EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100675/2018

Held in Glasgow on 29 and 30 May 2018

Employment Judge M Whitcombe

Ms A Edwards	**Claimant** **Represented by:** **Ms M Dalziel (solicitor)**
Ascensos Limited	**Respondent** **Represented by:** **Ms K Beattie (solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(1) the Claimant was unfairly dismissed;

(2) having regard to the Claimant's contributory fault, it would be just and equitable for both the basic and also the compensatory awards for unfair dismissal to be reduced by 20%;

(3) the Claimant was wrongfully dismissed in breach of contract and is entitled to notice pay;

(4) the remaining issues relating to remedy will be determined, if necessary, at a further hearing on 24th July 2018.

REASONS

Introduction

1. At the joint request of both representatives I gave judgment with oral reasons at the conclusion of the hearing. Having done so, the Respondent requested these written reasons for my decision.

2. This is a claim for unfair dismissal and wrongful dismissal. I upheld those claims for the reasons set out below.

3. While it had originally been the intention to deal with remedy as well as liability, an issue arose during submissions which had the potential to affect remedy and the Respondent's arguments on mitigation of loss. The fair resolution of that issue would require further evidence. After some discussion, and by consent, the hearing was therefore converted to deal with liability and issues of contributory fault only. That would enable an oral judgment on those issues to be given without delay. A date has been fixed for the hearing of the remaining remedy issues. It may of course be that the parties are now able to resolve matters without the need for a further hearing.

4. I am grateful to the representatives for their hard work and their focused submissions, and also for dealing with my own queries during the case. The live issues between the parties were actually quite narrow, and the relevant disputes of fact were very limited. Most of the dispute concerned the application of familiar legal principles to those facts.

Evidence

5. I heard oral evidence from (in order):

a. Bernadette Bruce, called by the Respondent, a witness to the central incident;

b. Leah Fyfe (formerly Leah Brady at the relevant time), called by the Respondent, a Senior Operations Manager, who took the decision to dismiss the Claimant;

c. the Claimant;

d. Maureen Carroll, called by the Claimant, a team member and witness to the central incident.

6. I should make it clear that in my assessment all of the witnesses were doing their best to help. They gave their honest recollection of events and (where relevant) their reasoning at the time. However, and for the reasons set out below, I did not always accept every aspect of their evidence. I would not wish these reasons to be misunderstood as implying a finding that they lied. Far from it. The position is simply that, having heard all of the evidence, I was sometimes unable to accept the accuracy of the events a witness honestly recalled.

7. The primary focus of this case was properly on the evidence available to the Respondent when it decided to dismiss. It is important to emphasise that because the witness evidence on unfair dismissal was at certain points presented as if the Tribunal hearing would amount to a rehearing of the disciplinary allegation. When several witnesses are asked to state what they remember of the critical incident that is dangerously close to an invitation to make up my own mind as to what actually occurred. When considering the fairness of dismissal that is not my function, and I am not permitted to substitute my own view for that of the Respondent on issues of fairness. However, the approach is different in relation to the issues of contributory fault and wrongful dismissal. On those issues (only) I make my own assessment of the Claimant's culpability.

8. I raised this with the representatives during the hearing, and I understood them to agree that the preceding paragraph summarises the correct approach. Strictly then, a repeat or an expansion of "eye witness" evidence is of potential relevance only to contributory fault or wrongful dismissal. So far as the fairness of dismissal is concerned, the correct focus is on the witness evidence available to the Respondent at the time of dismissal, rather than on any additional or different evidence put forward for the first time at this hearing.

Factual Background

9. Having heard the evidence and the parties' submissions I made the following findings of fact on the balance of probabilities.

10. At the time of her dismissal the Claimant had a responsible position as a Team Leader in the Respondent's outsourced contact centre business. She worked at the Respondent's premises at Stirling House on the Clydebank Industrial Estate and had over 5 years of unblemished service. The Respondent operates a national network of contact centres and employs about 1450 people in the UK.

11. A single incident on 4th September 2017 led to the termination of the Claimant's employment. It can only have lasted moments. It is useful to set out early in these reasons the respective contentions of the parties.

12. On the Claimant's case, when required to carry out some challenging mental arithmetic in order to answer a colleague's question, she said something along the lines of "I'll need a calculator, I can't do mingo mongo maths". The Claimant says that the phrase was not targeted at any particular person, and that it had no particular meaning. In essence, she said that it was a meaningless alliterative phrase intended to convey a jumble of numbers in her head.

