



EMPLOYMENT TRIBUNALS

Claimant: John Murray

Respondent: (1) CNN Communications Limited

(2) Nexus Fibre Solutions Limited

Heard at: Bristol Employment Tribunal

On: 14 & 15 February 2022

Before: Employment Judge Gibb

Representation

Claimant: Mr Piddington (Counsel)

Respondent: Mr Waters (Solicitor)

RESERVED JUDGMENT

1. The Claimant's employer at the time of his dismissal was the Second Respondent.
2. The Claimant was unfairly dismissed by the Second Respondent.
3. The Claimant contributed to his dismissal by his conduct and there should be a 25% reduction to both the basic and the compensatory awards.
4. The Claimant's claim for wrongful dismissal succeeds and he is entitled to notice pay of one month's wages.
5. The Second Respondent failed to provide a written statement of terms and conditions of employment and the Claimant is entitled to be paid two week's wages.

REASONS

Introduction

1. The hearing took place remotely over two days. The Claimant was represented by Mr Piddington and the Respondents were represented by Mr Waters. There was an agreed bundle (154 pages). I heard evidence from the Claimant himself and the Respondents' four witnesses: Ashley Adams, Tracey Castle, Mike Rogers and Mike Reavley. At the start of the hearing, the parties agreed that we were to proceed on the basis of the Claimant's List of Issues. The parties both confirmed that they did not wish me to apply the 'Polkey' principles in this case. In his submissions, Mr Waters conceded on behalf of the Respondents that the Claimant had not been provided with a written statement of his terms and conditions of employment.
2. Mr Piddington and Mr Waters provided me with oral submissions at the end of the evidence which I have considered carefully.

Claims and Issues

Identity of C's employer

3. There is an issue between the parties as to the correct identity of the Claimant's employer, hence he has joined both Respondents. As at September 2018, the Claimant was employed by the First Respondent. At that time, the Second Respondent was not registered under its current company name and could not have been his employer.
4. It is clear that there is a degree of fluidity in the Respondent companies' inter-relationship. Both Respondents form a group of companies under the umbrella of Verevo Limited. At page 79 of the bundle, is a benefits overview in the name of CCN and there is a document indicating the Claimant's salary increase dated May 2019, also on CCN headed paper. However, the Claimant's payslips from 2021 at page 145 of the bundle show that his wages were being paid by the Second Respondent. Most compellingly, starting at page 142 of the bundle, his P45 which was completed by the Second Respondent, shows that his employer was Nexus Fibre Solutions Limited. There is no evidence as to when his employment changed from CNN to Nexus and I am not asked to determine this point. In the circumstances, I am satisfied that Nexus Fibre Solutions Limited was the Claimant's employer at the time of his dismissal.

Unfair Dismissal

5. The parties agree that the Claimant was dismissed summarily on 5 February 2021. The Claimant says that his dismissal was unfair in accordance with section 98 of the Employment Rights Act 1996 ("ERA"). The Claimant states firstly, that there was an ulterior motive for his dismissal, namely the recovery of his shareholding in the Second Respondent and secondly, that the dismissal was procedurally unfair in a number of ways. He also claims

that he was wrongfully dismissed and that he did not receive the notice pay to which he is entitled.

6. The Second Respondent asserts that he was dismissed fairly pursuant to his misconduct in accordance with s 98(2)(b) of the ERA. The Second Respondent states that it had a genuine belief in his misconduct and that it was based upon reasonable grounds and as such was entitled to dismiss without notice by reason of gross misconduct.

Wrongful Dismissal

7. The Claimant states that he was wrongfully dismissed and is entitled to his notice pay.

Failure to Provide Written Terms & Conditions of Employment

8. During the course of the hearing, the Second Respondent conceded that the Claimant had not been provided with written terms and conditions of employment as required under the ERA.

Contributory Fault

9. The Second Respondent asserts that the Claimant's conduct prior to dismissal was such that it would make it just and equitable to reduce the basic and / or compensatory awards pursuant to sections 122(2) and / or 123(6) of the ERA.

