the chronology of events described by the parties to be persuasive and cogent. Furthermore, I find their accounts of what they had in mind and the sincerity of their attention to what was said to them by C to be convincing to the required standard of proof being a balance of probabilities. I do not find any aspect of their testimony, or anything said by C, who took little issue with their accounts of events, to be such as to impeach their credibility.

9.4 The chronology of events is as follows but with my further findings about them duly added: -

9.4.1 Letter calling first Disciplinary meeting 6 July 2018;

9.4.2 First Disciplinary Meeting – final warning given 19 July 2018 for poor management of finishing the Barnsley Contract;

9.4.3 Letter calling second Disciplinary Meeting 1 August 2018

9.4.4 Grievance raised by C and scheduled to be heard at Disciplinary meeting

9.4.5 Second Disciplinary meeting preceded by Grievance meeting 3 August 2018 – outcome of summary dismissal for "financial misconduct"

9.5 At the second Disciplinary, I note that the Minutes (**RP104 to RP108**) refer extensively to discussion of matters relating to an 8th application for payment under the Barnsley Contract being calculated and collated incorrectly, and it casting doubt on earlier calculations but that the earlier ones needed to be checked which could only have taken place after dismissal was concluded and communicated on 3 August i.e. the same day;

9.6 C admitted errors in calculations leading to the application for payment but explained that these were caused by domestic stress and work stress caused by lack of support and each aggravating the other, but R didn't accept this; her explanation which in terms showed that she did not perpetrate errors deliberately or without trying to apply due care was not challenged by R, so may be regarded as at worst careless and in any event at best explicable though regrettable;

9.7 In her mind, the decision maker Ms Stockton Wood considered consequence rather than cause, and she concluded that the errors were a cause of serious consequences in the loss of the prospect of future work from the customer, the knock on effect on R's fortunes and its capability to employ its staff and its longer term financial viability; on this basis she characterised the making of errors as "financial misconduct" given C's previous good record of calculating applications without error; in short Ms

Stockton Wood concluded that the consequences of such errors gave R a fair and valid basis for concluding that the errors were reckless and thus gross negligence of a conscious and culpable kind or so careless as to merit summary dismissal, without referring to the errors as gross misconduct as such using that terminology;

9.8 Ms Stockton Wood didn't put to C that her conduct was gross misconduct by either using that form of words or describing the concept thereof by any substantive description, and she did not give her an opportunity to understand at any stage that her employment was at risk, so C was unaware of the jeopardy in which she stood in preparing for the second Disciplinary meeting, and further despite her requests, she was expressly denied access to the documentary and other financial records relied upon by R to be a basis for their concerns until she was confronted by such evidence literally at the meeting and at no time before then;

9.9 Immediately, R dismissed C and in the dismissal letter dated 3 August 2018 (**C27**) they make no more reference to the cause of dismissal other than using the term "financial misconduct" to describe the reason and it is expressed as a sole reason, despite R today arguing that it should be seen cumulatively with the previous causes for concern otherwise dealt with in the first Disciplinary; C appealed but was unsuccessful and thus brought this claim;

9.10 It is noted that at both hearings, C was given the right to be accompanied and thus her claim under this head fails, but without affecting the substantive findings otherwise expressed above.

Conclusions on Application of Law to Facts

10 I find that R has shown that C was dismissed because of a reason relating to conduct which is the reason they had in mind for dismissal. My further findings in this respect are as follows: -

10.1 R reached this conclusion after the second Disciplinary meeting which was called without full explanation of what was being discussed, the fact that an adverse conclusion could lead to dismissal, and without C being given access to the evidence which R relied upon against her. This makes summary dismissal unfair on no fewer than three separate but cumulative procedural bases, and so unfair as to make the conclusions reached manifestly unsafe as a basis for dismissal.

10.2 I find accordingly that the conclusion to dismiss did not fall within a band of reasonable responses the Tribunal would expect from another reasonable employer in the same circumstances.

10.3 I find that errors in calculation in this case were not evidenced by anything other than, at worst, minor carelessness (minor measured by

reference to intention and not consequence) and at best unfortunate mistake. Statute and case law do not regard anything short of virtually deliberate error or reckless negligence as enough of a basis for finding that misconduct in committing calculation errors amounts to be being gross misconduct. Gross misconduct according to all the decided authorities is the only legally valid and fair basis for terminating someone's contract without notice and in this respect all the authorities require that "gross" means the most serious form measured by reference to intent and mental state of the perpetrator of the misconduct, not the arbitrary measure of the consequences. A person may be justifiably and fairly dismissed for gross misconduct even if the consequences are not serious but not vice versa. In short, the Tribunal cannot find that the reason thus relied upon in the second Disciplinary as a basis for dismissal was a sufficient reason on the facts of this case.

10.4 R has shown to my satisfaction that it had not conducted a fair and reasonable procedure in leading up to and reaching a conclusion to dismiss, since it also conflated the misconduct already dealt with in the first Disciplinary with the so called financial misconduct canvassed in the second disciplinary and therefore imposed a double penalty for C's actions which led to the written warning after the first disciplinary. This was manifestly unfair;

10.5 However, the Tribunal accepts that C was advised of her right to be accompanied at all relevant stages so her claim under section 10 ERelA fails and is dismissed.

11 A significant test, as in all unfair dismissal cases, is as set out in **Iceland** and is based on what **an** other reasonable employer might do (emphasis added) not what it might not do, nor what many or all employers would do. The outcome of dismissal was one which in this case and in this Tribunal's finding potentially fell outside the bounds of what an other reasonable employer would do in the same circumstances. The dismissal was therefore unfair.

12 The Tribunal further concluded that R has not established that had it followed a different procedure, C would still have been dismissed in a way that another reasonable employer would dismiss, as it has not been established that another reasonable employer would dismiss.

13 The Tribunal is also satisfied that C's errors do not amount to breach of contract on her part given the findings as to her unchallenged explanation. Thus, the claim of wrongful dismissal (that is, in breach of contract) succeeds in respect of notice and/or pay in lieu as it is not countervailed by R establishing breach of contract by C.

14 I find that the quantum of C's loss has been simply and fully calculated and because R hasn't challenged it, I make the Awards as set out in the Judgment section above.

Employment Judge R S Drake

Date: 11 March 2019

FOR THE TRIBUNAL OFFICE