



EMPLOYMENT TRIBUNALS

Claimant : Mr Mario Nicolas

Respondent: Philips Accountants (Southgate) Ltd

Heard at: Watford Employment Tribunal **On:** 11th May 2023

Before: Employment Judge Young (sitting alone)

Representation

Claimant: In person

Respondent: In person, Mr Papaphilippou (Director)

JUDGMENT

It is the decision of the Tribunal:

- (1) The Claimant was unfairly dismissed.
- (2) The Claimant was wrongfully dismissed.
- (3) The Respondent shall pay compensation to the Claimant of £10,384.50 not £9610 as set out in my oral judgment, made up as follows:
 - a. A basic award for unfair dismissal of £5,048
 - b. A compensatory award for unfair dismissal of £2,812.50
 - c. Wrongful dismissal award of £2,524.00.
- (4) The recoupment provisions do not apply.

REASONS

Introduction

1. The Claimant was employed as the Respondent's Payroll clerk/ Bookkeeper from 3 September 2012. The Claimant is claiming unfair dismissal and wrongful dismissal. The Claimant presented his claim form on 29 October 2022. The Respondent responded to the claim on 29 November 2022.

Hearing & Evidence

2. The case was listed for 2 days. Neither party were legally represented and Mr Papaphilippou the director for the Respondent appeared for the Respondent. Both parties agreed that they wanted to finish the case on day 1. The Claimant provided additional emails correspondence between him and Mr Papaphilippou on the morning of the first day of the hearing covering the period of 14-22 September 2022. Later in the hearing the Claimant produced a further 4 emails that included screen prints of the Claimant's email box of adverts for jobs that the Claimant applied for and responses to his applications. The Respondent made no objection to the late disclosure of the documents and was provided with copies of the documents.
3. At the end of the evidence the Respondent made an application for a postponement on the grounds that he was not provided with documents in accordance with the ET's orders, in particular the order dated 20 February 2022 requiring the Claimant to provide a schedule of loss. I heard the Respondent's application and refused it on the grounds that it was not in the interest of justice and there were no exceptional circumstances, the Respondent had received the ET1 which included the Claimant's schedule of loss. The Claimant's case had not changed. The Respondent had sufficient time to instruct a solicitor and call witnesses to attend.
4. I heard oral submissions from both parties. The Claimant denied that he had committed gross misconduct, he wished to have continuous service from 1997 but accepted that he had no evidence that there was a nexus of ownership between the parties. The Respondent stated that there was no nexus of ownership between the Respondent and the company Phillips Enterprises. Mr Papaphilippou said that if the ET found against the Respondent all the staff would be made redundant by next Friday.

Issues

5. There was no agreed list of issues. At the start of the hearing, I discussed the issues with the parties I needed to decide. The issues were agreed in the case as follows:

Unfair dismissal

- 1) What is the date of dismissal?
- 2) What was the reason or principal reason for dismissal was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996")?
 - a. The Respondent says the reason for dismissal is misconduct as alleged-
 - i. On 14 September 2022, the Claimant threw files down in the Director's office in front of other members of staff,
 - ii. On an unspecified date the Claimant called a client "stupid"
 - iii. In or around 6 months before the dismissal in March 2022 the Claimant told a colleague to "F off".
 - iv. In the last 2 years staff felt threatened and vulnerable because of the Claimant.

- 3) If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
- a. the Respondent genuinely believed the Claimant had committed the alleged misconduct.
 - b. there were reasonable grounds for the belief the Claimant committed the alleged misconduct: -
 - c. At the time the belief was formed the Respondent had carried out a reasonable investigation;
 - d. The Claimant's case is that:
 - i. the Respondent acted in a procedurally unfair manner in that the Claimant should never have been dismissed because of what happened on the day and shouldn't be allowed to bring the past into it.
 - ii. the Respondent otherwise acted in a procedurally unfair manner in that the Claimant did not receive any written warnings,
 - iii. the Respondent otherwise acted in a procedurally unfair manner in that the Respondent should have had a discussion with the Claimant before dismissing.
- 4) Was the dismissal within the range of reasonable responses?
- 5) If the Claimant was unfairly dismissed: -
- a. What basic award is payable to the Claimant, if any?
 - i. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
 - b. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - i. What financial losses has the dismissal caused the Claimant?
 - ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the Claimant be compensated?
 - iv. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the Claimant's compensation be reduced? By how much?
- 6) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8

- 7) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 8) Did the Respondent unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, is it just and equitable to increase the amount of compensation by up to 25% to reflect such unreasonable failure by the Respondent?

