Case Number: 3201123/2024

EMPLOYMENT TRIBUNALS

Claimant: **Ms T Worth**

Respondent: **Twenty-Four Seven Recruitment Services Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **13th and 14th November 2024**

Before: **Employment Judge W Brady**

Representation
Claimant: Mr D Welch (Counsel)
Respondent: Mr Pettifer (Solicitor)

JUDGMENT

1. The Claimant's claim for Unfair Dismissal is well founded.

2. The Claimant's claim for Wrongful Dismissal is well founded.

3. The Respondent shall pay to the Claimant the sum of **£12,321.73.**

REASONS

1. The Claimant was employed by the Respondent as the Regional Manager for the South East region. She commenced her employment on 1 December 2016 and was dismissed on 22nd December 2023. Early conciliation began on 11th January 2024 and the Certificate was issued on 22nd February 2024. The ET1 was filed on 2nd May 2024.

2. The Claimant claims unfair dismissal and wrongful dismissal.

3. The Respondent's case is that the reason for dismissal was due to Gross Misconduct and that this is a potentially fair reason for dismissal.

4. The remaining issues were identified at the start of the hearing and are as follows:

4.1 Did the respondent genuinely believe that the claimant was guilty of misconduct?

4.2 Was that belief based on reasonable grounds?

4.3 Had the employer carried out such an investigation into the matter was reasonable?

4.4 Did the employer follow a reasonably fair procedure within the band of reasonableness?

4.5 If all the requirements are met, was it within the band of reasonable responses to dismiss the claimant rather than impose some other disciplinary sanction such as a warning.

4.6 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/have been dismissed in time anyway.

4.7 Would it be just and equitable to reduce the amount of the claimant's basic award because of blameworthy or culpable conduct before dismissal?

4.8 Possibility of the ACAS uplift.

4.9 Wrongful Dismissal. Did the conduct complained of amount to Gross Misconduct and therefore repudiate the contract allowing the Respondent to dismiss the Claimant without notice.

Procedure:

The Tribunal heard evidence from Mr Alexander Edward Roessler, Ms Ellie-Annabell Warman for the Respondent and Ms T Worth (the Claimant).

There was a tribunal bundle of 225 pages and a supplementary bundle of a further 9 pages, so the total bundle was 234 pages.

The bundle of witness statements contained 3 statements, the Claimant, Mr Roessler and Ms Warman.

Oral reasons were given at the end of the hearing, but the Respondent made an immediate request for written reasons and so I have prepared these full reasons.

Facts of the case:

1. The Respondent is a recruitment agency. The Claimant, Ms Worth, was employed as a Regional Manager for the Southeast area and part of her role was to ensure that the Respondent's client's needs were met. One of those clients was Poundland in Harlow. Ms Worth had 7 years' continuous employment, but had previously worked for the same company and it was

accepted by both parties that she had approximately 17-18 years' experience with the Respondent company. Up until this incident Ms Worth had received one written warning which the Respondent accepts was due to an unrelated matter and had no influence in the decision to dismiss.

2. On 26th October 2023, an additional manager, Mr T Sullivan was appointed to assist Ms Worth with the work in her geographical area due to the amount of work that she had to carry out in that area.

3. On 26th October 2023, Ms Worth arrived at Poundland Harlow to meet with Mr Sullivan for the first time. During their meeting, Mr Sullivan told Ms Worth that Poundland believed that the Respondent company was “fucking shit”.

4. Ms Worth gave evidence to say that she then went to speak to Mr Banner and said to him, “I understand from Tom that you said 24-7 are shit”, and Mr Banner responded by saying, “that we were shit”.

5. On her way out of her meeting with Poundland, Ms Worth approached Mr Marples who is the UK Compliance and Training Officer for the Respondent and said, “I went in and asked him outright, so you think I’m shit then”. Mr Marples then said that Ms Worth told him that Mr Banner had replied, “No I didn't say that”. Mr Marples then finishes his account by saying that he was engrossed in something else and wasn't taking too much notice. Mr Marples made no mention of the word, “fucking” in his account, which is the most contemporaneous account of the incident.

6. Mr Marples was present in the same open office as the meeting took place in, although both parties accept that due to the positioning of his desk it is possible that he would not have been aware of or heard the conversation. In his statement he makes no reference to hearing any banging or shouting or any commotion during the incident itself. I therefore find that he did not hear the incident itself, and that the incident was not of a nature to draw Mr Marples attention away from the matter that he says he was engrossed with at the time.

