



EMPLOYMENT TRIBUNALS

Claimant: Ms A Housley

Respondent: A M Clark Limited

Heard at: Sheffield

On: 23 January and (by CVP videoconferencing) on 20 November 2020

Before: Employment Judge Maidment

Representation

Claimant: Mr P Sangha, Counsel

Respondent: Mr A Weiss, Counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded and succeeds. Her basic and compensatory award shall be reduced by a factor of 75% by reason of her conduct prior to dismissal. There was no unreasonable failure to comply with the ACAS Code of Practice on Disciplinary Procedures 2015.
2. The claimant's complaint seeking damages for breach of contract succeeds.
3. This matter will be listed for a remedy hearing to take place by CVP videoconferencing with a time estimate of 3 hours.

REASONS

Issues

1. The claimant brings a complaint of ordinary unfair dismissal where the respondent puts forward the potentially fair reason of the claimant's alleged

misconduct. She also brings a claim seeking damages for breach of contract arising out of the termination of her employment without notice.

Evidence

2. The tribunal had before it an agreed bundle of documents numbering some 169 pages. The first day of the hearing was an attended hearing where the tribunal heard, on behalf of the respondent, from its owner, Mr Adam Clark and his father and former owner of the respondent, Mr Lionel Clark. Unfortunately, due to the coronavirus pandemic, the hearing originally relisted to resume on 23 April 2020 was postponed. Having canvassed the parties' views, the second day of the hearing was relisted to be conducted by CVP videoconferencing. Unfortunately, on the day, the claimant was unable to join the hearing from her home due to technical difficulties. This necessitated her driving to her solicitors' offices, where an effective CVP videoconferencing link was established. The tribunal heard then from the claimant and, on her behalf, from Mr John Faxon, the husband of one of her former colleagues. Following submissions from respective counsel, the tribunal reserved its decision due to lack of time to deliberate that day.

Facts

3. The respondent operates a pharmacy and retail shop in Penistone, Sheffield. It is a small family business owned by Mr Adam Clark and with 14 employees. It was previously owned by Mr Adam Clark's father, Lionel, who had retired but retained some involvement in the business.
4. The claimant was employed as a pharmacy assistant. Mr Adam Clark's partner, Melanie Housley was the shop manager. There is some dispute as to her actual position of authority (she certainly termed herself as manageress), but it is clear that Mr Clark delegated management tasks to her, including human resource issues. Melanie Housley is also the claimant's cousin and Melanie Housley's mother, Karen, also worked in the business.
5. Melanie Housley had spoken to the claimant in previous private meetings about the claimant's behaviour towards Mr Clark. The claimant's view was that Mr Clark should have addressed any issues himself. In one meeting the subject of redundancies had been raised with reference to possible cuts in funding to the pharmacy. If necessary, selection would be based on performance, not length of service. The claimant's evidence on this point is accepted – Melanie Housley is unlikely to have been explaining to the claimant a sector wide problem without any reference to the respondent's own business (as was put to the claimant in cross-examination). Certainly, the claimant felt threatened by this.
6. On 28 May 2018, Mr Adam Clark witnessed the claimant taking a call at around 8:55am from a patient making a request for medication. His evidence was that the patient in question was known to the business, elderly

and hard of hearing. Mr Clark considered that the claimant quickly lost her patience and hung up on the patient without fully dealing with her request. Mr Clark challenged the claimant's behaviour in response to which she said that the patient couldn't hear her and she then walked away from Mr Clark. The claimant denies walking away.

7. At around 5:30pm Mr Clark asked the claimant about a couple of notes he had sent with her when she went to a local surgery with a prescription request. The claimant had left the notes at the surgery for the next day rather than, Mr Clark considered, asking the questions he wanted answered before returning to the pharmacy. On explaining to the claimant how she should have dealt with the notes, the claimant began arguing with him in a raised voice commenting "it doesn't matter what I do, you're never happy". Mr Clark's perception was that the claimant was refusing to listen, shouted over him and walked away before he had finished speaking.
8. On balance and given the claimant's level of corroboration, yet also inconsistent accounts, Mr Clark's evidence is in all material respects accepted.
9. Mr Adam Clark asked Melanie Housley to carry out an investigation meeting with the claimant the following day. The meeting took place on 29 May. The claimant was accompanied by a colleague, Janet Faxon. Melanie Housley's record of the meeting includes the claimant accusing her of "kissing Adam's bottom", saying that Mr Adam Clark was not a professional boss, that Melanie Housley had more to lose than anyone and that if Melanie Housley wanted to open up a can of worms she should go ahead but "it will not end well". The claimant accepted before the tribunal that she shouldn't have made those comments, that they were inappropriate and that "you do a lot in the heat of the moment". She explained that she was frustrated. Melanie Housley had pre-prepared her questions and Mr Adam Clark conceded that the notes taken of the claimant's responses were "not the best I've seen". They were, however, signed by the claimant and Mrs Faxon. The claimant said that it did look like her signature on the notes, but that she did not sign them. The tribunal rejects the claimant's evidence on this point. She would not answer, when asked if she was saying that the notes were a forgery.
10. After the meeting, Janet Faxon's husband, John, came to the shop to see the claimant at her request. Melanie Housley felt he was aggressive towards her. Mr Faxon then spoke to the claimant in one of the consultation rooms. Eventually, Melanie Housley agreed to talk to them both in the consultation room. She was accompanied by another employee, Kay Bower. The notes of the meeting record the claimant as saying to Melanie Housley: "I want to knock that smirk off your face" and "me and you will have our day lady, don't you worry". The tribunal finds that these comments were made after the claimant raised with Melanie Housley the earlier conversation where

