



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms Carol Farren

**Respondent:** Millom Network Centre Ltd

**HELD AT:** Manchester Employment Tribunal by Cloud Video Platform (CVP) **ON:** 10 July 2024

**BEFORE:** Employment Judge Ficklin

### REPRESENTATION:

**Claimant:** Mr J Fallows, Representative

**Respondent:** Mr C Ushieagu, Consultant

### RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is well-founded.
2. For unfair dismissal, the respondent is ordered to pay the claimant:
  - 2.1. A basic award of £532 (gross pay);
  - 2.2. A compensatory award of £2145.94 (net pay);
  - 2.3. Award for loss of statutory rights of £50 (net pay).
3. The claimant's claim for wrongful dismissal is well-founded.
4. For wrongful dismissal, the respondent is ordered to pay the claimant:
  - 4.1. £532 (gross pay).
5. The claimant is awarded a total of £3,259.94.

### REASONS

#### Preamble

1. In a claim form received on 17 July 2023 following ACAS Early Conciliation, the claimant brought complaints of unfair dismissal and wrongful dismissal (failure to pay her notice pay, aka breach of contract).

### Evidence

2. I heard evidence from the claimant on her own behalf, and from Ms Sue Dust, who was formerly employed at the respondent as office manager. For the respondent I heard from Mr Tony Dixon, Project Lead and Lead Mentor, who was the claimant's line manager at the material time. In the 119-page bundle there were *inter alia* copies of notes and documentation from the claimant's disciplinary process and termination, and copies of the respondent's disciplinary policy.

### Agreed issues

3. The issues were agreed between the parties, as follows:

#### 1. Unfair dismissal

##### Dismissal

1.1 The respondent accepts that it dismissed the claimant.

##### Reason

1.2 Has the respondent shown the reason or principal reason for dismissal?

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent says the potentially fair reason is conduct.

1.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.4.1 The respondent genuinely believed the claimant had committed misconduct;

1.4.2 there were reasonable grounds for that belief;

1.4.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.4.4 the respondent followed a reasonably fair procedure;

1.4.5 dismissal was within the band of reasonable responses.

#### 2. Remedy for unfair dismissal

2.1 The claimant does not wish to be reinstated or re-engaged.

2.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.2.1 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.2.2 Did the respondent or the claimant unreasonably fail to comply with it by the respondent failing to give the claimant proper notice of any disciplinary hearings and by not allowing her to be accompanied at any of the disciplinary hearings?

2.2.3 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.2.4 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

2.2.5 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.2.6 Does the statutory cap of fifty-two weeks' pay apply?

2.3 What basic award is payable to the claimant, if any?

2.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

3.4 If the respondent did wrongfully dismiss the claimant, how much should she be awarded in damages?

**Facts**

4. The respondent is a charitable community centre in Millom that employs nine people. The respondent runs activities such as classes in woodworking, a second-hand furniture shop, a children's STEM club and Meals on Wheels.

5. The claimant was employed as a cook working 28 hours per week at £9.50 per hour during her employment from 21 December 2020 to 5 May 2023. She made meals for the Meals on Wheels programme, which were delivered to people in the community.

6. At a Trustee meeting on 25 April 2023, the respondent decided to terminate the claimant's employment. The stated grounds were:

- Food Hygiene Standard levels and cleanliness not being adhered to. The state of the kitchen not fully discovered until your absence, the dirt, clutter and mould. Food stored incorrectly and at wrong temperature, resulting in not meeting FSA regulations.

- Attitude towards Senior Management who were offering to assist you to complete necessary tasks.

- Necessary checks & paperwork not completed fully, which as explained is a legal requirement.

- A lack of respect for Senior Management along with defamation of Millom Network Centre as a whole, whereby derogatory comments reaching members of the board of trustees.

7. The claimant was dismissed effective 5 May 2023 for gross misconduct. On 17 May 2023 the claimant met two of the respondent's trustees for an explanation of why she was dismissed. The claimant wrote to the respondent on 20 June 2023 contesting the reasons for dismissal. This was treated as an appeal against dismissal. The respondent employed a human resources (HR) consultant to conduct an appeal. The claimant declined to take part in an appeal meeting. In a report dated 10 October 2023, the consultant upheld the dismissal for gross misconduct.

**Policies & Procedures**

8. The respondent's Disciplinary Policy materially states:

"b) Examples of offences regarded as gross misconduct warranting summary dismissal:

...

