Case Number: 3200355/2020V

EMPLOYMENT TRIBUNALS

Claimant: **Mr H Obeng**

Respondent: **4 Emel Limited t/a Belvoir Lettings**

Heard at: **East London Hearing Centre** **On: 11 November 2020 and 23 December 2020 (in chambers)**

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: In person

Respondent: Huseyin Nasif, Managing Director and Owner

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's complaint of unfair dismissal pursuant to s98 of the Employment Rights Act 1996 succeeds.**

2. **Pursuant to s122(2), s123(1) and s123(6) of the Employment Rights Act 1996, the claimant's basic award and any compensatory award will be reduced by 30%.**

3. **Pursuant to s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and s124A of the Employment Rights Act 1996, the claimant's compensatory award will then be increased by 25%.**

4. **The claimant was wrongfully dismissed and is awarded damages comprising 4 weeks' pay.**

5. **Remedy will be considered in detail further at a hearing on 11 January 2021.**

REASONS

1 ***This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video (although the respondent was able to join only by telephone for most of the hearing). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of approximately 180 pages, the contents of which I have recorded. Both parties were content with the way in which the hearing was held.***

2 On 28 January 2020, the claimant presented claims for unfair dismissal and wrongful dismissal. The respondent resisted the claims in a response dated 4 March 2020.

ISSUES

3 The claimant in essence alleges that the respondent had been looking to dispense with her services to save money, and that she had been dismissed for a matter which was not misconduct let alone sufficient to justify summary dismissal. Her employer had in any event followed no procedure.

4 The respondent in turn argued that its managing director, Mr Nasif, had concluded after a reasonable investigation that the claimant had acted dishonestly and without integrity, causing him to lose all trust and confidence in her and justifying her summary dismissal.

5 Consequently, the issues I had to decide were:

5.1 What the reason was for the claimant's dismissal.

5.2 Whether it was a potentially fair reason (alleged to be conduct).

5.3 Whether the respondent had reasonable grounds to conclude that the claimant had misconducted herself.

5.4 Whether Mr Nasif conducted a reasonable investigation.

5.5 Whether dismissal fell within the range of reasonable responses.

5.6 Whether the respondent followed a fair procedure.

5.7 If necessary, whether any award should be reduced because the claimant contributed to her dismissal as a result of culpable conduct on her part.

5.8 If necessary, whether any compensatory award should be reduced to reflect the chance that the claimant would have been dismissed had a fair procedure been followed (in accordance with **Polkey v AE Dayton Services Ltd [1987] IRLR 503**).

5.9 If necessary, whether any compensatory award should be uplifted to reflect any unreasonable failure on the respondent's part to follow an applicable ACAS Code of Practice.

5.10 If necessary, whether the claimant has taken reasonable steps to mitigate her loss.

5.11 Whether the claimant committed a fundamental breach of contract which caused the respondent to dismiss her.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

6 Over the course of the two-day hearing, the Tribunal heard evidence from the claimant and Mr Nasif on the basis of written witness statements. The parties both relied on a bundle of documents comprising approximately 180 pages. I was also provided during the hearing with the email sent by the respondent to the claimant confirming her dismissal.

7 The parties each made oral submissions. I took these into account in their entirety when determining the issues in the case. It was agreed that I would give judgment on liability and would determine remedy at a separate hearing, provisionally agreed to take place remotely on 11 January 2021. However, given the factual overlap with issues of liability, I have also reached conclusions on any reduction for contribution and **Polkey** and on any ACAS uplift.

FINDINGS OF FACT

8 In order to determine the issues as agreed between the parties, I made following findings of fact, resolving any disputes on the balance of probabilities.

9 The claimant was employed by the respondent as a lettings negotiator and office manager from 1 January 2015 until her summary dismissal on 4 November 2019. She was, until the events in question, good friends with the respondent's managing director and owner, Huseyin Nasif.

10 The claimant had on occasion provided services to tenants managed by the respondent, such as undertaking inventories and contract cleaning. It was usual that Mr Nasif would be aware, either before or shortly afterwards, that it was the claimant providing these services. Moreover, on all previous occasions but one the claimant's invoice for services would be paid by the respondent, who would deduct the charges from the relevant landlord's client account.

11 One of the properties on the respondent's books is 43 West Rd, Stanstead, Essex. Following a change of tenants on 1 August 2019, the new occupants required the garage to be cleared. On 23 September 2019, the claimant emailed the landlord in the following terms:

> 'We need to have the garage cleared from the old tenant…the new tenant have [sic] been very patient but really need to have the use of the garage as it was rented to them with the garage. They have not paid the extra £40.00 as they have not had use. I have been trying to obtain quotes which have been really high due to the fact that it is full to the brim with sofa, beds, washing machine, clothes, toys. I

have managed to get a quote for £380.00 can you let me know if we should go ahead as soon as possible please Mark.'

12 The landlord replied:

'With the best quote do what you need to get it cleared. As you say crazy expensive. Please try to find cheaper. Just need to be taken to a tip. I can make a house move with that price. Thank you'

13 The claimant responded:

'Yes some of the prices came in at over £500.00 I had a washing machine and a sofa only removed last week from another property and they charged £270.00 think it's something to do with needing a licence for the dumps. So I thought this was the best.'

14 The contractor in question was an individual called Tunde, known to the claimant's husband. He owned a van and undertook occasional removal work with it. However, Tunde's principle line of work was as a Barber.

15 Tunde attended the property on 26 September 2019 and asked for more money for the job because the garage was full of large items. The claimant agreed an additional £50, and then emailed the landlord informing him that she had informed the contractor to go ahead nevertheless because all of the other quotes were still much higher.

16 On 1 October 2000, The claimant emailed the landlord saying :

'I have attached the invoice for payment. I notice that Huseyin has process [sic] the rent this morning and the invoice had not been posted. could you please either pay direct to contractor or send to us and we will forward whatever is best suited. if you could let me know when this has been done.'

17 The attached invoice was not in Tunde's name but rather in the name of 'Bright Property Management', and the bank details were the claimant's. All of the claimant's businesses names began with either 'Bright' or 'Grace'.

18 At this stage, the claimant had not raised a works order nor had she entered the invoice on the respondent system. Therefore, there was no mechanism by which the invoice could at that point have been paid by the respondent and attributed against the landlord's rent on the property in question.

19 Tunde had removed most of the large items but had not fully cleared the garage and the tenants complained. The claimant asked him to return to do so. Tunde refused but allowed the claimant's husband to borrow his van to finish the job himself. Consequently, the claimant's husband returned alone on 4 October 2019. Unfortunately, the van rolled down the driveway and struck the tenants' car, also damaging the garage door.

20 The claimant arranged with the tenants for their car to be repaired privately rather than involve insurance companies. The claimant eventually paid a total of around £1,500 to the tenants.

21 On 7 October 2019, the claimant emailed the landlord again, forwarding her previous email of 1 October 2019 asking for payment for the garage clearance:

> 'Hi Mark, can you let me know if this has been done please, also tried calling you as wanted to discuss the garage door. it really needs replacing now, we have managed to get as much use out of it but it is handing [sic] off and in really poor condition can you confirm if we can go ahead with the previous quotes on this one. Attached quotes.
>
> Thanks Heidi Goddard'

22 On 30 October 2019, the claimant raised a work order and repeat invoice for the garage clearance. However, she gave 15 October 2019 as the date of the invoice. By this time, the tenants had been asking the claimant to pay for the cost of hiring a replacement car whilst theirs was being repaired.

23 On 1 November 2019, during a lengthy telephone conversation, the claimant told Mr Nasir about the job and the consequential problems. In a subsequent exchange of texts, only part of which has been produced, the claimant agreed not to pay any more to the tenants, said 'It's my fault' and also 'I know I should have told you as soon as it happened.' Mr Nasir was at this stage supportive and concerned for the claimant's welfare, offering to 'drip feed' the money she had already paid back to her over the course of three to four months.

24 However, Mr Nasir reflected on matters over the weekend and became concerned about the circumstances of the incident. On 3 November 2019, he sent a text to the claimant and her office colleague, William Chalk, saying:

> 'Heads up for you both tomorrow. Please don't come into the office until further notice. I will be there and going through all the records for my own personal audit. Please don't call or text me. I will get in touch with you both in next few days.'

25 Mr Nasir reviewed emails sent and documents created by the claimant regarding the garage clearance job and spoke to the claimant at 9:24 on Monday 4 November 2019 for just over 9 minutes. He told her that she was the one due to make money from the Garage clearance job, that he was disappointed in the way that the job had been executed, and that he would be speaking to her or emailing her. Mr Nasir ask for Tunde's, telephone number which the claimant provided.

26 The following morning, Mr Nasif email to the claimant, Saying amongst other things:

> 'When I unravelled the circumstances, regarding the 43 West Road job, and how it was executed, I was disappointed. It exposed me and my company to an unnecessary level of high risk. One that could have collapsed the company altogether. Also, it exposed the landlord to damages, expense and a potential civil case. That landlord being the same one that I pay rent to, for leasing this office.
>
> 'As mentioned to you on the phone, I have no alternative but to terminate your employment with Belvoir. The reason being 'gross misconduct'. It was a difficult decision. I have taken back management of the office, with immediate effect, and will restructure the business model. This is an upsetting time for all, not least you.

On a personal note, please respect my privacy. Any further communications must be by email.'

27 The email went on to make an offer to resolve matters in the alternative by way of a modest settlement payment.

28 At some point after 4 November 2019, Mr Nasir spoke to Tunde, who claimed not to have had anything to do with the job except renting his van to the claimant's husband. I am not satisfied, however, that Mr Nasir spoke to Tunde before writing the email above. There is no evidence from Mr Nasir's mobile phone bills of any call at that time, Mr Nasir's evidence of when he had spoken to Tunde was inconsistent, and there is no mention in the dismissal email of the claimant having lied about who undertook the job.

29 Mr Nasir did not offer the claimant any right to appeal against his decision.

Facts relevant to wrongful dismissal and remedy for unfair dismissal

30 The claimant was aware from previous garage clearance jobs that companies in that line of work require a licence to use local recycling and refuse disposal centres, and that charges consequently tend to be substantial.

31 The claimant knew or ought to have known from the amount Tunde intended to charge and the fact that he required to be paid in cash rather than by invoice that he was unlikely to be acting strictly lawfully when carrying out the job at 43 West Road.

32 The claimant created the work order for the garage clearance job on 30 October 2019 because she intended soon to discuss the problems experienced as a result with Mr Nasir.

33 The landlord of 43 West Road had not before 7 October 2019 authorised replacement of the garage door at the property. It had for some time been in a poor state of repair, and the 'up and over' mechanism did not work. However, it could still be opened outwards and closed because it had been rehung on hinges to one side.

34 Following the accident on 4 October 2019, however, the door no longer operated at all, and needed to be replaced. It would heave been reasonable for the landlord to expect to be informed about the accident.

THE LAW

Unfair Dismissal

35 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

36 Section 98 ERA provides:

> (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 reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

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

…

(b) relates to the conduct of the employee,

…

(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)—

(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.

…

37 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

38 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

39 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. 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. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

40 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

41 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

42 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA). In **Nelson v BBC (No.2) [1979] I.R.L.R. 346**, the Court of Appeal clarified that blameworthy conduct could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances'

43 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and **Polkey v AE Dayton Services Ltd**.

44 If a party fails unreasonably to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, a Tribunal can increase or decrease (as appropriate) any compensatory award for unfair dismissal by up to 25%, if the Tribunal considers that it is in the interests of justice to do so (per s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and s124A ERA).

Breach of Contract

45 Pursuant to art 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

46 An employer is only entitled to dismiss an employee without sufficient contractual notice (or pay in lieu, the contract so permits) if dismissing in acceptance of a repudiatory breach on the part of the employee.

