6183/140

Case Number: 2201804/2011

MS

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Miss T A Bridgeman	**AND**	Family Mosiac Housing Association

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 19 & 20 October 2011

EMPLOYMENT JUDGE: Ms J Wade **MEMBERS:** Ms C I Ihnatowicz
Mr S Godecharle

Appearances
For the Claimant: Ms J Andrews, Consultant
For the Respondent: Mr G Goodlad, of Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Respondent:
1.1 Unfairly dismissed the Claimant;
1.2 Did not fail to pay her a bonus in breach of contract.

2. The Claimant's claim for notice pay is dismissed on withdrawal by the Claimant.

EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
19 December 2011
JUDGMENT SENT TO THE PARTIES ON
20 DECEMBER 2011
AND ENTERED IN THE REGISTER
FOR SECRETARY OF THE TRIBUNALS

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BETWEEN

Claimant		*Respondent*
Miss T A Bridgeman	**AND**	Family Mosiac Housing Association

Date of Hearing: 19 & 20 October 2011

REASONS OF THE EMPLOYMENT TRIBUNAL

1 The Claimant worked for Family Mosiac Housing Association. She says that when she was dismissed for reasons relating to her performance the dismissal was unfair. She says that she was also owed a bonus. Her claim for notice pay has been withdrawn.

The Issues and the Relevant Law

2 Employment Rights Act 1996 says that a potentially fair reason for dismissal is capability. The reason for the Claimant's dismissal has occasionally been described as "conduct", but it is common ground that the reason for the dismissal was performance related and therefore probably better fits into the category of "capability".

3 A dismissal will in fact only be fair if it satisfies the test set out in Section 98(4) of the Act and is fair. The decision as to whether the dismissal is fair or unfair:

> "(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."

4 The Tribunal must not substitute its own decision for that of the employer. Instead the Tribunal must audit the decision of the employer to decide whether the employer formed a genuine and reasonable belief after reasonable investigation that

the employee was not capable of performing work of the kind which he was employed by the employer to do.

5 The Tribunal must also decide whether the decision to dismiss was reasonable. The term "reasonable" in this context means, "was the employer operating within the range of reasonable responses open to an employer"? Every employer is different and every employer's response will therefore be different but the response in such a situation must be reasonable because, of course, the employer's decision to dismiss deprives the employee of their livelihood.

6 The employee also argues that she had a contractual right to a bonus. The bonus was, it seems to be agreed, a discretionary bonus of an unspecified amount payable when an employee's performance merited it.

Evidence

7 The Tribunal heard evidence from the Claimant. For the Respondent, it heard from Ms K Jones, Operations Manager who investigated the Claimant's capability; Mr D Black, Head of Operations who dismissed the Claimant and Ms Y Arrowsmith, Director who heard the appeal. It read the pages in the bundle to which it was referred.

8 Following the unusual circumstances of the first day of the hearing, the Claimant's representative Ms J Andrews attended the hearing on the second day and was able to assist the Tribunal very capably by cross examining the Respondent's witnesses and making closing submissions.

The Facts

9 Having considered all the evidence, the Tribunal makes the following findings on a balance of probabilities.

10 The Claimant started working for the Respondent Housing Association in 2007. At that point she was working for an agency, but she applied for and was appointed to a post with the Respondent which started on 10 September 2008. The Respondent provides a range of services to vulnerable adults and employs approximately 1,500 staff. The Claimant's role was as a floating support officer. She was to provide support to vulnerable adults in a particular catchment area. Many of the adults suffered from multiple issues such as mental health problems and required a high level of support. The Claimant was one of the links in the chain and often she worked jointly with others such as community psychiatric nurses. The Claimant had been in this line of work for many years. She started her career in 1996 working for St Mungo's Housing Association. By the time she was dismissed she had been providing floating support for nearly four years.

11 In 2009 the Claimant was paid a bonus for her work in the 2008/2009 year. It is the Respondent's case (not denied by the Claimant) that unfortunately she had a weak manager during this period who does not seem to have provided her with the support

or the objective assessment of her skills required. That manager has now been dismissed. It is not possible to say if the Claimant's performance in 2008/2009 was good, or that it was bad. The evidence is not available. However, we do not consider that it is correct that the Claimant can say that her performance up to 2010 was good, we simply do not know.