Findings of Fact

10. On 3 September 2018, the Claimant commenced employment with the First Respondent as a Business Unit Lead. At the same time, he was provided with 25 B Ordinary shares in the Second Respondent ("the Shares").
11. The Claimant was subject to the terms and conditions of the Second Respondent's Employee Handbook. This contained a Harassment and Anti Bullying Policy and a Disciplinary and Dismissal Procedure. The disciplinary procedure included a provision for gross misconduct which stated:

"If, after investigation, it is confirmed that an employee has committed an offence of the following nature (the list is not exhaustive), the normal consequence will be dismissal without notice or payment in lieu of notice:

- *Theft*
- *Damage to property*
- *Fraud*
- *Incapacity for work due to influence of alcohol/illegal drugs*
- *Physical violence*
- *Bullying and gross insubordination*
- *Bringing the company into disrepute*

While the alleged gross misconduct is being investigated the employee may be suspended, during which time he or she will be paid their normal pay rate. Any decision to dismiss will be taken by the employer only after full investigation.”

12. On 23 October 2019, there was an altercation between the Claimant and another employee Rick Atkins which took place at work. The Claimant apologised for the incident. The matter was dealt with internally and no disciplinary action was taken against the Claimant.
13. The Claimant was the line manager of Senior Engineer Mike Rogers. The Claimant was aware that Mr Rogers used his company vehicle outside work hours and at weekends. On 16 June 2020, the Claimant issued Mr Rogers with a written warning in relation to unauthorised use of his company vehicle. However, Mr Rogers’ brother Eddie Noone, who also worked for the Second Respondent, intervened and spoke to the director Ashley Adams. Mr Adams was the Claimant’s line manager and told him to rescind the written warning and apologise to Mr Rogers, which he duly did.
14. On 4 December 2020, the Claimant sent an email to Alex Blake, who was a junior member of staff based at the Bournemouth office. The email read:

*“Hi bud,,
I know I haven’t got back to you get about your mail to Me, please accept my apologies. I will but now I need your help, this has to stay between us, only us. Mike Rogers, he’s bad and gets away with shit, I need to send him to you, I’d like you drive him hard, hard, hard, don’t let him leave without letting you know and make sure he gets worked hard, please keep this between us.*

John”

(“the December Email”)

15. Mr Blake did not respond to the Claimant but forwarded the email to his manager who in turn sent it to Mr Adams on 10 December 2020.
16. On 11 December 2020, Mr Adams was scheduled to have a meeting with the Claimant. Mr Adams repurposed this meeting and asked Tracey Castle, the Second Respondent’s HR consultant and Mike Reavley, another director, to attend. Mr Reavley was there to take notes. When the Claimant arrived, Mr Adams showed him a copy of the December Email. Mr Adams informed the Claimant that this email could be construed as bullying and gross misconduct and that it was to be the subject of further investigation. Mr Adams suspended the Claimant and removed his company mobile phone.
17. In a letter dated 11 December 2020, the Claimant was asked to attend a further meeting on 7 January 2020 to hear the outcome of the investigation.
18. On 6 January 2021, the Claimant contacted Mrs Castle to say that he was unfit for work due to anxiety and depression and enclosed a GP sick note.

On 7 January 2021, Mrs Castle emailed the Claimant and asked him to attend a meeting on 21 January 2021.

19. On 21 January 2021, the Claimant attended a zoom meeting with Mrs Castle and Mr Adams. The Claimant was not expecting to be questioned about the email and the meeting was adjourned to 25 January 2021 to allow him time to prepare.
20. On 24 January 2021, the Claimant emailed Mrs Castle with a further GP sick note and informed her that he was not well enough to attend the rescheduled meeting. It was therefore rescheduled for 5 February 2021.
21. On 4 February 2021, the Claimant emailed a statement to Mrs Castle and informed her that he would not be attending the meeting the next day. He said that if she required any clarification or to ask any additional questions, she should do so in writing.
22. The following day, Mr Adams sent the Claimant a letter dated 5 February 2021 in which he was dismissed for gross misconduct.
23. On 17 February 2021, Matthew Skilton, director of the Second Respondent, executed a stock transfer form to transfer compulsorily the Claimant's Shares back to the Second Respondent.
24. The Claimant duly issued these claims on 4 May 2021.