47 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

48 The burden lies on the employer to prove that the employee was in fundamental breach of contract.

CONCLUSIONS

49 Consequent to my findings of fact above, I have reached the following conclusions.

50 The claimant and Mr Nasif had until the events in question enjoyed a very cordial relationship. Indeed, even as of 1 November 2019, Mr Nasif was concerned for and supportive of the claimant, whom he believed was being taken advantage of by a tenant. Consequently, I do not accept that Mr Nasif was seeking to exploit the situation which had arisen over 43 West Road as an excuse to dismiss her, whether to save money as she argues or otherwise. Instead, I find that the reason for her dismissal was exactly as stated in Mr Nasif's email of 4 November 2019: the circumstances of that job and how it was executed, exposing him and his company to an unacceptable level of risk. It was that belief which caused him to dismiss her and can properly be categorised as a matter of conduct.

51 However, Mr Nasif's investigation was perfunctory and fell well outside the range of reasonable investigations. No reasonable employer would have failed to speak to the tenants and contractor involved. Nor would any reasonable employer have failed to seek the claimant's own response to those specific matters concerning him.

52 Indeed, Mr Nasif followed practically no procedure at all, let alone a fair one. In addition to his wholly inadequate investigation, he gave the claimant no proper opportunity to answer his suspicions, and did not offer her any right of appeal. Consequently, I find that the claimant was unfairly dismissed.

Adjustments to the Basic and Compensatory Awards

53 Of course, I have to consider whether the claimant could have been fairly dismissed had a fair procedure been followed and whether, in any event, she contributed her dismissal.

54 As I indicate above, any reasonable employer would at a minimum have spoken to Tunde and the tenants of 43 West Road, would have put all of the evidence relied upon to the claimant (including that of Tunde and the tenants) and given her a proper opportunity to respond. Mr Nasif did eventually speak to Tunde, who told him that he had had nothing to do with the garage clearance job beyond renting his van to the claimant's husband; however, the claimant would have been able provide cogent evidence to the contrary. For the reasons I give below, I believe that Mr Nasif would have been justified in concluding that the claimant's behaviour was less than exemplary; however, I do not accept that he would have been entitled to conclude that she had misconducted herself to the extent where dismissal would have fallen within the range of reasonable responses.

55 It is clear from my reasoning and findings above that the claimant should have realised that Tunde was an extremely unwise choice to undertake the garage clearance at 43 West Road. Mr Nasir should have been informed at the time, when the work was left incomplete and when the tenant's car and the garage door were damaged. Finally, the claimant ought to have informed the landlord about the accident, and her email to the

landlord asking for permission to replace the garage door because of its state of repair was in any event misleading by failing to explain why it was hanging off its hinges.

56 These are all matters in respect of which I find the claimant to be blameworthy. Moreover, all of them occurred before the claimant was notified of her summary dismissal and all of them, I accept, formed part of Mr Nasir's reason for dismissing her. It is appropriate, therefore, to reduce the claimant's basic and compensatory awards to reflect her degree of culpability. Doing my best, I consider that a 30% reduction is appropriate.

57 Conversely, I find that the respondent failed utterly to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures: Mr Nasir failed to carry out an adequate investigation, failed to give the claimant sufficient information about the allegations against her, did not invite her to a meeting to discuss them and did not offer her a right of appeal. The respondent has offered no explanation for these failures and so I find that an uplift of 25% to her compensatory award would be just and equitable.

Damages for Wrongful Dismissal

58 As will be clear from my conclusions above on contributory fault, I am satisfied that the claimant's blameworthy conduct, whilst contributing to her dismissal, fell short of behaviour justifying dismissal or critically undermining trust and confidence, and thus fell far short of constituting a fundamental breach justifying her summary dismissal. Consequently, I find that she is entitled to damages for loss of notice pay.

59 In the absence of any evidence of a more generous contractual entitlement, I find that the claimant's losses comprise one week's pay for each whole year worked (per s86 ERA), a total of 4 weeks' pay.

60 Remedy will be considered further at a hearing listed for 11 January 2021.

Employment Judge O'Brien
Date: 24 December 2020