12 On 26 April 2010 a serious incident took place affecting one of the Claimant's clients. The Claimant told her line manager what had happened but when the matter came to the attention of more senior managers, they were shocked at the way the incident had been dealt with. Mr Black, Operations Manager, initiated a fact finding meeting and then commissioned Ms B Horne to carry out an investigation of the situation. Ms Horne's report was critical of the Claimant and identified shortcomings which had been going on during much of 2009 as well as 2010. It seems that these had not come to light because of the poor direct line management of the Claimant.

13 At the time Ms Horne's report was written, the Claimant had not been appraised and therefore a decision had not been made whether to award her a bonus for the financial year ending 31 March 2010. In the light of Ms Horne's findings it was decided not to award a bonus.

14 The Respondent decided to organise a disciplinary hearing and the Claimant was written to and told to attend. Unfortunately the meeting had to be adjourned twice to allow the Claimant to attend because, twice, she asked for it to be postponed. Eventually she was told that if she did not attend, the meeting would go ahead in her absence. It took place on 4 August 2010.

15 Mr Black, who had recruited the Claimant and who had a "sneaking regard" for her considered the way she had performed in relation to the incident on 26 April merited dismissal. However, he did have regard for some of the Claimant's abilities and he did think that she had not been adequately supported by her manager and therefore he decided that there were sufficient mitigating circumstances not to dismiss. Instead he issued a final written warning. This was to remain on the Claimant's file for 18 months.

16 In order to give the Claimant a fresh start she was to change teams and a "work plan" was to be put in place to ensure that she had measurable targets which, if achieved, would show that she had managed to put her performance problems behind her. The Claimant did not appeal the decision.

17 From the very early days of the Claimant's working in the new team under a manager called John Phelan, problems arose and these were recorded in supervision notes between Mr Phelan and Ms K Jones his manager. In those notes various problems with various members of staff are recorded but only two were on a work plan and thus identified as having serious performance problems which needed to be solved or else they faced dismissal. In fact the other individual passed her work plan which meant that she did make sufficient progress. The Claimant says that the Respondent was not so critical of other staff members even though their alleged failings were comparable with hers. She says that this shows that she was singled out and

differently treated which was unfair. We find that the other staff members were in a different situation to that of the Claimant. For example, the Claimant was criticised for not conducting adequate risk assessments whereas another member of staff was criticised for not keeping her outlook diary in order. Clearly the former involves a risk to a vulnerable adult far more directly than the latter. Also, it has consistently been the Claimant's case that there was in fact nothing wrong with her work and therefore, logically, she should not be disciplined at all. The evidence of discussions between Mr Phelan and Ms Jones (neither of whom had an obvious ulterior motive for criticising her) indicate that their collective view was not the same as the Claimant's. All witnesses also, consistently, made the point that they did not feel that the Claimant understood that her standard of work actually put vulnerable adults at risk. It was not a question of deciding whether the Claimant was "good enough", it was a question of whether she was meeting the minimum standard.

18 In October 2010 the Claimant had a change of team leader and instead of John Phelan she was managed by Janet Findlay. This was unfortunate because Ms Findlay, it turns out, was also being performance managed and perhaps her management skills were not as robust as were needed.

19 On 10 December 2010 Ms Findlay carried out a review of the Claimant's work plan and reported that progress was satisfactory. However, unfortunately, Ms Jones, Ms Findlay's manager did not agree. Ms Jones organised a meeting on 22 December with the Claimant to review the progress on the work plan. She had done some preliminary investigation and was concerned about some of the Claimant's record keeping. She was also concerned to see that it appeared that the Claimant had not visited some clients for six weeks. The Claimant says that the review meeting of 22 December occurred around six weeks after it should have occurred. There were a number of reasons for this and the Tribunal does not consider that indicates a significant failing on the part of the Respondent.

20 The Respondent's view of the Claimant's capability went down hill in January 2011. On 21 January Ms Jones prepared a comprehensive report having carried out a file audit. She was upset to find a number of failings which she considered to be significant. In her report she wrote that she had:

> "Serious concerns about Theresa's performance and do not consider that any improvements had been made during the period of the work plan. Theresa has failed to demonstrate that she is capable of carrying out the basic functions of her role. She has also displayed a lack of respect for her clients with her poor time keeping ... I can only conclude that the risk of a serious incident due to lack of competency by Theresa is at risk of recurring. I consider that she is potentially putting vulnerable people at risk, and is also bringing the name of Family Mosaic into disrepute. I consider that this constitutes serious misconduct, and would recommend that she is dismissed from Family Mosaic."

