



EMPLOYMENT TRIBUNALS

Claimant: Mrs Yvette Louise Derry

Respondent: St Helier Dental Surgery

Heard at: London South Employment Tribunal and by CVP

Before: Employment Judge Martin

Representation

Claimant: In person

Respondent: Ms Chesca Lord - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim of unfair dismissal is unfounded and is dismissed.

REASONS

1. By a Claim Form lodged at the Tribunal the Claimant contends that she was unfairly dismissed. The Respondent defended the claim on the basis that the Claimant was fairly dismissed for gross misconduct. the Claimant was employed by the Respondent from 15th October 1997 until her summary dismissal on 30 of November 2018.
2. First, I would like to apologise everyone for the delay in concluding this case. The hearing was first listed for 20 March 2020. The hearing went part heard and was adjourned. Unfortunately, the adjourned hearing could not go ahead as by then I was on extended sick leave. Subsequently, the ongoing Covid-19 pandemic further delayed the hearing being resumed. I thank everyone for their patience.
3. I heard oral evidence from Dr Deval and Dr Gaur on behalf of the Respondent and the Claimant in support of herself. I have carefully considered such documents as I have been taken to in the bundle and

read and listened to the closing submissions of the parties. As explained to the parties these reasons are limited to those matters which are relevant the issues and are necessary to explain why I have come to the decision that I have.

The law

4. It is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a conduct reason. Once that reason is established, I must consider section 98(4) of the Employment Rights Act 1996 to decide whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case.
5. I am not concerned about whether the Claimant actually committed the act for which she was dismissed. My focus is on whether the Respondent had reasonable ground for concluding that she had in accordance with the laws set out below.
6. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether the processes and the decision to dismiss fell within a band of reasonable responses. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303***, and that I need to consider whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation.

My findings of fact

7. I have found the following facts on the balance of probabilities having heard the evidence and considered the documents. I have also considered the submissions made by both parties. These findings are limited to those that are relevant to the issues and necessary to explain the decision reached. All evidence was considered even if it is not specifically recorded below.
8. The Claimant transferred to the Respondent in July 2016 and was promoted to Practice Manager in mid 2017.
9. The Respondent is a dental practice. The sole practitioner is Dr Deval. Confidential and sensitive information is kept on patients and as such data protection is an important issue. On 12 December 2018, the Claimant signed a confidentiality agreement which amongst other matters said: "*breach of confidence, including the improper passing of computer data, will result in disciplinary action, which may lead to your dismissal*". The Claimant's contract of employment also contained provisions relating to the use and disclosure of confidential information and indicated that a breach of confidentiality would be dealt with as gross misconduct and was likely to result in summary dismissal. The Claimant undertook training on the General Data Protection Regulations in June 2018.

10. Relations between the Claimant and Ms Deval became strained, and the Claimant took out a grievance against Ms Deval in April 2018. This was resolved by way of external mediation using The British Dental Association with an agreement being signed on 6 July 2018. The Respondent considered that the mediation agreement had resolved the issues and did not receive any further complaints from the Claimant after it had been agreed. As part of the grievance process and before the mediation the Respondent took statements from other staff to investigate the matters which the Claimant had made. One from a colleague who will be referred to as NN in this judgment. The statement made criticisms of the Claimant. The Respondent's evidence is that other staff were also critical of the Claimant. The Respondent decided not to proceed with the complaints against the Claimant because it considered that the mediation process had drawn a line and that everyone was going to move on. There were no complaints from the Claimant until 28 October 2018 and the evidence shows that the mediation was successful. Both the Claimant and Dr Deval said matters were much better and the Claimant said she was getting on better with her colleagues.
11. On 28 October 2018 the Claimant accessed a document contained in NN's personal Google drive which had been left open on the work computer. NN had forgotten to log out. The document accessed was the statement relating to the grievance that the Claimant had taken against Ms Deval during the investigation. The Claimant printed this statement off and three days later made a video showing how she gained access to it. She texted a colleague saying she had found the document. A week later she told Dr Deval what she had done. This led to the Claimant being suspended from work on 12 November 2018 pending an investigation.
12. An independent investigator, Jane Perks, was appointed by the Respondent from an external organisation. The Claimant had requested this and made no complaint at the time about who the investigator was. Ms Perks interviewed the Claimant twice, one by telephone and once in person. She also interviewed Dr Deval. The Claimant sent Ms Perks a statement and other documents she wanted to be considered.
13. The Claimant said that she did not realise she was looking at a colleague's personal Google Drive. The Respondent also uses Google Drive. The outcome of the investigation was that there was a disciplinary case to answer for breach of confidentiality. Ms Cheung who had been present when the Claimant accessed NN's Google Drive account had given a short statement at the time. She was on leave when Ms Perks was conducting the investigation so was not interviewed by her. Ms Perks concluded that there was a disciplinary case to answer.
14. The Claimant was invited to a disciplinary hearing by letter dated 21 November 2021. The investigation report was enclosed, and she was given the right to be accompanied at the hearing. She was sent copies of all documents relied on during the hearing before it took place although it appears that some emails sent from the Respondent's NHS email account did not reach her. The disciplinary hearing was heard by Dr Deval who was accompanied by Dr Williams who was a retired dentist, and his role

was to take notes. The Claimant was accompanied by a retired colleague.

15. During the disciplinary hearing the Claimant was given the opportunity to respond to the allegations. She admitted to accessing the document and to printing it and told Dr Deval that she would do the same again if faced with a similar situation and as far as Dr Deval was concerned showed no remorse.
16. The hearing was adjourned for Dr Deval to consider the evidence and her decision. Dr Deval concluded that the Claimant had breached the confidentiality agreement by continuing to use the personal Google Drive account of her colleague despite realising that this was a personal and not a work account and had taken printouts of the statement without authorisation. Her decision was to terminate the Claimant's contract of employment for gross misconduct. This was communicated to the Claimant by letter dated 29 November 2018. The Claimant was given the right to appeal.
17. The Claimant did appeal, and an appeal hearing was scheduled for 13 December 2018 to be heard by Dr Gour, a Consultant Paediatric Intensivist at St George's University Hospital. Although Dr Gour was known to Dr Deval, the Tribunal is satisfied that he was independent t. The Claimant was given the right to be accompanied to the appeal hearing.
18. The Claimant did not attend and consequently another hearing was set up for 18 December 2018. The Claimant was told that if she failed to attend again, then the hearing would proceed in her absence. The Claimant did not attend. Dr Gour considered the matter fully and interviewed the employee who had been on leave when the original investigation was undertaken in addition to reading the statement she had given to the investigating officer. Dr Gour upheld the decision to summarily dismiss the Claimant.

My conclusions

19. Having found the factual matrix above, I have made the following findings on the balance of probabilities. In a claim of this type, it is not the function of the Tribunal to say whether the Claimant in fact carried out an act of misconduct. What the Tribunal is concerned with is whether the Respondent acted reasonably in response to the allegations against the Claimant. Here, the Claimant as admitted she accessed the document and printed it.
20. I conclude that the Respondent has demonstrated that the Claimant was dismissed for a reason relating to her conduct. The procedures carried out within the final disciplinary process were in accordance with the disciplinary policy and within ACAS guidelines. The Claimant was given every opportunity to defend herself against the allegations and did so. The Claimant complains that Ms Deval conducted the disciplinary hearing in circumstances where the Claimant had taken out a grievance against

her and says this was unfair. I note that the grievance was resolved by way of mediation and having heard from Ms Deval am satisfied that for her, the matter was closed. It seems it was not for the Claimant.

21. In any event even if this did amount to unfairness, this was remedied on appeal which was heard by someone independent. Similarly, the Claimant's complaint that a colleague was not interviewed as she was on leave was remedied by Dr Gour, who interviewed her as part of his investigations into the appeal. It is a shame that the Claimant did not attend that hearing resulting with it being heard in her absence. She was given two opportunities to attend. Having considered the matter as a whole and having regard to the size and administrative resources of the Respondent, I am satisfied that the investigation was reasonable and that following on from that investigation and the hearing there were genuine grounds upon which the Respondent held their belief that the Claimant was guilty of gross misconduct. The Claimant admitted that she had gained access to another employee's account and that she had printed information off that account.
22. I am satisfied that the decision to dismiss fell within a band of reasonable responses in the same way that I am satisfied that the process was reasonable. The Claimant was in a position of trust and was responsible for ensuring data protection compliance for the practice. She had received training and had signed a contract containing confidentiality clauses. She had seen the policy relating to data protection. The Claimant knew that what she had done was wrong, which is why she got another employee to witness what she had done. I appreciate that the Claimant was under stress at that time, however I can not say that this mitigated her actions to the extent that I can say that it was outside the band of reasonable responses to dismiss her. This was a decision for the Respondent, and I find it fell within the band of reasonable responses.
23. I have had to decide whose evidence I consider was more likely to be correct at various stages during my deliberations. The Claimant was in a highly emotional state and she accepts that her recollection of events may not be totally reliable. There were stark contradictions in her evidence. There is no doubt that the Claimant was very upset when she read the statement as she had not been told because of the mediation that there had been any complaints about her. The Claimant then revisited the issues that had led to her grievance and the mediation. I can understand why, when this was raised, that Dr Deval told the Claimant that those matters had been resolved by the mediation and everyone had moved on.
24. The Claimant says that because of her distress she did not say what she meant to say. This may well be correct. However, the Claimant did not ask for a postponement of the disciplinary hearing because she was not in a fit state to attend, nor did she supply any medical evidence either at the time or at this hearing to show that her mental state was such that she would be confused and not able to fully participate.
25. The Respondent accepted that the Claimant may have inadvertently stumbled on NN's Google Drive account, however what it could not accept

was that the Claimant having established that the account was NN's personal account went on to click on folders thus discovering the statement.

26. The Respondent's evidence as set out in the disciplinary outcome and the appeal outcome, was that it made no difference whether the documents were on a personal Google Account or the Respondent's but that once it had been established that the account was NN's personal account, the Claimant should not have looked further and certainly should not have printed the document for her own use. I accept that the language used in the transcript shows little remorse on the part of the Claimant and indicates that the document was printed to further her allegations of bullying which the Respondent had thought had been resolved by the grievance. The Claimant says this is not what she meant, but it is what she said.

27. Accordingly, I dismiss the claim for unfair dismissal.

Employment Judge Martin
Date 1 June 2021