7. On 31st October 2023, Mr Andrew Morden (Implementation and Business Support Director of 24/7) emailed the Respondent’s HR manager, Jacqui Richards, and reported the incident to her. In his email, he said that “Craig Lucking is extremely disappointed with the level of support management provided by Teresa Worth to our site team of Nicole Malonsa and Alex Mangiru. Craig made his opinion known to Tom Sullivan and Gary Marples last week and expressed his opinion that this is not acceptable.” He then wrote that, “During the events of last week, Teresa Worth took it upon herself to confront Travis Banner (Operations manager Poundland) by saying “I understand you think I'm F***** S***.” Travis (Banner) advised Craig Lucking of the confrontation and added “he’s being bullied by someone who he doesn't even work with”.

8. Ms Richards then began her investigation into what happened on 26th October 2024. She emailed Tom Sullivan who said that he had spoken to Travis Banner who had told him that while he was in an open plan office and on a meeting, Teresa walked up to him and said, “so you fucking think I’m fucking shit then do you?”. Tom Sullivan was not present when the

incident took place, but said that Travis had told him that he didn't know how to react to this and he felt that he was being bullied by someone who is not even a direct report for him."

9. The Claimant was then informed by a letter dated 2nd November 2023 that she was suspended. The letter stated, "Please note that suspension is not a disciplinary sanction. It is a neutral step to allow an investigation to take place without hindrance."

10. On 7th November 2023 a letter was sent to Ms Worth asking her to attend a disciplinary hearing on 10th November. The letter informed her of the allegations saying, "specifically you used the words "fucking" and "shit".

11. By this time, no request had been made by the Respondent company to the Claimant for her account of the incident.

12. Due to a medical note being produced by Ms Worth, the meeting was postponed to 6th November 2024.

13. The disciplinary meeting was held on 6th November 2023. The meeting was chaired by Mr Alex Roessler. Also present were the Claimant, Mr Redmond (Claimant's representative) and Ms Samantha Richards (note taker).

14. During cross examination, Mr Roessler was asked whether he thought it was appropriate that Ms Worth had not been asked to give her account of the incident prior to the disciplinary hearing. He replied, "I don't think it has to be done if the allegations are strong enough". Therefore, as he believed that the allegations against Ms Worth were strong enough he did not believe that it was necessary to obtain an account from her prior to the disciplinary meeting.

15. That said, at the disciplinary meeting, Mr Roessler did ask Ms Worth to give her account, having heard her account he then adjourned the meeting to make further investigations.

16. Mr Roessler then made further investigations by contacting Mr Sullivan and holding a further meeting with him to ask him what he had heard.

17. The meeting with Mr Sullivan was held on 7th December 2023. During that meeting Mr Sullivan expanded on the statement that he had given previously in an email dated 7th November 2023. On this occasion, Mr Sullivan said that Mr Banner had told him that "Teresa walked over to me while I was in a meeting, slammed her hands on my desk, leant over and said, 'you fucking think I'm fucking shit then'. I've never had this in my place of work where I feel like I've been bullied, and this person doesn't even work for me". Mr Roessler then asked Mr Sullivan "What is Travis like?", he answers, "Obviously he leaves tomorrow, 6ft 5" American guy". They then discuss the fact that it is an open-plan office and Gary Marples was present at the time.

18. Following the meeting with Mr Sullivan, Mr Roessler then wrote to the Claimant to ask for her comments. Unfortunately, due to the company's IT security, the Claimant's reply to Mr Roessler was not received, therefore

meaning that the Claimant's account in response to Mr Sullivan's new allegations, was not heard. Mr Roessler therefore made the decision and on 22nd December 2023 a letter was sent to Ms Worth informing her that she had been dismissed with immediate effect due to gross misconduct.

19. When Mr Roessler was asked in cross examination, how he came to his decision, he said that he could see no reason for the customer to lie or "cause chaos". I note however that Poundland had been considering whether or not they were going to renew their agreement with the Respondent prior to this incident, and I also note that no formal complaint was ever received from Poundland about Ms Worth's alleged conduct on that day. Such possible alternative explanations for the accounts reported by Mr Sullivan do not appear to have been considered by Mr Roessler prior to his decision making.

20. Although the letter of dismissal did not inform Ms Worth of her right to appeal, Ms Worth was aware that she had a right to appeal and submitted a letter of appeal to the Respondent company on 5th January 2024. Again, this email was not received due to the company's IT security but after having been contacted by Ms Worth's legal representative, the company arranged an appeal hearing which was held on 24th January 2024.

21. The appeal hearing was held on 24th January 2024. Present at the meeting were Julia Bellingham, the HR manager, Ellie Warman, the business development director, the Claimant, Lesley Cavendish (claimant's representative) and Samantha Richards – Note taker.

22. During her evidence, Ms Warman accepted that she was not familiar with the company's written appeal procedure in the Employee Handbook which was in the bundle at page 65. Ms Warman accepted that she did not refer to the Employee Handbook prior to the appeal hearing but said that she had been trained on and she knew what the appeal procedure was. She agrees that the staff handbook did not provide any detail about how an appeal hearing should be conducted.

23. Ms Warman said that she considered the 3 initial emails that had been obtained from Mr Sullivan, Mr Marples and Mr Morden and the minute of the meeting with Mr Sullivan. When asked if she had any concerns about the fact that the Claimant had not had the chance to challenge the new evidence that had been obtained after the disciplinary hearing, she said she did not have any such concerns.

24. Following the appeal hearing, a letter was sent to Ms Worth explaining that her appeal had been unsuccessful. The points that had been raised in her email were each answered in the letter. Ms Warman in her evidence said that she believed that someone using the word "shit" in front of a client was sufficiently serious enough to dismiss them despite their long service. She also, having decided that the conduct amounted to gross misconduct, did not consider that payment in lieu of notice should be considered.

The Law:

25. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

26. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (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. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827.

27. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

28. An employer should carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances. The employer should not act on the basis of mere suspicion: it must have a genuine belief that the employee is guilty based on reasonable grounds after having carried out as much investigation into the matter as was reasonable in all of the circumstances. The employer's task is to gather all the available evidence. Once in full possession of the full facts, the employer will be in a position to make a reasonable decision about what action to take.

29. The EAT in *Khan v Stripestar Ltd EATS 0022/15* held that there is no limitation on the nature and extent of the deficiencies in a disciplinary hearing that can be cured by a thorough and effective internal appeal. Thus, even if an investigation is found to be beyond the bounds of

reasonableness, a fair appeal process and investigation can cure the deficiencies.

30. The extent to which an employer can rely on allegations made by a third party when reaching a decision on whether to dismiss was considered in *Henderson v Granville Tours Ltd 1982 IRLR 494, EAT*, where the EAT found it unreasonable to dismiss on customers' complaints alone, no matter how truthful and reliable the complainants might be. Further investigation is needed, even by small firms, before a reasonable belief in the misconduct can be established. This point was reiterated in *Sneddon v Carr-Gomm Scotland Ltd 2012 IRLR 820, Ct Sess (Inner House)*, a case concerning allegations that an employee had shouted at and bullied a vulnerable care user. The allegations were based on a brief note of the evidence of a single third-party witness given in a short phone call, with no other corroborating evidence, and was strongly contested by the employee. The Court held that, in these circumstances, a reasonable employer would have gone back to the third-party witness to obtain a clearer and more detailed account.

Conclusions:

1. The principal reason for dismissal was a potentially fair one. The Claimant was dismissed for misconduct.

2. Did the respondent genuinely believe that the claimant was guilty of misconduct? Yes, it is clear that both Mr Roessler and Ms Warman had a genuine belief that the claimant was guilty of misconduct that being swearing at a client in an open office.

3. Was the belief based on reasonable grounds?

   3.1 The investigation: There were a number of flaws in the investigation. It was perhaps unfortunate that the incident came to light when Ms Worth was on annual leave. Despite that, even after her return from annual leave, Ms Worth was not asked for her account of the incident prior to the disciplinary hearing. No written complaint was ever received from the client, about Ms Worth's behaviour but hearsay evidence reported third hand by Mr Sullivan was considered more reliable than Ms Worth's own account, which was not sought prior to the disciplinary hearing on 6th December.

4. At the disciplinary hearing on 6th December 2024, Mr Roessler did hear Ms Worth's account and as a result he adjourned the disciplinary meeting to hold a meeting with Mr Sullivan. During that subsequent meeting with Mr Sullivan, Mr Sullivan provided a great more detail than he had provided a month earlier. In this account, Mr Sullivan said that Mr Banner had reported that Ms Worth had "slammed her hands on my desk, leant over and said, "you fucking think I'm fucking shit then" and that despite being 6 ft 5 in height Mr Banner was "shaken" and "on edge" after the verbal confrontation with Ms Worth, who, according to her evidence, is 5ft 4 in height. None of this physical aggression had been reported in the original statement that triggered the disciplinary meeting, neither was it witnessed or reported by Mr Marples who was present in the open office at the time of the incident. The considerable inconsistencies in the accounts recalled by

Mr Sullivan do not seem to have been considered by the Respondent company.

5. Emails: It was, of course, unfortunate that the emails from Ms Worth were intercepted by the Respondent company's IT system and therefore not received by the Respondent company, and whilst this was not a deliberate act, it clearly put Ms Worth at a disadvantage in putting her response to the new evidence forward to her employers.

6. The appeal meeting was held on 24th January 2024. Following the case of Khan, it is possible for deficiencies in an investigation to be put right by a properly conducted appeal meeting. However, the appeal meeting minutes show that the appeal had a predetermined outcome rather than a fresh approach to the evidence. During that meeting, Ms Worth raised the points that she had made previously, Ms Bellingham said, "Tom doesn't appear to have the greatest recall so I will look into the statements, but it is based on a combination of them all. The allegation is enough."

7. When, during the appeal meeting, Ms Worth raised the fact that she hadn't had a chance to put her side forward, Ms Bellingham replied, "you did, in the investigation". But that was not the case. Ms Bellingham later went on to say, "I can tell that you are a valued member of staff, this isn't going to ruin your career", which again indicates that the decision to dismiss was predetermined.

8. In the letter dated 26th January 2024, Ms Warman attempted to answer the points raised by the Claimant in her appeal. Ms Warman said that she took into account the claimant's longevity with the Respondent company when she was weighing up the conflicting versions of events. However, Ms Worth had not been given an opportunity to put her account forward. Ms Worth not been asked to give her account prior to the disciplinary meeting, no investigatory meeting had been held, her emails in response to the new evidence from Mr Sullivan, had been lost and then by the time the Appeal hearing was held, the Respondent had decided that Mr Sullivan's report of the client's complaint was the accurate version of events, despite its inconsistencies and despite the fact that Poundland had never provided a written complaint or a statement from either Mr Lucking or Mr Banner.

9. Finally, having made the decision that Ms Worth was guilty of misconduct, the company were under a duty to consider whether or not summary dismissal was appropriate. The ACAS guidance states, "If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation." When questioned about this, Ms Warman was adamant that summary dismissal was the only appropriate sanction because (she said) there was a breakdown of trust and confidence. Despite the long service of Ms Worth, I am not convinced that other remedies were considered, for example a final warning and a move to another area.

10. The Respondent company argued that there has been a large loss because of the incident between Ms Worth and Mr Banner on the 26th October 2024,

however even prior to that incident, there were issues being raised about the contract between the Respondent company and Poundland. As Mr Roessler said in his evidence, it cannot be solely attributed to this incident. In the email dated 31st October 2024, Mr Morden said, "Craig Lucking is extremely disappointed with the level of support management provided by Teresa Worth to our site team... Craig made his opinion known to Tom Sullivan and Gary Marples last week and expressed his opinion that this is not acceptable and went further to say he is looking to reduce agency supply to one agency and that 24-7 Recruitment were, at present not favourite to be that agency." Mr Sullivan had recently been moved to the South East area because it was a large area and needed additional support.

11. I have reminded myself of the fact that when considering the Unfair Dismissal claim, it is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

12. However in this case I find that the investigation and in particular the failure to properly consider Ms Worth's account before making the decision to dismiss, fell outside the bands of how a reasonable employer would conduct the disciplinary process. These failures were not rectified by the appeal process which sought to justify the decision that had already been made, rather than to consider it afresh.

13. I therefore find that Ms Worth was unfairly dismissed.

14. With regard to the claim for notice, I find that Ms Worth's account has been consistent throughout. I accept Ms Worth's account that she did not use the word, "fucking" to her client, and the initial report of Mr Marples who was present in the open office at the time of the incident, confirms that account. I find that Mr Sullivan's account was inconsistent and elaborate. Had there been a slamming of the desk or raised voices and swearing, it is likely that Mr Marples would have been sufficiently distracted from the work that he was doing to notice that something had gone on.

15. I therefore find that although Ms Worth may be guilty of some degree of misconduct in that (as she accepted in her evidence) she did not follow the proper procedure, but spoke to the client directly, this does not amount to gross misconduct. I have considered the argument that was made by the Respondent that the misconduct caused damage to the business, but I do not find that that can be solely attributed to Ms Worth's conduct on the 26th September 2023. I therefore do not find that Ms Worth was guilty of gross misconduct. I find that other disposals such as moving Ms Worth to work in another area with a warning would have been more appropriate and I therefore find the Claimant's claim for wrongful dismissal is proved.

16. As Ms Worth herself admits that she did not follow the proper procedures, I will reduce the basic award by 15 percent to reflect the contributory negligence and compensatory awards by 15 percent to reflect the Polkey

deduction, I will also award the 15 percent ACAS uplift to reflect the fact that ACAS procedures were not followed correctly.

Remedy:

17. I therefore make the following award:

For the basic award: £5728.77 (15 percent deducted)

For the loss of statutory rights: £400

Loss of Earnings:

For the loss of earnings to date, I have reduced the amount to 26 weeks due to Ms Worth's new employment status. She has applied for 3 positions in the past 6 months and does not appear to have been actively looking for alternative employment, having secured a position immediately after her dismissal: £5601.60

18. For the loss of pension benefit, again reduced to 26 weeks £581.36

19. Total loss of earnings: £6182.96, reduced by 15 percent for Polkey and then increased by 15 percent due to ACAS uplift.

20. Total amount awarded to the Claimant is **£12,321.73**

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Employment Judge W Brady
28th November 2024