Wrongful dismissal / Notice pay

- 9) Did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?
 - a. The Respondent says the accumulative effect of all the Claimant's misconduct was gross misconduct.
 - b. The Claimant doesn't accept that his conduct was gross misconduct.
- 10) What was the Claimant's notice period?
- 11) Was the Claimant paid for that notice period?
- 12) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 13) Did the Respondent unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, is it just and equitable to increase the amount of compensation by up to 25% to reflect such unreasonable failure by the Respondent?

Findings of Fact

6. I make the following findings of fact based upon a balance of probabilities. The Respondent is a small business run by Mr Papaphilippou who is the Director of the company and the principal. The company has 8 employees including Mr Papaphilippou. The business is run informally. There is no one in the company who is equal to or more senior than Mr Papaphilippou. On 14 September 2022, an incident arose where the Respondent asked the Claimant about completing payroll files for new customers. The Claimant responded that there was no additional space for the files. Mr Papaphilippou instructed the Claimant to put the files down on the floor. It was alleged that the Claimant threw down the files. Mr Papaphilippou was not happy with this. Mr Papaphilippou told the Claimant not to bring the files into his office and said to the Claimant "if you are going to be like that take your things and go and find another job".
7. When the Claimant got home, he emailed the Respondent to ask whether he had been dismissed or not. The following day on 15 September 2022, the Respondent emailed the Claimant to say that "*Further to your email you have been dismissed for gross misconduct. You were warned before about your behaviour with the clients, members of staff and myself and this behaviour is not acceptable.*" The Claimant responded by email the same

day requesting an appeal with an independent manager. The Respondent did not answer this request nor set up an appeal but responded by email dated 22 September 2022 saying, *“did you or did you not call clients stupid, did you or did you not say to a member of staff to f’off, did you or did you not throw the files in my room on the day of your dismissal?”*. The Respondent also attached the Claimant’s P45 to that email.

8. The Respondent agreed that the Claimant was dismissed on 14 September 2022 he also agreed he did not follow a procedure or put any warnings in writing or send letters to the Claimant. I accepted the Respondent’s evidence on these points. The Claimant disputed throwing the files although he agreed he had done all the other matters raised in the Respondent’s email. I accepted the Claimant’s evidence on this point.
9. In evidence Mr Papaphilippou also referred to the Claimant making staff vulnerable and feel threatened as a reason why he dismissed the Claimant. However, under cross examination he was unable to refer to anyone other than the one employee, Eleanor who complained that the Claimant told her to f’off. The Claimant said he was provoked to say f’off. The Claimant accepted in evidence that he did call a client stupid. When asked about when the misconduct of the Claimant first came to the Respondent’s attention, Mr Papaphilippou said it had been going on for the last 2 years and that the Claimant was late by 15- 20 minutes every day and that the Claimant was on his mobile and texting for at least an hour each day and on the work computer for non-work related matters. The Respondent accepted in evidence that he never spoke to the Claimant about any of these matters. The Claimant did not accept that he was late everyday but late on some occasions or inappropriately use his mobile phone or workstation. The Claimant said his was on his mobile for 5 minutes and used the computer for personal matters for 5 minutes, but everyone one did it. I accepted the Claimant’s versions of events as the Respondent never spoke to the Claimant about any of these things.
10. I accepted Mr Papaphilippou’s evidence that he believed it was the accumulative effect of all the misconduct in the last 2 years with the last straw being the throwing down of the files that meant the Claimant’s conduct amounted to misconduct.
11. Mr Papaphilippou explained that one of his employees “George” was a witness to the Claimant throwing the files on the floor. However, no statement was taken from George at the time. Whatever George had to say it was not taken into consideration by the Respondent in deciding to dismiss the Claimant.
12. I accept Mr Papaphilippou’s account that he did not give the Claimant an appeal because he did not want to. Mr Papaphilippou was aware of the ACAS Code on Disciplinary and Grievance Procedures, but he did not follow the code because he did not want to. He admitted that he had never spoken to the Claimant about his behaviour except in respect of calling clients stupid. Mr Papaphilippou told the Claimant after the first time he called a client stupid that if he did it again, he would dismiss him. The Claimant did call another client stupid, but the Respondent did not dismiss

him. This happened about 6 months before the dismissal. Mr Papaphilippou did not do dismiss the Claimant because he felt he had to give him another warning.