reference had been made to redundancy. The claimant denied before the tribunal that she had been aggressive, but said that she had lost her temper.

11. On this being reported back to Mr Adam Clark, he decided to suspend the claimant which was done by WhatsApp followed up by a suspension letter dated 30 May. Melanie Housley then further investigated and gathered witness statement evidence which included her own and Mr Adam Clark's account of what had happened. The claimant was invited to a disciplinary hearing on 25 June in respect of the two incidents on 28 May (charges 1 and 2), that she had acted in an unprofessional and aggressive manner to staff and customers as detailed in a witness statement (charge 3) and that at two separate meetings 29 May she had spoken to Melanie Housley in an unprofessional aggressive and threatening manner, including threatening her with violence (charge 4). The claimant was told that the charges were considered potentially to be gross misconduct which might result in her dismissal. She was given the right to be accompanied. The decision to move to that stage was Mr Adam Clark's, on legal advice.

12. Witness statements were included with the invitation from Melanie Housley, Kay Bower, Adam Clark, Kate Hartley, Riyaz Patel, a locum pharmacist and Diane Needham. Ms Bower had accompanied Melanie Housley to the meeting with the claimant and Mr Faxon on 29 May and confirmed the comments made by the claimant. Mr Patel recounted hearing raised voices that day. He also referred to an incident on 15 or 16 May where the claimant reacted to how a customer had been speaking to her and then reacted angrily to Karen Housley when Karen Housley suggested that she take a break. The claimant told the tribunal that she had been angry with Karen and that she did not take well to a colleague telling her to do something. She thought that Karen Housley had been trying to get her out of the situation with the customer. Ms Needham's evidence related to 28 May, but she could not say what had been said.

13. The hearing was to be conducted by Mr Adam Clark, but the claimant did not attend. She was then invited by letter of 25 June to a rescheduled hearing on 28 June. She was reminded of the expressly stipulated requirement in her letter of suspension to cooperate with the process. An additional charge of potential gross misconduct was added in respect of her failure to attend the earlier meeting (charge 5).

14. The claimant's solicitors corresponded with the respondent stating that, amongst other things, the original timeframe was unreasonable, that the claimant had "misconstrued" the date of the original hearing thinking it was to take place on 28 June, that Mr Adam Clark was not an impartial decision maker, requesting the witnesses to attend the disciplinary hearing to be questioned by her and asking that Mr Faxon be allowed to attend as the claimant's union representative. He rejected those contentions. He

considered that his prior involvement was much more limited than Melanie Housley's and that he was only a witness to some of the charges. He was not prepared to appoint a third party to make what he regarded as a key decision. He agreed in cross examination that that his father did not know the claimant but said that he had not been involved in the business for 5 years and he wanted to keep him out of the whole thing.

15. The claimant attended the hearing on 28 June accompanied by a work colleague. Lizzie Kitchen was present to take notes. The meeting was brief, recorded as lasting 13 minutes. There was no substantive discussion about the first 3 charges and the claimant's account in respect of the material forming the third charge had never previously been discussed with the claimant. There was no probing by Mr Clark of the claimant's responses to the questions he did raise. The claimant's allegedly inconsistent account of the events of the morning of 28 May was not raised or questioned. Mr Clark said that the issue for him was her attitude to the call rather than the way she terminated the call, but he agreed that he had not made that clear. Mr Clark thought that the claimant had every opportunity to put forward her case – it was not for him to draw it out. Ms Kitchen recorded that the claimant admitted that she had “lost it” with the customer over the telephone and that she was unprofessional. Furthermore, she recorded an admission of being aggressive with Melanie Housley at the meeting on 29 May admitting that she said that she wanted to knock the smile off her face and that these were “words of violence”. It was put to Mr Clark in cross-examination that the context was of the claimant being called to an investigation meeting, feeling she had nothing to address and a family relationship. He said in evidence that he believed the comment had been directed at Melanie Housley because she was a family member. He said that he appreciated those factors at the time. They certainly did not provide an excuse, he said. He agreed in cross examination that the comments were out of character. The claimant said that she forgot about the disciplinary hearing on 21 June and thought it was on a different day, but that she wouldn't have gone anyway as she did not have anyone to represent her.
16. The claimant agreed in cross-examination that she had admitted being aggressive, but was now maintaining that in fact she had not been. She did not recall the “have our day” comment, but was reminded that she accepted saying it in her witness statement. Those statements were, the tribunal finds, clearly made. The claimant, the tribunal finds, made the comments alleged and was aggressive in her demeanour.
17. The claimant was given an opportunity to say anything she wished to add at the end of the hearing. She told the tribunal that Mr Clark had made it clear that he didn't want to engage with her or answer anything.

18. Mr Adam Clark adjourned the hearing and wrote to the claimant on 2 July terminating her employment on the basis of gross misconduct. All five charges were upheld against the claimant. He considered that the claimant being aggressive and inappropriate towards himself was corroborated by Kate Hartley and Diane Needham who had both heard the claimant raise her voice to him. In evidence, however, he accepted that the witnesses were not aware of what had been said between the claimant and Mr Clark and it was not clear on what they based their opinions. The claimant's evidence to the tribunal was that she had raised her voice. She agreed that it had not been appropriate to call Mr Clark "pig headed". He considered the claimant had been rude to the hard of hearing customer. He noted that during the investigatory meeting she had said the call was going on too long and she thought that Mr Clark would prefer her to put the phone down, whereas at the disciplinary hearing she said that Mr Clark was getting angry as the claimant was needing to repeat herself on the phone call. At the subsequent appeal hearing, it is noted that the claimant said that Mr Clark had told her (by signalling, she told the tribunal) to end the call. Before the tribunal the claimant accepted that the call had been terminated abruptly, but that the customer wouldn't have appreciated that to be the case as she couldn't hear.
19. Mr Clark gave examples of what he regarded as the claimant's recent unprofessional and aggressive attitude to customers and colleagues which included the aforementioned incident with the hard of hearing customer and her comments made to Melanie Housley on 29 May. He considered that the claimant admitted to the majority of these comments.
20. He accepted in cross examination that the claimant had not hit Melanie Housley and that she probably had no intention of doing so and regretted making the comment. However, stating: "I want to knock that smirk off your face" was considered to be a threat of violence and totally unacceptable.
21. Mr Clark did not accept that the claimant had forgotten about the disciplinary hearing or had misunderstood the date arranged. The letter was clear and she was being advised by a solicitor. She made no attempt to inform the respondent that she would not be attending. The claimant before the tribunal was unable to say whether she had forgotten about the hearing or got the date wrong. She agreed that her account did not coincide with what her solicitor had said in correspondence at the time.
22. He concluded that the first and second charges in isolation justified formal warnings. However, the third, fourth and fifth charges individually and cumulatively amounted to gross misconduct warranting the claimant's summary dismissal. He considered that the claimant had 4 years of unblemished service, however that this was outweighed by the seriousness

of the charges including admitted threats of violence to her line manager. In the context of a small business the claimant's conduct had damaged relationships with colleagues, broken trust and, as a small business in a small town, the claimant's conduct potentially damaged the respondent's reputation in the community. This last aspect, he explained to the tribunal, related to the behaviour to a customer described by Mr Riyaz. The evidence was that both the claimant and the customer had apologised at the end of this particular interaction. He felt the claimant's initial reaction, however, had been unacceptable. They had gone past the stage of potentially giving the claimant an opportunity to learn from these instances.

23. The claimant was given the right to appeal. The claimant appealed through her solicitor on 9 July. It was determined that this should be heard by Mr Lionel Clark. The claimant objected to him hearing her appeal. Mr Adam Clark did not agree that his father was not able to make an impartial decision.

24. The appeal hearing took place on 12 September. The claimant was accompanied by Patricia Dobson. Mr Lionel Clark was accompanied by Mr Stephen Owen, who had no connection to the respondent's business, but was known to the Clark family. He was there to take notes, assist with the procedure and if necessary any questioning of the claimant. The hearing was, by agreement, recorded. As someone with a HR background, Mr Owen inevitably took a more active part in the hearing. Mr Lionel Clark considered that his own role was more to receive any information the claimant might want to give him before considering his decision.

25. Mr Lionel Clark adjourned the hearing and waited to consider the transcript of the hearing before making his decision. He wrote to the claimant then on 26 September rejecting her appeal. The claimant's appeal was based on procedural breaches, a failure to establish a fair reason to dismiss and that dismissal was not within a range of reasonable responses. Mr Lionel Clark considered that there was a fair procedure, that there was sufficient evidence supporting the claimant's misconduct and that the claimant's conduct towards Melanie Housley alone, including threatening her with violence when she was only doing her job, justified dismissal. He felt that this had been a threat of violence not just a figure of speech. In addition, the claimant had demonstrated an unprofessional and unacceptable attitude towards colleagues, customers and Mr Adam Clark.

26. As regards the claimant's failure to attend the initial disciplinary hearing, Mr Lionel Clark felt that he had his doubts, but couldn't prove anything. He agreed he did not raise those doubts at the meeting and that the appeal notes read as if he was satisfied with the explanation he received from the claimant. After the hearing he had spoken to Mr Adam Clark and Melanie Housley a number of times to seek clarification. He wanted to check, he

said, that he was doing what he was supposed to and was told by Mr Clark that if the claimant had not added anything, then he had all the information he needed.

Applicable law

27. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 (“ERA”). This is the reason relied upon by the respondent.

28. If the respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

“ [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 upon 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”.*

29. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee’s guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.

30. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to determine whether the employer’s decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

31. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. An unreasonable failure to follow the Code can lead to an uplift of the compensatory award by up to 25%.

32. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to what degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.
33. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to her dismissal – ERA Section 123(6).
34. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal.
35. In a claim of breach of contract, it is for the tribunal to determine whether the claimant committed a repudiatory breach of her contract of employment.
36. Applying these principles to the facts as found, the tribunal reaches the following conclusions.

Conclusions

37. The claimant was dismissed for a reason relating to conduct, a potentially fair reason for dismissal. The respondent's stated position is that the events of 28 May 2019 would have led only to some form of disciplinary warning on their own. However, the matters in issue in respect of the first two allegations were then brought back under consideration within the third allegation of an aggressive and unprofessional attitude to both staff and customers. In fact, this allegation also covered the claimant's behaviour towards Melanie Housley on 29 May which formed the fourth allegation. The only new matter, in fact, within the third allegation was the issue reported on by Mr Patel on 15 or 16 May. In that, Mr Clark's primary concern related to the claimant's reaction to her colleague, Karen Housley.
38. It is clear to the tribunal that the operative reason for dismissal as determined by Mr Adam Clark (and but for which indeed the claimant's employment would have continued) was that relating to the claimant's treatment of Melanie Housley on 29 May. The final allegation upheld against the claimant arose out of her failing to attend the disciplinary hearing as originally scheduled. The claimant's explanation was not accepted, albeit there was no substantive discussion about it at the disciplinary hearing. The claimant had failed to comply with an instruction to co-operate with the disciplinary process. This was very much an add-on in terms of the charges

against the claimant. A consideration that the claimant's actions had damaged relationships within the business and had the potential of damaging reputation in the community was a consequence of the claimant's behaviour, but did not amount to a separate finding of misconduct.

39. The claimant's behaviour on 28 May 2019 was investigated by Melanie Housley, potential witnesses were spoken to and produced witness statements which were disclosed to the claimant in advance of the disciplinary hearing. The investigation, however, was not particularly detailed and produced notes which Mr Clark himself recognised could have been more illuminating. In those circumstances there was reasonably more onus upon him to seek to get to the bottom of the allegations and to seek to understand the context in which the claimant had behaved as it was alleged that she had and why. He exhibited, however, at the disciplinary hearing no real desire to probe the claimant regarding the incidents ultimately held against her which might have enabled a greater understanding on his part. Of course, Mr Clark knew all about the incidents which occurred on 28 May. As regards the allegations, he felt that his primary role was to allow the claimant to put forward her case but not to be proactive in any questioning of her. It might be said that he was doing little more than going through the motions. The length of the hearing is rather illustrative of that.
40. Mr Clark was not, in all the circumstances, an impartial and appropriate decision maker. In particular, he was his own witness in terms of the events of 28 May and the, for him, key allegations were those made by his partner, Melanie Housley - an allegation that the claimant had acted inappropriately and aggressively towards her. Again, his lack of questioning of the claimant is rather illustrative of his acceptance in advance of Melanie Housley's account and how the claimant's behaviour was to be viewed, although it is recognised that the claimant had very little to say for herself in terms of an explanation for her behaviour.
41. The tribunal recognises that this is a small family business. There were always going to be difficulties in achieving a full disciplinary process which might be objectively viewed free from the risk of bias. Nevertheless, at the crucial disciplinary hearing stage, Mr Lionel Clark was available and could have heard and interrogated all of the evidence on a more dispassionate basis.
42. Mr Lionel Clark of course conducted the appeal, but not in a manner which could cure any earlier procedural defects. Indeed, it was clear from his evidence that he viewed his role at that stage as rather passive and his admitted discussion with both Mr Adam Clark and Melanie Housley is suggestive of a lack of independent decision making. Having heard considered how the appeal decision making was conducted, the tribunal