The Tribunal funds that Ms Jones was genuine and reasonable in her findings. They may have disagreed with Ms Findlay's but Ms Jones was the senior and more experienced manager, she looked very thoroughly at the Claimant's work, she had no

identifiable grudge against her and the findings were consistent with the negative findings of Ms Horne in 2010.

21 During January the Claimant was off sick and she eventually provided a sick note at some point after 21 January saying that she had a viral illness. This was after Ms Findlay wrote to her saying that her pay would be stopped if she did not make contact.

22 At the same time Ms Findlay investigated a complaint by a service user about the Claimant. Ms Findlay, despite the fact that she thought that the Claimant's performance was acceptable, upheld the complaint. The Claimant says that the Respondent encouraged the client to make a complaint but we find that this was only in the sense of the Respondent alerting the client to the complaints procedure which was the correct step to take.

23 On 31 January 2011 the Respondent wrote to the Claimant enclosing a pack of documents and requiring her to attend a disciplinary hearing. It was clear from the pack that the Claimant faced dismissal. She was in any event subject to a final written warning.

24 The pack contained the work plan, the work plan review of December 2010 by Ms Findlay which was largely favourable, minutes of the review meeting with Ms Jones held on 22 December 2010 and outcomes of the various enquiries made by Ms Jones indicating what Ms Jones considered to be serious failings. The upheld complaint was also included.

25 At this point the Claimant was absent from work without leave. She did not provide a further medical certificate although she did ring at the beginning of February saying that she was trying to get hold of one.

26 On the day of the hearing the Claimant rang to say that she was not well and would not be able to attend. Under cross examination, the Claimant said that she actually e-mailed to say she could not come, but this allegation was made so late in the day that it is not credible. Mr Black decided to go ahead with the hearing. His view was that the Claimant was not co-operating with the process and that he would have to go ahead, not least because he needed competent people in the role and needed to get on and recruit if the Claimant was to be dismissed. He thought that, all in all, the Claimant had not demonstrated that there was any reason to adjourn the hearing as the outcome would not be different if she did attend. At this point the question arises whether paragraph 24 of the ACAS code is engaged "where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a decision on the evidence available." It is also notable that the Claimant may have fallen foul of paragraph 12 of the code: "... employees ... should make every effort to attend the meeting".

27 On 15 February Mr Black decided to dismiss and the dismissal letter is dated 16 February 2011. The Claimant was paid for her notice, so the Respondent is not alleging that she was guilty of gross misconduct. Given the evidence available to Mr

Black and his decision not to dismiss in 2010 his conclusion was not surprising and was genuine and reasonable. The Tribunal looked at the claim that the Respondent treated the Claimant unduly harshly but reject it. Given that the Claimant was on a final written warning, had not improved and was accused of serious failings towards her clients it is understandable that colleagues were shown more lenience than she.

28 Also on 15 February the Claimant finally obtained a sick note. She seems to have been responding to a letter from the Respondent, again telling her that if she did not submit a sick note she would not get paid. The sick note said she was suffering from "malaise" but did not elaborate.

29 The Claimant appealed on 3 March. She said that she had not been given a chance to attend the hearing and therefore had not had the chance to put her case.

30 The appeal was heard by Ms Arrowsmith on 3 May 2011. Ms Arrowsmith spent nearly two hours with the Claimant and whilst she told the Claimant at the start of the hearing that this was "not a rehearing" and decided that Mr Black had been right to go ahead with the hearing in the Claimant's absence, she says she did give the claimant every chance to put her case. She says that it was not her job to force the Claimant to defend herself but she worked hard to give her the opportunity to do so. The Claimant's case was that her work was "OK". This was also what she said in her statement to the Tribunal. Therefore there was not a great deal more to say in that the Claimant was not in a position to accept that there had been problems and promise improvement in the future or indeed to reflect on why she had failed.

31 The Claimant says she did not feel able to defend herself at the appeal hearing because she felt that a decision had already been made, which of course it had to the extent that Mr Black had already made a decision to dismiss so that the Claimant was at the last hurdle.