Wilful refusal to carry out a legitimate instruction”

### **Findings**

9. The claimant had been a cook for the respondent since December 2020. In February 2023 the claimant became ill and was admitted to hospital for tests. After a period off work, she attempted to return to work on 11 April 2023. Upon return she was refused access to the building. The respondent demanded a ‘fit for work’ certificate. The claimant asked her GP and the hospital for such a document but neither provided one. The claimant’s claim form (ET1) says that she returned to work on 18 April 2023.

10. The respondent’s trustees became concerned in February and March 2023 about the cleanliness of the kitchen. The respondent arranged for extra staff to undertake a deep clean while the claimant was off work. The local council food safety inspection report March 2023 awarded the respondent’s kitchen 5/5 with no issues. The respondent instituted a new cleaning regime to maintain cleanliness.

11. The claimant claims that on 18 April 2023 she was called into a meeting with two of the respondent’s Trustees, David Baker and Mike Askew. The claimant was not informed in advance that it was a disciplinary meeting or that she could bring a representative. She was given a verbal warning about the cleanliness of the kitchen.

12. The respondent says there were two meetings; the first was a discussion of the new cleaning regime and the second when the verbal warning was issued. There is in any case a letter confirming the verbal warning from the respondent to the claimant dated 17 April 2023. I accept that the claimant was given a verbal warning, apparently about the state of the kitchen at the time she was signed off work in the preceding February. There is no record of this meeting in the bundle or what evidence the claimant was shown to justify the warning, ie photographs or food safety records.

13. The claimant’s evidence defensive and evasive. She claimed that the various photographs and evidence of the dirty kitchen in the bundle were not the kitchen where she worked, which I reject. I accept the respondent’s evidence that the photographs related to the claimant’s work area. I do accept her evidence that she had previously entered food temperatures and dates and other relevant food safety information on the required forms, before the safety procedures were changed while she was on sick leave.

14. The claimant is dyslexic. The respondent was aware of that and says that she was offered help. I accept that before she went on sick leave in February 2023, Mr Dixon and the trustees had made at least some effort to assist the claimant with written records and form-filling when she had difficulty. There was some effort to retrain the claimant after she returned. I also accept the claimant’s evidence that Mr Dixon and other management were often not available in person or by telephone, leaving her to manage the food safety forms alone.

15. The claimant agreed in oral evidence that she may not have always recorded food temperatures. She repeatedly stated that she had not had any problems with her food in the time she worked for the respondent and that should be determinative of whether she adequately followed procedures.

16. There is at least one food temperature/date form in the bundle that I accept was completed by the claimant. I also accept that the claimant sometimes did not follow instructions and did not seem to take some of the procedures seriously. She repeatedly said that she “would never do that” when food safety failures and the potential consequences were put to her. I accept the respondent’s argument that this was insufficient, and that the procedures must be complied with anyway. I also find that there was no sufficient attempt to re-train the claimant upon her return.

17. The claimant says that Tony Dixon shouted at her in the presence of Sue Dust, who was the office manager at that time, on 19 April 2023. Mrs Dust agreed with this in a letter dated 27 June 2024 and in her oral evidence. She accepted that she had made a previous statement that was not before me to the effect that Mr Dixon had not been aggressive. She now described Mr Dixon as “intimidating” and said that he was physically “far too close” to the claimant. The claimant accepts that Mr Dixon then left and returned with a new type of records form for the kitchen and that Mr Dixon agreed to help her with the new form. This incident was not put to Mr Dixon, who said nothing about it except to reiterate that Mrs Dust had previously given a contrary statement.

18. I accept that Mr Dixon behaved inappropriately in this event, and also that he offered assistance. While I do not accept all the claimant’s evidence, I find Ms Dust to be a credible witness, and take into account that she said that she felt unable to give honest evidence while employed by the respondent because she feared retaliation.

19. I am surprised that Angela Dixon, the respondent’s Chief Executive Officer, did not give evidence, even a witness statement. The only evidence from her is a document purporting to be a “log on what [the claimant] is doing and not doing.” The document states that she was asked by the trustees to keep it. The document is entirely personal to Mrs Dixon; it was never put to the claimant for response at any stage and Mr Dixon was not clear in his evidence whether it was before the trustees when they made the decision to dismiss the claimant. There is no evidence that it was kept contemporaneously. There is no attached documentary support for it, and Mrs Dixon deigned not to give any evidence in support of it. I attach no weight at all to that document.

20. At a trustee meeting on 25 April 2023, the respondent decided to terminate the claimant’s employment. The claimant was not present or represented and had no opportunity to respond or present evidence. There is no record of this meeting before me. The trustee meeting was said to be an emergency meeting, convened solely to deal with the claimant.