can only conclude that there was never likely to be any decision other than an upholding Mr Adam Clark's decision to dismiss.

43. On these conclusions, the tribunal finds that the claimant's dismissal was unreasonable due to a lack of investigation in the sense of a willingness to explore what had gone on and why and also by reason of the aforementioned procedural defects.
44. The tribunal does not conclude that there was any breach of the ACAS Code on Disciplinary Procedures. The tribunal reminds itself of the relatively basic requirements of that Code and notes that the claimant was aware of the charges against her, had an opportunity to respond to them and was invited to a disciplinary and then separate appeal hearing. Decisions at both stages were confirmed in sufficient detail to her writing. Her primary submissions are based upon paragraph 12 of the Code, but again, the claimant was allowed to set out her case and had an opportunity to answer the allegations. She had a reasonable opportunity to ask any questions she wished to and there was no bar on her presenting any evidence. She had the benefit of legal advice at that time and was accompanied by a colleague. She did not request any witnesses of her own and it was not unreasonable for the respondent not to tender witnesses to be cross-examined by the claimant during the disciplinary process. Having heard, the claimant's evidence, there is little she would have wished to put to them. The right to cross-examine witnesses is not part of the Code. No uplift of compensation would be appropriate in this case.
45. More fundamentally, the tribunal, after careful and finely balanced consideration, cannot conclude that dismissal was within a band of reasonable responses. The respondent's case is not that the first two allegations justified dismissal and, again, very little is added beyond those and the treatment of Melanie Housley within the third allegation. The claimant was reasonably concluded not to have cooperated with the process in failing to attend the original disciplinary hearing but, whilst this may have been a breach of contract, dismissal would have been unreasonable on this basis alone or cumulatively with others in circumstances where the claimant was clearly seeking to contest the process which the respondent was adopting and to make representations regarding how a fair process might look. Behaviour in reaction to allegations often has to be reasonably viewed and categorised differently to behaviour which forms the basis for the original allegations themselves and this is certainly the case here.
46. Again, from the respondent's viewpoint, the decision to dismiss came down to an assessment of the claimant's behaviour towards Melanie Housley. The claimant behaved inappropriately and aggressively, it was reasonably concluded. However, the decision to dismiss arising from this behaviour had

reasonably to be viewed in the overall context of the claimant's state of upset in the face of what she regarded as unfounded allegations where she felt threatened already in terms of the job security. Furthermore, the context was of a family relationship between her and Melanie Housley. Mr Clark's own conclusion was that the claimant's behaviour was out of character and there were indeed no previous issues of such similar conduct. No consideration appears to have been given by Mr Clark to that relationship. Furthermore, his conclusion at the time was that whilst "words of violence" had been used, the claimant did not in fact ever intend to be violent to Melanie Housley or follow through on them.

47. The claimant was unfairly dismissed.

48. There is no basis for any reduction in compensation based on the principles to be derived from the case of **Polkey** on the tribunal's findings. However, the tribunal has found, largely on the claimant's own admissions, that the claimant behaved inappropriately and aggressively. Her whole behaviour surrounding the incident with Melanie Housley was to inflame rather than diffuse a difficult situation and there was an obvious lack of insight flowing from the claimant as regards her behaviour. Certainly, this was not a situation where the respondent could have full confidence that there would be likely to be no further incidents of inappropriate behaviour at work. The tribunal considers it just and equitable in the circumstances for the claimant's compensatory award to be reduced by a factor of 75% reflect her blameworthy conduct. This represents a conclusion that the claimant was largely to blame for her own dismissal.

49. There is no basis for not imposing a similar reduction to the claimant's basic award entitlement due to her conduct prior to dismissal.

50. As regards the claim seeking damages for breach of contract, whilst serious enough to make a substantial finding as to contribution, the tribunal does not conclude that the claimant's actions were repudiatory of her contract of employment or quite sufficient to amount to an act of gross misconduct. She will be entitled to damages assessed with reference to her contractual notice entitlement.

Employment Judge Maidment

Date 25 November 2020