32 When cross examined the Claimant had a reason for each and every failing identified. The Tribunal finds firstly that those failings were correctly identified by the Respondent, in other words the Claimant was not "doing ok" and secondly that at the appeal hearing she was given every changer to explain herself. That she did not do so was due to that fact that she did not accept that there were problems to explain, a misjudgement on her part.

33 The Claimant also says that she was failed by the Respondent in that it did not support her by appraising her and some of her managers were bad. She was put on the back foot by being told that her performance was fine by Ms Findlay, but of course she was an experienced Floating Support Officer, who was being required to be competent at the basics of the job and to take responsibility for her own performance, which she has not done.

34 Ms Arrowsmith decided that the dismissal should stand and the appeal was rejected on 4 May.

Conclusions

35 The Respondent had genuine and reasonable grounds for dismissing the Claimant. Mr Black had saved the Claimant from dismissal in 2010 but he was not prepared to do so again and he wanted to press on and recruit a replacement. Unfortunately in his haste he got the balance between the reasonable needs of the Housing Association and the right of the Claimant to a fair hearing wrong.

36 In our judgment his decision to dismiss without a hearing on the first occasion that the Claimant did not attend was too hasty. As the ACAS Code says an employer need not wait indefinitely for the employee to attend, and if they are malingering and not keeping in touch the wait need not be long at all BUT the right to have a hearing and to put forward your case is the bedrock of a fair dismissal process. It should not be dispensed with as lightly as it was. Mr Black did not know when he decided to go ahead whether the Claimant was showing disrespect for the system; based on her previous behaviour he had reason to think that she was, but on the occasion of the 2011 disciplinary hearing he had no way of knowing because the process was right at the beginning.

37 Further we conclude that whilst Ms Arrowsmith gave the Claimant the chance to put her case in full at the appeal, by then Ms Bridgeman was on the back foot as she had already been dismissed. Rather than wind back the clock Ms Arrowsmith defended Mr Black's decision to proceed in the Claimant's absence and the appeal was heard on the basis that she had been treated fairly thus far, so the appeal did not cure this unfairness and was indeed tainted by it.

38 We therefore conclude that the decision to dismiss was unfair in that this kind of procedural failing was substantial, especially given the size and administrative resources of the Respondent. There were no special circumstances making it imperative that the Claimant be replaced immediately by a permanent replacement.

39 Next the Tribunal must decide whether or not the outcome would have changed if her she had had the chance to put forward her explanations at the dismissal hearing. Our conclusion is that there us a 100% probability that the conclusion would not have been different. In summary:

a. The Claimant worked in a responsible job, often autonomously, and she had a responsibility to her vulnerable clients that she was not able to discharge, she could not be allowed to continue;

b. She did not accept or acknowledge that she was failing and therefore there was no chance that she could improve. Someone like this could not be redeployed;

c. She had already received a final written warning;

d. Several managers agreed in their assessment of her.

40 Therefore although the Claimant was unfairly dismissed the compensation to be paid is limited to the basic award and the period of time up to the date on which the Claimant would have been fairly dismissed. Her sick note expired of 23 February and on that date a hearing could have been held and the decision to dismiss with notice made. If the Claimant had not attended on that occasion then the Respondent could have proceeded fairly in her absence.

41 The Tribunal cannot make an order for compensation in this judgment because it does not know if recoupment applies to the award relating to the period from 15 to 23 February, but the principles are a follows:

a. The basic award is payable in respect of two complete years of employment. The multiplier is 1.5 as the Claimant was aged 47 at the time.

b. The compensatory award is to be of net pay from 16 to 23 February 2011.

c. There is an award of £300 for loss of statutory rights.

d. No other compensation is payable.

42 In the light of the above it does not appear that it will be necessary or cost effective to hold a Remedy Hearing and the parties are urged to agreed the compensation figure. They are ordered to write to the Tribunal by 23 January confirming that figures have been agreed or alternatively applying for the matter to be listed for a remedy hearing.

43 For the reasons set out in paragraphs 11-13 above the decision not to pay a bonus for 2009/10 was not unlawful.

EMPLOYMENT JUDGE

REASONS SIGNED BY EMPLOYMENT JUDGE ON

19 December 2011

REASONS SENT TO THE PARTIES ON

20 December 2011

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS