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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104168/2020

Hearing Held by Cloud Video Platform (CVP) on 17 February 2021

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Employment Judge - A Strain

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Ms E Doherty

**Claimant
In person**

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Walker Precision Engineering Ltd

**Respondents
Represented by
Mr Munro
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:

(1) the Claimant was not unfairly dismissed by the Respondent and accordingly her claim of unfair dismissal is dismissed;

(2) the Claimant is not due any further pay or holiday pay so her claim is dismissed.

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REASONS

Background

1. The Claimant represented herself. She had presented claims of unfair dismissal and in respect of arrears of pay and holiday pay.
- 5 2. The Claimant's claims were opposed by the Respondent. The Respondent was represented by Mr Munro, Solicitor.
3. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal. Witness Statements had been prepared and exchanged in advance of the Hearing. It was agreed that these would form the witnesses' evidence in
10 chief but could be supplemented at the Hearing.
4. The Claimant had lodged 2 additional documents in advance of the Hearing. One was screenshot of a text from Declan Walsh and the other was an email entitled Witness Statement from Cameron Montgomery.
5. The Claimant gave evidence on her own behalf. Neither Declan Walsh nor
15 Cameron Montgomery gave evidence.
6. The Respondent's Mr Mark Walker (Managing Director), Mr T Buchannan (Head of Engineering) and Ms Louise Morely (Manufacturing Manager) all gave evidence.

Findings in Fact

- 20 7. Having heard the evidence of the Parties and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - 7.1 The Respondent is a limited company manufacturing precision components for aerospace, defence, optronics and telecommunications industries. The Respondent operates from
25 premises in Glasgow.

7.2 The Claimant was employed by the Respondent from 4 July 2017 initially as an Account Co-ordinator and latterly as a Scheduler.

7.3 The Respondent's holiday year runs from 1 October to 30 September.

5 7.4 The Claimant had a contractual entitlement to 33 days paid annual leave (inclusive of public holidays).

7.5 The Claimant submitted a request on 17 December 2019 for 2 days' paid annual leave on 19-20 December 2019 (Production 7). The request was approved by her line manager and forwarded to the Respondent's Finance Department to input the annual leave on a spreadsheet file called the "holiday tracker". This kept a record of all paid annual leave taken by individual employees and facilitated payment through the Finance Department when paid annual leave was taken.

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15 7.6 The holiday tracker was last modified by a member of the Finance Department on 18 February 2020 after which it was locked and frozen.

7.7 An all-company email was issued to the Respondent's staff on 18 February 2020 requesting any member of staff to exit the spreadsheet to allow updating by the Finance Department (Production 14).

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7.8 On 21 February 2020 the Finance Department became aware that the holiday tracker had not been password protected for the period 18-21 February 2020. A copy of the spreadsheet was saved which detailed "author" and "date of creation" information for that 3 day period. The spreadsheet was then password protected once more (Production11).

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7.9 When the spreadsheet was password protected once more, the Finance Department noticed that the Claimant's paid annual leave on 19-20 December 2019 had been deleted.

5 7.10 The Finance Department ran checks on the spreadsheet which disclosed what changes were made and by whom over the period 18-21 February 2020. All changes were cross-referenced with approved authorisation forms and verified by the Finance Department. The only change that could not be verified by this method was the deletion of the Claimant's paid annual leave on 19-10 20 December 2019.

7.11 The Finance Department checked the history of the changes to the spreadsheet which identified that the deletion had occurred at 9.54am on 21 February 2020 by a user with the Claimant's log-in details (Production 15).

15 7.12 The Respondent was concerned that there had been unauthorised and possibly fraudulent use of its management systems. The Respondent decided to have the matter investigated.

Investigation

20 7.13 The Respondent appointed Ms Louise Morley, Manufacturing Manager, to undertake the investigation and to investigate the holiday tracker system, the IT provider and the Finance Department's procedures.

25 7.13 The investigation was delayed due to the Claimant going on annual leave from 4 March and the advent of the covid pandemic.

7.14 The Claimant was invited to an Investigation Meeting by letter of 6 May 2020 (Production 21).

7.15 Ms Morely interviewed the Claimant as part of the investigation on 8 May 2020. A record of that interview is produced

(Production 22). The Claimant denied altering the holiday tracker, aid that people could guess her password and that she usely took her break at 9.50am.

5 7.16 Ms Morely considered the Claimant's explanation, confirmed that there was no CCTV evidence and that the Company's IT Providers could not assist in the matter. She interviewed Claire Stanton (Financial Accountant) and John Houston (Business Contracts Manager). She considered all the documentary evidence available from the Finance Department. She
10 concluded that the Claimant should face disciplinary action as a consequence of her investigation and produced a Report dated 12 May 2020 (Production 23).

Disciplinary Hearing

15 7.17 The Respondent wrote to the Claimant on 14 May 2020 and invited her to a Disciplinary Hearing on 20 May 2020 (Production 24). The invitation told her that the allegation she was facing was that she had altered her holiday allowance on the holiday tracker. She was provide with copies of relevant documents such as the investigation report, transcript of her
20 investigation meeting, print outs from the holiday tracker and a copy of the Respondent's Disciplinary Policy. She was informed that she may be dismissed and of the right to be accompanied.

25 7.18 Mr Tony Buchanan, Head of Engineering with the Respondent, conducted the Disciplinary Hearing. The Claimant attended along with a colleague. Mr Buchanan presented all the relevant evidence to the Claimant including the timeline, the Claimant's log-in showing this was used to make the modfication and the fact she had taken the holidays that were subsequently deleted. The Claimant was asked to explain and given an opportunity to
30 respond to the allegations. She asked for confirmation of the dates the all-company email was issued by the Finance

5 Department. She advised of her concern at the passage of time taken to investigate the matter which meant that CCTV and system information was not available. She contended that the screenshot evidence of the holiday tracker could have been doctored. She contended that her password was not particularly secure. She always took her breaks at 9.50am. Notes of the Disciplinary Meeting were produced (Production 25).

10 7.19 The Disciplinary Hearing was adjourned until 21 May 2020. She was invited to this meeting by email of 21 May 2020 (Production 26). The Claimant was supplied with a copy of the notes of the Disciplinary Hearing of 20 May 2020 together with company responses to the points raised by her. She was provided with confirmation of the all-company email.

15 7.20 The Claimant was dismissed for gross misconduct. This was confirmed in writing to the Claimant by letter of 21 May 2020 (Production 27). She was paid 2 weeks pay in lieu of notice (Production 32) and advised of her right of appeal.

Appeal

20 7.21 The Claimant exercised her right of appeal by letter of 26 May 2020 (Production 29). She set out the reasons for her appeal.

25 7.22 The Respondent acknowledged her appeal letter by letter of 28 May 2020 (Production 33). This letter invited her to an appeal hearing on 5 June 2020 before the Respondent's Managing Director Mark Walker. She was advised of the right to be accompanied at the hearing.

30 7.23 The Claimant attended the Appeal Hearing on 5 June 2020 and was accompanied by a colleague, Michael McParland. The Claimant was informed of the process, the purpose of the hearing and confirmed to the Respondent that she had

sufficient time to prepare. She was informed that she had the opportunity to provide additional evidence or information for review.

5 7.24 The Claimant read out her appeal letter in support of her appeal. She did not lead any additional evidence or information. Notes of the Appeal Hearing were produced (Production 35).

10 7.25 Mr Walker adjourned the Appeal Hearing to consider the position. He subsequently issued a letter of 10 June 2020 dismissing her appeal and setting out the reasons why he had done so (Production 36).

15 7.26 As at the date of termination of her employment the Claimant was entitled to 113 hours paid holiday but had taken 136 hours. She had taken more paid leave than she was entitle to. The Claimant belatedly produced time sheets in respect of flexitime which showed that she was due 18 hours pay. The Respondent's Finance Department confirmed the calculation by email of 16 June 2020 (Production 40). 18 hours pay was paid to the Claimant on 10 February 2021. No further sums were due.

20 **The Relevant Law**

8. The Claimant asserts unfair dismissal and claims in respect of arrears of pay and holiday pay.

Unfair Dismissal

25 9. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

"(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 reasons)

for the dismissal, and

5 *(b) that it is either a reason falling within subsection (2) or*

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

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

10 *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

15 *(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.*

(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) –

20 *(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.”

10. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).
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11. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. In a misconduct case if facts emerge after the dismissal which show that the employee was innocent of the suspected misconduct after all that does make the dismissal unfair. The onus of proof is on the employer.
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12. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).
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13. Each case must turn on its own facts. The Tribunal must not substitute its view for that of the employer (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* and *Foley v Post Office and HSBC Bank v Madden [2000] ICR 1283*). The question is whether the dismissal fell within the band of reasonable responses which a reasonable employer might have adopted in response to the employee's conduct, not whether the Tribunal itself would have dismissed in these circumstances.
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14. In misconduct cases it is appropriate to address the tests for misconduct dismissals in *British Home Stores Ltd v Burchell [1978] IRLR 379*:
25 “First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that

belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

- 5 15. The burden of proving the first three limbs of the Burchell tests fall upon the employer. The remainder have a neutral burden.

Submissions

16. Both Parties made submissions orally.

The Respondent

- 10 17. It was submitted that the reason for dismissal was misconduct, which was a potentially fair reason in terms of section 98(2)(b) of ERA.
- 15 18. The Respondent had a genuine belief of misconduct, reasonable grounds upon which to base that belief and had carried out as much investigation as was reasonable. Reference was made to the well known cases of ***British Leyland v Swift 1981 IRLR 91*** and ***BHS v Burchill***. It was submitted that dismissal fell within the band of reasonable responses.
- 20 19. The Respondent had discovered that the holiday tracker had been altered using the Claimant’s log-in details. It had investigated and the Claimant had been unable to give any satisfactory explanation as to how her log-in details had been used to alter the holiday tracker. The Claimant had said she was on her break but did not suggest that she had been outside the building at the time of alteration until after the disciplinary process had been concluded.
20. The Claimant had been dismissed following a fair investigation and fair disciplinary process.

21. The **Burchill tests** were satisfied and dismissal was within the band of reasonable responses.
22. In so far as the Claimant's claims for arrears of pay and holiday pay were concerned it was the Respondent's submission that she had taken in excess of her holiday entitlement and was due nothing further. She was due 113 hours of leave and had taken 136. 13 hours had been clawed back and the other 10 disregarded.
23. In respect of flexitime she was due 18 hours pay which was paid on 10 February 2021.
24. She had been summarily dismissed for gross misconduct but the Respondent had paid her 2 weeks notice in lieu notwithstanding that.

The Claimant

25. The Claimant submitted that the dismissal was unfair. There had been delay in the investigation, due to that delay there was no CCTV evidence showing who may have accessed her workstation, no IT system report, no witness statements from other work colleagues and no time stamp on the screenshot of the holiday tracker. All that the screenshot showed was that her log-in details had been used.
26. There were 7 working days before she went on annual leave after the alteration to the holiday tracker had been discovered. She went on leave on 4 March 2020 and no investigation with her took place until 6 May.
27. The notes of the investigation and disciplinary meetings were not fully accurate and missed out that she had said she was on her break at the time the alteration took place. She used standard passwords for logging-in and other staff members could have accessed her workstation.

28. She always took her breaks at the same time and would have been outside the building with her colleagues at the time the alteration happened. She had produced statements from colleagues saying that they all took their breaks at the same time.

5 29. She was due outstanding holiday pay and arrears of pay.

Discussion and Decision

Reason for dismissal

30. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that Claimant was dismissed.
10 On the basis of the evidence given by the Respondent's witnesses the Tribunal accepted that the reason for dismissal was misconduct. This is a potentially fair reason under section 98(2) of ERA.

31. The Tribunal note that the Respondent does not have to prove that the Claimant actually altered the holiday tracker. All that the Respondent has to
15 establish is that it had a reasonable suspicion amounting to a belief that the Claimant had committed the act of misconduct as set out in **Burchill**.

Fact of belief of misconduct

32. The Tribunal were satisfied that the Respondent did hold the genuine belief that the Claimant had committed the act of misconduct. The clear
20 evidence available to them was the confirmation of the Claimant's log-in being used to alter the holiday tracker. The Claimant offered little by the way of explanation as to how her log-in details could have been used by someone else. Her evidence was that she used passwords which were commonly used in the Company. There was no evidence of someone
25 else having accessed her workstation or using her log-in details. Her explanation that she would have been on a break **and** was outside the building at the time of the alteration was only raised after the termination of employment. She had not raised being out of the building at the time of the Investigation, Disciplinary Hearing or Appeal despite being

5 afforded the opportunity to do so. She had raised that she had been on a break. The Respondent was entitled to reach its conclusion on the basis of the information available to it at the time. The Respondent was entitled to conclude that there was no acceptable explanation and to accept the documentary evidence that it had.

reasonable grounds upon which to sustain that belief

10 33. It follows that the Tribunal accept that the Respondent had reasonable grounds upon which to sustain that belief. The Respondent had the documentary evidence and no adequate explanation from the Claimant as to how her log-in details could have been used.

as much investigation into the matter as was reasonable in all the circumstances of the case

15 34. The Respondent had carried out a full investigation into the matter. The Claimant had been invited to and attended an investigation meeting, a disciplinary hearing and an appeal hearing.

35. At all times the Claimant maintained her innocence and that she had been on a break at the time the holiday tracker was altered. It was not until after she had been dismissed that she raised the prospect of her being outside the building whilst on her break.

20 36. The Respondent had checked their CCTV and also the IT systems with their provider and could find no evidence from either source to suggest that someone else may have had access to the Claimant's workstation and used her log-in details.

25 37. There were no further avenues of investigation open to the Respondent at the time of dismissal. The Tribunal accordingly conclude that the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Was dismissal within the band of reasonable responses

38. The Tribunal then had to consider whether or not in all the circumstances the Respondent acted reasonably in treating that reason as a sufficient reason for dismissing the Claimant (section 98(4) of ERA).

5 39. The evidence of the Respondent was that it considered the alteration of the holiday tracker to be fraudulent. The Claimant stood to gain extra paid leave as a consequence of the alteration to the holiday tracker. The Tribunal conclude that, in such circumstances, a reasonable employer may well have adopted such a response to the alleged conduct and,
10 accordingly, dismissal fell within the band of reasonable responses.

40. The Tribunal considered the investigatory and disciplinary processes that had been adopted by the Respondent were fair. The Respondent had delayed the investigation process due to the Claimant's annual leave commencing 4 March and the subsequent impact of the covid pandemic.
15 This was fair and reasonable. The Claimant had been given notice of the allegations against her, the potential outcomes and had been given the opportunity to put forward any explanation on her behalf. She was also afforded the right to be accompanied. The statements she had produced for the purposes of the Hearing were not available to the Respondent
20 when the decision to dismiss was made or at the appeal. The Tribunal disregarded the statements in the circumstances.

41. The Tribunal conclude that the dismissal was substantively and procedurally fair.

Arrears of Pay and Holiday Pay

25 42. The Tribunal considered and accepted the documentary evidence of the Respondent (set out in Production 40) which confirmed the holiday entitlement of the Claimant and that she had been overpaid by 10 hours. No further sums were due to her.

43. The Tribunal also accepted the Respondent's evidence that 18 hours of pay had become due to the Claimant following submission of time sheets (again s detailed in Production 40). The sums due (18 hours) had been paid to the Claimant on 10 February 2021.

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Employment Judge: Alan Strain
Date of Judgment: 12 March 2021
Entered in register: 20 March 2021
and copied to parties

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