Relevant Law & Conclusions

Unfair Dismissal

25. Employees have the right not to be unfairly dismissed and enforcement of that right is by way of a complaint to the employment tribunal in accordance with section 111 of the ERA. Section 98 of the ERA deals with the fairness of dismissals and provides:

(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 subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(b) relates to the conduct of the employee.

...

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.”

26. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the employer shows that it had a potentially fair reason, the tribunal must consider whether it acted fairly or unfairly in dismissing for that reason. Misconduct is a potentially fair reason for dismissal under section 98(2).
27. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances 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.
28. Where the dismissal is said to be based upon the employee's misconduct, it is necessary for the tribunal to consider the guidelines set out in the case of *British Home Stores v Burchell* [1978] IRLR 379. The tribunal must therefore decide (i) whether the employer genuinely believed that the employee had committed the misconduct (ii) whether the employer held such genuine belief on reasonable grounds and (iii) at the time the belief was formed had it carried out a reasonable investigation. In considering all the circumstances of the case, the tribunal must determine whether the act of dismissal fell within the 'range of reasonable responses' available to an employer acting reasonably. It is not for the tribunal to decide for itself what it would have done in the circumstances, thereby substituting its view for that of the employer: *Iceland Frozen Foods v Jones* [1982] IRLTR 439.
29. What is reasonable in terms of the investigation into the misconduct will depend on all the circumstances of the case. Where conduct is admitted, a less rigorous investigation might well satisfy the standard of reasonableness.
30. The ACAS Code of Practice on disciplinary and grievance procedures provides valuable guidance to the fair process to which the tribunal must have regard when assessing fairness and I have had regard to that Code in this case.

Wrongful Dismissal

31. I must be satisfied that the Claimant fundamentally breached his contract of employment by committing an act of gross misconduct, justifying summary dismissal. If I am not satisfied of this, the Claimant is entitled to his notice pay.

Failure to Provide Written Statement Terms & Conditions of Employment

32. As this is admitted, I must decide the appropriate remedy for breach of section 1 of the ERA.

Contributory Fault

33. The ERA provides a statutory basis on which compensation payable for unfair dismissal may be adjusted.

“Section 122: Basic award: reductions

(2) 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, the tribunal shall reduce or further reduce that amount accordingly.”

Section 123: Compensatory award

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

34. Where a claimant has engaged in conduct which has caused or contributed to the dismissal then this may be reflected by the making of such reduction to the basic and compensatory awards as is just and equitable.
35. Where, in proceedings relating to a matter covered by a relevant Code of Practice, a tribunal considers that either an employer or an employee has unreasonably failed to comply with the Code, any award made may be increased (in the case of a failure by an employer) or reduced (in the case of a failure by an employee) by up to 25% (section 207A TULRCA 1992).

Conclusions

What was the reason for the dismissal and was it a potential fair reason?

36. The Second Respondent maintained that it dismissed the Claimant on the grounds of gross misconduct. The dismissal letter is unclear as to the specific grounds but did state that the Claimant was being dismissed for gross misconduct. The December Email was the trigger for the investigation and I accept Mr Adams' evidence that he was treating it as a very serious incident. Mr Adams was the decision maker and he says that he was focused upon the sending of the December Email, the October 2019 altercation and whether this constituted a pattern of behaviour.
37. The Claimant maintained that the real reason for his dismissal was to obtain a transfer of his Shares in the Second Respondent. Prior to 7th of January meeting, it was clear that there were email discussions about what might happen to the Claimant's shareholding. The Claimant said that these emails show that the Second Respondent had an ulterior motive in dismissing him.
38. There are two email chains set out at pages 150 and 151 of the bundle. These showed that Mr Skilton along with other senior members of the Second Respondent were discussing what might happen to the Claimant's shareholding in the event that he was summarily dismissed. It is clear that Mr Adams was included in these email chains and was aware of the

contents. Whilst it was clearly precipitous for the Second Respondent to be discussing the Claimant's shareholding prior to the conclusion of any investigation and disciplinary process, I accepted Mr Adams' evidence that he simply wanted to know what the position would be if the Claimant were to be dismissed.

39. There was also the issue of the October 2019 altercation. The Claimant said it should not have formed part of the decision making as the Second Respondent decided to take no further action at the time. The allegation was that the Claimant had not only verbally assaulted Mr Atkins but that he had also physically assaulted him as well. The Claimant denied that he had physically assaulted Mr Atkins, however, in the bundle there was a detailed contemporaneous written statement from Mr Atkins himself as well as two contemporaneous statements from other employees who supported Mr Atkins' version of events. I note that the Claimant's statement of apology at page 83 of the bundle accepted responsibility for the altercation. There was no suggestion in that document that he did not physically assault Mr Atkins.
40. Whilst the Second Respondent chose to take no action against the Claimant at the time, no doubt because of the mitigating circumstances he put forward, I believe it was unrealistic to think but Mr Adams would not have these events in his mind when he was considering a further allegation of bullying. I consider that Mr Adams was entitled to include this earlier altercation in his decision making.
41. I therefore accepted Mr Adams' evidence that the reason for the Claimant's dismissal was his misconduct arising out of the sending of the December Email and the previous altercation with Mr Atkins. For the reasons already given, I also find that this was a genuine belief.

Did the Respondent have Reasonable Grounds for that Belief? Had it Carried Out a Reasonable Investigation?

42. In this case these two considerations are inexorably linked. The ACAS Code requires necessary investigation of potential disciplinary matters without delay. However, I find that Mr Adams failed to inform the Claimant as to all the subject matters being considered during the disciplinary process. Although, at the outset, the investigation was concerned with the December email, the Claimant was not informed until much later in the process that the altercation with Mr Atkins was also forming part of the investigation.
43. I also find that Mr Adams believed that the Claimant's attitude towards Mr Rogers was racially motivated but that this concern was never put to the Claimant during the investigation and he was not afforded the opportunity to address this particular allegation. There was a screen shot of an email from Mr Blake, but otherwise no further evidence of the investigation was presented. At the hearing, the Claimant was asked whether he had singled out Mr Rogers because of his race on a number of occasions, however, it remains the case that this serious issue was not raised with the Claimant during the disciplinary process.

44. For completeness, I should note that the allegation that the Claimant singled out Mr Rogers on the grounds of his race is first raised in paragraphs 17 and 28(3) of the Defence. A further serious allegation that the Claimant made a racist comment about Mr Rogers to another member of staff Joe Uden, was raised in Mr Rogers' witness statement as hearsay. Mr Uden was not called to give evidence despite remaining employed by the Second Respondent. The Claimant was not cross examined on this comment. It was not put to Mr Adams that this formed part of his decision-making and he did not refer to it in any documents or his witness statement. In the circumstances, I am unable to give any weight to the allegation and have disregarded it for the purpose of this judgment.
45. The ACAS Code states that where possible the disciplinary and investigative stages should be conducted by different people and this is intended to be a safeguard of fairness. Such a separation of roles means that the person who conducts the hearing can review the evidence impartially and to consider whether it was fair. Mr Adams accepted that there were other senior employees who could have conducted either the investigation or the disciplinary hearing. The Second Respondent therefore failed to comply with ACAS Code in circumstances where it would have been practicable for it to do so. The fact that Mr Adams dealt with both stages of this process meant that there was no objective overview of the investigation.
46. In addition, the ACAS Code makes it clear that the investigatory meeting should not result in disciplinary action, but again I find that this happened here. The Second Respondent's procedural failings are further compounded by my finding that the decision to dismiss was taken prior to the 5th of February. Mrs Castle admitted in evidence that the dismissal letter had been written the preceding day, being 4 February. It is therefore clear that Mr Adams had made the decision to dismiss prior to 5 February and it was therefore predetermined.
47. The Claimant also complained that he was not afforded the opportunity to be accompanied at the various meetings. I do not accept this as correct, as the right to be accompanied is clearly set out in the letters sent to him. The Claimant also stated that he did not appeal the decision to dismiss because he believed that many of the senior management were involved in the decision-making process. I do not accept this argument either. The Claimant would not have known at the time that Mr Skilton, for example, was involved in discussing shareholding issues. The Claimant could have written to the Second Respondent to explain that he would not be appealing because he felt he would not get a fair hearing; but he did not do so.
48. Mr Waters on behalf of the Second Respondent made the point that the Claimant failed to give any good explanation as to why he sent the December Email. He also says that the Claimant failed to engage with the investigation process.