21. From Mr Dixon’s evidence I take it that the situation with the claimant had been at a crucial stage in that week because the provision of Meals on Wheels, and the running and reputation of the respondent, were at stake. Mr Dixon was the claimant’s line manager. I find that Mr Dixon did not tell the truth in oral evidence when he said that he did not remember if he attended the emergency trustee meeting. It is not clear whether he did attend, but I do not believe his claim that he simply does not remember.

22. The claimant says that on 2 May 2023 she was called into another meeting with trustees named Dave and Ruth. She was again not told what the meeting was for in advance and was not offered the right of representation. She was summarily dismissed effective either 2 May or 5 May 2023; the evidence records different dates.

23. A meeting was held on 17 May 2023 after the claimant requested an explanation of her dismissal. The document that purports to be a written record of this meeting is nothing of the sort. It is simply a list of the respondent's reasons for dismissal.

24. The claimant appealed her dismissal by letter submitted on 20 June 2023, raising grounds summarised as follows:

- “- You believe that upon your return to work after a period of sickness, Millom Network Centre Ltd refused to start you back.
- You believe that your verbal warning was too harsh as nothing was said to you before you went on sick leave regarding the cleanliness and procedures of the kitchen even though Millom Network Centre Ltd knew you were dyslexic and offered you support.
- You state that you were not offered the right to be accompanied.
- You state that you were not warned that this could have terminated your employment contract.
- You believe that Millom Network Centre Ltd did not act in a fair and reasonable way or comply with employment law.”

25. The respondent's written response to this clarifies that the verbal warning was for the alleged unclean state of the kitchen up to February 2023, before the claimant was off work due to illness. The response states that the claimant refused to abide by new health and safety procedures and complete the relevant records of food temperatures, refused to follow directions, and despite the verbal warning, her “attitude to staff was no better”.

26. The appeal report dated 1 November 2023 produced by a consultant from Peninsula, a human resources consultancy firm, says that the appeal was a review of the original decision to dismiss the claimant. The claimant did not take part in the process other than her submitted grounds. The report considers various documents that are also in the Tribunal bundle, including the purported 17 May 2023 meeting summary and the verbal warning letter, and the claimant's contract. The claimant's appeal failed and the dismissal upheld.

### **Law**

27. Section 94(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

28. Section 98(4) provides that 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 reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonably or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

29. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

30. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair...in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view."

31. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

32. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. For the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

33. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that

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 reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

34. The basic award may be reduced where the tribunal 'considers that any conduct of the complainant before the dismissal was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...'. In respect of other awards 'where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...'. The claimant's conduct must be 'culpable or blameworthy', and must cause or contribute to the claimant's dismissal, though not its fairness or unfairness. Such conduct need not amount to gross misconduct - Jagex Ltd v McCambridge UKEAT/0041/19.

35. if there is a finding that the claimant's conduct was contributory, the steps are to:

- 1) Identify the relevant conduct;
- 2) Assess whether it is objectively culpable or blameworthy;
- 3) Consider whether it caused or contributed to the claimant's dismissal; and
- 4) If so, determine to what extent it is just and equitable to reduce any award - Steen v ASP Packaging Ltd UKEAT/0023/13/1707

### **Conclusion**

36. The respondent says that the "potentially fair reason" for dismissal is the claimant's conduct. In their evidence, the respondent conflates issues of capability with gross misconduct, but sets out their case based solely on gross misconduct.

37. Whether the respondent genuinely believed the claimant was guilty of gross misconduct or not, there was no valid investigation into her conduct. The claimant was not allowed at any stage to take part in the process or investigation before the appeal, months later. The decision to dismiss the claimant was taken at a trustee meeting for which there is no record. There is no credible evidence at all of what information was before the trustees; Mr Dixon pretended not to know. The claimant was not invited to the meeting and knew nothing about it until the notice of termination was handed down.

38. I find that the respondent intentionally excluded the claimant from the disciplinary and dismissal process. The investigation was not simply unreasonable, it was non-existent and therefore clearly unfair. I acknowledge the respondent's view that there were issues that the claimant could have been expected to respond to, ie that her conduct may have breached her contract. But in the first place, capability is not conduct. The claimant is dyslexic and the respondent's evidence does not show



that there was adequate training or fair opportunity in the single week she was back at work to comply with the new safety procedures.

39. Other than assertions and hearsay, the respondent brought no evidence at all about the claimant's attitude and behaviour to other staff. The respondent's evidence does not detail any incident that justifies this claim, and no details were put to the claimant in her oral evidence.