13. The Claimant had worked with Mr Papaphilippou for 25 years, since 1997. The company he worked for then was called Phillips Enterprises and the company was run and owed by Mr Papaphilippou's wife. Following the liquidation of the company, the Claimant claimed and was paid all termination payments including redundancy pay by the secretary of state. The Respondent did not share the same shareholders or directors as Phillips Enterprise.
14. The Claimant obtained a new job on 24 October 2022 working for Blue Square Marketing as a payroll clerk /bookkeeper. The Claimant did earn more in this role than with the Respondent but did not like this job, so he left on 28 October 2022. The Claimant did not claim universal credit.

The Law

Unfair dismissal

15. The test for unfair dismissal is set out in section 98 ERA 1996. Under section 98(1) ERA 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
16. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)
17. Under s98(4) ERA 1996 '... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'
18. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4) ERA 1996. However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; EAT on considering the issue of reasonableness. There are three stages: (1) did the Respondents genuinely believe the Claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation?
19. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the Respondent, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the Respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).
20. Finally, tribunals must decide whether it was reasonable for the Respondent

to dismiss the Claimant for that reason.

21. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.
22. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)
23. Included in applying the reasonable responses test, the tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures ("the Code"). By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992"), the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.
24. Failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings. However, the Code is also relevant to compensation. Under section 207A TULR(C)A 1992, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.
25. Under s122(2) ERA 1996, the tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so. Under s123(6) ERA 1996, where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.
26. Langley and another v Burlo [2007] ICR 390, CA affirms the Norton Tool Co Ltd v Tewson [1972] ICR 501 principle that it is good industrial practice to give full pay in lieu of notice to an employee who is dismissed without notice and that an employee's compensation should include a sum equivalent to the pay in lieu of notice which that employee should have been paid irrespective of whether the employee has found other work during the notice period.
27. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the Claimant would still have been dismissed had fair procedures been followed.

28. s218 ERA 1996 sets out when continuity will apply in the case of change of employers and what breaks service. A redundancy payment breaks continuity of service.
29. Section 231 ERA 1996 sets out when 2 employers will be regarded as associated employers so that if an employee changes employment between associated employers, they will have continuity. The burden is on the Claimant to show that one company controls the other or a third company controls both companies.

Analysis and conclusions

Effective Date of Termination

30. Whilst it was the case that the Claimant was paid until 16 September 2022, the parties agreed that the Claimant was dismissed on 14 September 2022.

Reason for dismissal

31. I accept the Respondent's reason for dismissal as misconduct.

Reasonableness?

32. In applying the Burchell test, the Respondent had a genuine belief that the Claimant was guilty of misconduct. The Respondent did believe that the Claimant had thrown down the files and considered this the last straw in multiple acts of misconduct. However, this belief was not held on reasonable grounds, and neither was there a reasonable investigation.
33. The Respondent disapproved of the behaviour of the Claimant attending work late, and the Respondent was unable to give any examples of the Claimant making staff feel threatened and vulnerable other than the Claimant saying f'off to a colleague, but the Respondent did not consider this misconduct of the level that warranted any kind of warning. The fact that the Claimant had been carrying out this behaviour over a period of 2 years indicated to me that the Respondent did not think the behaviour was unacceptable and so the Respondent's belief that the Claimant had committed misconduct was not held on reasonable grounds. On the other hand, the Respondent did consider the calling of clients' "stupid" unacceptable behaviour and spoke to the Claimant about it. However, it was not such behaviour again that it warranted dismissal. The fact that the insult to the client was completely different behaviour to the throwing down of the files and took place long before the file incident again indicates that there was no connection between them and contrary to the Respondent's position, they did not have an accumulative effect. I consider that this further demonstrates that the Respondent did not have reasonable grounds to believe there was misconduct that warranted dismissal.
34. The Respondent failed to carry out any kind of investigation into any of the misconduct. In the circumstances, no reasonable employer would have dismissed the Claimant for misconduct without even speaking to the Claimant about that misconduct or relevant witnesses like George who

witnessed the alleged throwing down of the files.

Range of reasonable responses

35. By failing to give the Claimant any warning about conduct that was taken into account in dismissing him, the Respondent could not be said to have behaved reasonably. The Respondent ignored the ACAS code on disciplinary and grievance procedures, and accepted there was no procedure applied. There was no invitation to discuss the Claimant's behaviour with a meeting so that the Claimant knew the allegations against him. The Respondent declined when given an opportunity to give the Claimant an appeal. No reasonable employer would have turned down that opportunity, particularly having regard to the Claimant's significant length of service.
36. In light of the fact that, the Claimant's previous behaviour did not result in any sanction, the conduct complained of by the Respondent could not have amounted to serious misconduct or gross misconduct in any way. There was no investigation at all into the alleged behaviour on 14 September and the Claimant was not given an opportunity to state his case. Dismissal for throwing down files after 10 years' service is not a fair sanction. Having regard to the size and administrative resources of the company it seems unlikely that anyone else would have been able to hear the Claimant's case except Mr Papaphilippou. But in the interests of natural justice the Claimant still deserved to be told what he had done and defend himself against it after 10 years' service.
37. Having applied section 98(4) ERA 1996 to these facts, I find that the Respondent's decision to dismiss did not in any way fall within the range of reasonable responses of a reasonable employer.

Did the conduct amount to gross misconduct?

38. Considering the conduct of the Claimant objectively, the Claimant admitted to looking at his phone and using the work computer for 5 minutes at a time and being late on occasion. This conduct is objectively minor and would not amount to gross misconduct on any analysis. The Claimant also admitted to calling a client stupid and telling a colleague to f' off. Whilst the calling of the client stupid and telling a colleague to f' off was objectively serious misconduct, it did not amount to gross misconduct, entitling the Respondent to terminate the contract of employment. This is because the Claimant was a junior member of staff who worked in an informal environment.

Contributory Conduct or Polkey?

39. I then considered whether there was any contributory fault or whether it was just and equitable to reduce the Claimant's award. This was a small employer; staff were on informal terms and communicated informally. Given the lack of warnings and the relative lack of seriousness of the conduct, I do not consider any deduction for contributory fault or conduct prior to dismissal to be just and equitable. I do not find Polkey applied as in my judgment there was no chance that, acting fairly, the Respondent would

have dismissed the Claimant at the time or in the foreseeable future.

40. In the circumstances, the Claimant was wrongfully and unfairly dismissed.

Remedy

41. As the Claimant was not able to show that Phillips Enterprise and the Respondent were associated companies, I awarded a basic award based on only 10 years of continuity of employment. The Claimant's age when dismissed was 46. The Claimant was paid until 16 September 2022 and so I have calculated his compensatory award from 17 September 2022 until 24 October 2022. It appeared to me that the Claimant had mitigated his losses sufficiently by finding a job within 5 weeks of his dismissal. Applying the principle in Norton Tool Co Ltd v Tewson, the Claimant is awarded the full notice period of 10 weeks and so does not need to account for the earning received when obtaining a job within the 10 week notice period. The Respondent totally and completely failed to comply with ACAS code (s207A TULR(C)A) and so I award an uplift of 25% on the compensatory award and the award for wrongful dismissal.

42. In the oral decision of this matter, I mistakenly added the Claimant's compensatory losses and notice pay which equalled double recovery but did not add the 25% uplift on the wrongful dismissal award. In the circumstances the Claimant is only entitled to 5 weeks' notice pay. I correct these mistakes in this judgment.

Calculation

43. The Claimant's gross weekly pay - £403.84

44. Basic award= £5,048

a. $12.5 (5 \text{ years} \times 1 + 5 \text{ years} \times 1.5) \text{ weeks} \times £403.84 = £5,048$

45. Compensatory Award =£2812.50

b. The Claimant's net weekly pay - £350.00

c. Loss of statutory rights= £500

d. Period of losses 16/09/22- 24/10/22 -approx. 5 weeks

e. Loss of earnings 5 weeks x £350 net = £1,750

f. Increase on compensatory award of 25% based on failure to follow the ACAS code of practice = £562.50

g. Total unfair dismissal losses =£7,860.50

46. Wrongful dismissal= £2,524.00

h. $10 \text{ weeks} - (5 \text{ weeks already awarded under unfair dismissal}) \times £403.84 = £2019.20$

- i. Increase on compensatory award of 25% based on failure to follow the ACAS code of practice= £504.80

47. Total losses = £10,384.50

Employment Judge **Young**

16 June 2023

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON
19 June 2023

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FOR THE TRIBUNAL OFFICE