Was the Decision to Dismiss within the Range of Reasonable Responses Open to a Reasonable Employer in All the Circumstances of the Case?

49. In considering whether the decision to dismiss in this case was within the range of reasonable responses open to an employer I bear in mind the provisions of section 98(4) of the ERA. I remind myself that the Second Respondent did not properly put all the matters to the Claimant at the time, that it failed to conduct a reasonable or fair disciplinary procedure as set out above and that there is no evidence to show what consideration if any the Second Respondent gave to the range of sanctions available to it. I also note that the decision to dismiss was predetermined.

50. In all the circumstances, the decision to dismiss summarily was not within the range of reasonable responses open to a reasonable employer in this case.

Should any Compensation Awarded to the Claimant be Adjusted to Reflect Contributory Fault?

51. Mr Waters said that as a result of the Claimant's bullying, the sending of the December Email, his non-co-operation with the investigation and saying that he had no recollection of sending the December Email, that the Claimant brought things on himself and that there should be a reduction of up to 100% for contributory fault on both the basic and compensatory awards.

52. The Claimant accepted that he was aware of the terms of the Employee Handbook. The Claimant also accepted that he wrote the December Email having consumed alcohol and that therefore he did not remember sending it. In my view, the Claimant did not engage sufficiently with the investigation and did not give an adequate explanation of the reason for sending the December Email. Overall, I consider that it would be appropriate to reduce both the basic and compensatory awards by 25%.

Wrongful Dismissal

53. The Claimant was dismissed without notice and brings a breach of contract claim for his notice pay. I must decide for myself if he committed an act of gross misconduct entitling the Second Respondent to dismiss without notice. In my view, whilst the December Email is hard to understand I do not consider that it was bullying towards Mr Blake nor, that of itself, it constituted bullying or harassment of Mr Rogers. The only evidence put forward as regards Mr Blake was a short, undated and unsigned document presented by way of a screenshot. Mr Blake did not give evidence in these proceedings and there was little explanation provided by the Second Respondent as to why this email constituted bullying or harassment towards him. As regards Mr Rogers, he was not the recipient of the email. Based on these reasons, I do not consider that it was a fundamental breach of the employment contract in this instance which would justify summary dismissal. The Claimant's claim for wrongful dismissal therefore succeeds and I find he is entitled to be paid his notice pay.

54. Neither party addressed me on the appropriate period of notice. However, on page 79 of the bundle there is a document which sets out that his notice period was one month and I award the Claimant his wages for that period accordingly.

Failure to provide written statement of terms and conditions of employment

55. The Second Respondent accepted that no written statement of employment particulars was provided to the Claimant. In accordance with section 38 of the Employment Act 2002, I must award compensation to a worker where the employer is in breach of this duty following a finding of unfair dismissal.

56. Neither party made submissions in relation to the level of award for this head of claim. I am not aware of any just and equitable circumstances which may affect the award I make. I note that the Claimant had a record of the key terms and conditions as well as his salary both of which are at page 79 of the bundle. I also note that the Claimant was provided with an employee handbook. In the circumstances I will award the minimum amount of two week's pay.

57. At the end of the evidence, I discussed potential time frames for the remedy hearing with the parties and we agreed to list any remedies hearing on 5 May 2022. However, on reflection I consider 28 days for the Claimant to confirm his position on reinstatement would leave insufficient time for the preparation of the remedies hearing and of my own volition I have reduced this to 21 days. Should the parties wish to challenge this period, they may make further representations to the Tribunal in writing.

CASE MANAGEMENT ORDER

1. The Claimant is to notify the Second Respondent and the Tribunal within 21 days of promulgation as to whether he is pursuing a remedy of reinstatement or re engagement.
2. 14 days thereafter, the parties to disclose all the documents upon which they wish to rely.
3. 14 days after disclosure, the parties to agree a bundle of documents for the remedies hearing.
4. 14 days after the bundle is agreed, the parties to exchange their witness statements.
5. The matter is listed for a remedies hearing on 5 May 2022 with a time estimate of 1 day.

6. Reserved to Employment Judge Gibb.

Employment Judge K Gibb
Date: 17 February 2022

Reserved Judgment & reasons sent to parties: 28 February 2022

FOR EMPLOYMENT TRIBUNALS