40. I am surprised that the human resources consultant who conducted the appeal found this total lack of procedure to be fair. The appeal was conducted by way of 'review' and so did not address the merits of the dismissal, only whether the respondent acted reasonably. It clearly did not, and the appeal was no effective remedy for the respondent's complete failure to comply with the requirements of a fair dismissal.

41. The Acas Code's section on handling disciplinary issues sets out the steps employers must normally follow, namely:

- carry out an investigation to establish the facts of each case
- inform the employee of the problem
- hold a meeting with the employee to discuss the problem
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- provide employees with an opportunity to appeal.

42. Other than the ineffective appeal, no attempt at all was made to follow any of these steps. I find the claimant's claim for unfair dismissal to be well-founded.

43. I have been asked to consider a reduction in the basic award for unfair dismissal on the basis that the claimant's behaviour was culpable and blameworthy, and that she would have been dismissed in any event if the respondent had bothered with a dismissal procedure. There must be evidence of this behaviour. There is no reliable evidence before me of the claimant's "attitude", "lack of respect" or "derogatory comments". I bear in mind that in the very short time the claimant was back at work after being away, she was not receptive to re-training and new procedures, and relied on her record as showing she was compliant. I accept that the claimant's attitude to food safety procedures was at times dismissive. I address this below.

44. It is not enough for the respondent to prove that it had a reasonable belief that the employee was guilty of gross misconduct in a wrongful dismissal claim. The test for a wrongful dismissal claim is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief is necessary as part of the legal test. There is no reliable evidence of the claimant's statements or actions that could constitute gross misconduct. Her failures to follow procedures must be considered in light of her dyslexia and the inadequate training she was given in the one week before dismissal.

## **Remedy**

### ***Unfair Dismissal***

45. The basic award for unfair dismissal is a statutory calculation based on 1.5 weeks' pay for each full year of employment, because the claimant is older than 41. She was employed for two years and about six months. This comes to £532 (£9.50 gross hourly pay x 28 hours x 2 full years' service= £532).

46. The respondent made no attempt at all to comply with the ACAS Code of Conduct. The respondent's failure to invite the claimant to any of the meetings, allow her to respond or keep any records merits an increase in the basic award by 25%. However, I would reduce the basic award by the same percentage, ie 25%, based on the claimant's blameworthy conduct. The basic award remains £532, awarded as gross pay.

47. The claimant is also entitled to a compensatory award. I take into account that the claimant was close to retirement and says did not intend to find another job after her 65<sup>th</sup> birthday. But the position with the respondent was as a cook, and the claimant had qualifications such as food handling. She has provided no evidence of any attempt to find a different job or mitigate her loss. I find that the claimant would reasonably have been out of work for up to two months. The claimant's monthly net pay, as the respondent confirms in the ET3, was £1072.97. I award the claimant £2145.94 (2 months net pay).

48. There is no evidence that the claimant was in a pension scheme, as she asserts. I also find that the claimant's stated intent was to retire within a year of her dismissal on her 65<sup>th</sup> birthday. The claimant had no intention of staying in work for at least two more years, which is the minimum to establish statutory protection for unfair dismissal. In these circumstances, I find that £50 is just and equitable for loss of statutory rights.

49. I award the claimant a total of £2,727.94 (net pay) for Unfair Dismissal (£532 + £2145.94 + 50 = £2,727.94).

### ***Wrongful dismissal / Notice Pay/ Breach of Contract***

50. The respondent was in breach of contract when it dismissed the claimant, and her claim for wrongful dismissal is well-founded. The claimant is therefore entitled to statutory notice pay as per her contract. Statutory notice pay is one weeks' net pay for each full year of service. The claimant was employed for two full years. Her gross weekly pay is £266. Two weeks of gross pay is £532.

## **Total Remedy**

51. I award the claimant a total of £3,259.94.

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Employment Judge Ficklin

4 October 2024

SENT TO THE PARTIES ON

8 October 2024

FOR THE TRIBUNAL OFFICE

Notes:

(1) Damages for breach of contract have been awarded gross. This is because it counts as Post-Employment Notice Pay and the claimant is liable to pay tax and national insurance on it. The respondent may deduct the tax and national insurance at source.



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2407617/2023**

Name of case: **Mrs C Farren** v **Millom Network Centre**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 8 October 2024

**the calculation day** in this case is: 9 October 2024

**the stipulated rate of interest** is: **8% per annum**.

Paul Guilfoyle  
For the Employment Tribunal Office

## GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:  
[www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426](http://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426)

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.