13. On the Respondent's case, the Claimant used the word "mongo" in a different way and in a different context. The Respondent maintained that it reasonably believed that the word had been directed at a junior co-worker from a different team who had asked the Claimant for her help. That co-worker had a learning disability as well as various other challenges and took great offence to the remark.

14. The Tribunal hearing proceeded on the agreed basis that "mong", "mongo" or "mongol" (sometimes spelt "mongul" in the papers) could all potentially be interpreted as offensive derogatory references to a person with Down's Syndrome. It was also common ground that neither the offended co-worker nor anyone else present had Down's Syndrome.

15. The Respondent has an Equal Opportunities Policy, an Anti-Harassment and Bullying Policy, a Grievance Policy and a Disciplinary Policy.

16. On 6th September 2017 the offended co-worker lodged a grievance. The grievance was outlined in a letter and meeting of 6th September 2017 and also in a subsequent meeting on 8th September 2017. He described the background as being a difficult call from a customer regarding a price match, in relation to which he sought the Claimant's assistance because other managers were busy. The relevant conversation had taken place at the Claimant's desk. He alleged that the Claimant had called him a "mongo" and had asked him to stop talking like one. He alleged that the remark had been heard by many others who were shocked and disgusted. He alleged that the remark was totally inappropriate and vile, especially when made by someone in authority. It had adversely affected his self-confidence and had made him feel embarrassed, humiliated and disrespected in front of colleagues.

17. The matter was investigated by David Long who interviewed the following witnesses on the following dates:

a. Brian McGowan (then known as “anonymous witness 1”), Bernadette Bruce (then known as “anonymous witness 2”) and Debbie Kerrigan on 7th September 2017;

b. the co-worker who lodged the grievance on 8th September 2017;

c. the Claimant on 11th September 2017.

18. The Claimant was told that the allegation was being investigated under the “anti-harassment and bullying policy”.

19. Geraldine Gibson (Operations Manager) reviewed the evidence and prepared an undated “Investigation Report” summarising the evidence and making findings.

a. The “facts established” were that the co-worker had asked the Claimant for help and that the word “mongul” had been used and overheard by witnesses, causing the co-worker to become upset.

b. “Facts that could not be established” were the “context in which the word “mongul” was used”.

c. A formal disciplinary hearing was recommended.

20. On 12th September 2017 the Claimant was required to attend a disciplinary hearing on 15th September 2017 to be conducted by Leah Brady (as she was then known). The Claimant was warned that the purpose of the meeting was to consider allegations of Gross Misconduct under the Anti-Harassment and Bullying Policy. Disciplinary sanctions might follow, up to and including summary dismissal.

21. The disciplinary hearing took place in two stages on 15th September 2017 and 26th September 2017. The reason for that is that, at the Claimant’s request, three additional witnesses were interviewed. The Claimant had complained that the three agents seated at her own desk, who might therefore be in a

good position to hear whatever had been said, had not been spoken to. On 18th September 2017 witness statements were obtained from Lauren Smillie, Maureen Carroll and Nicole Robertson.

22. At the reconvened meeting on 26th September 2017 Ms Brady adjourned for 10 minutes to consider her decision before announcing it. The notes may not be quite accurate, but the words attributed to her are "*it's my decision that from the evidence gathered is that this falls under the "Gross misconduct" in line with the company's Anti-harassment and bullying policy & based on this the outcome is to summary Dismiss you with effect from 26/9.*" It is not clear from that summary precisely what Ms Brady found that the Claimant had said, or in what context, with what implications.

23. The outcome was confirmed in an undated letter which was similarly opaque in those respects, saying "*The Company has considered all the evidence and has taken your explanations into account. I can confirm that the Company has established to its reasonable satisfaction that you have committed Gross misconduct during an incident with a colleague that was raised by several individuals.*" Once again, it is not clear from that letter exactly what Ms Brady had concluded the Claimant had said, in what context, and with what implications.

24. The Claimant appealed by a letter dated 3rd October 2017. Several of the points made in that appeal letter were not pursued as aspects of unfairness before me, and I will not comment on them. The Claimant did request that the additional witnesses Suzanne Dawar, Jayne Muir, Blair Campbell and David Long should also have been spoken to. All of them save for Mr Long were subsequently interviewed on 18th October 2017.

25. An appeal hearing took place on 11th October 2017, conducted by Ross Maycock, Director of Operations. It upheld the decision to dismiss. Most pertinently for present purposes, in relation to a ground of appeal challenging the severity of the penalty, it reasoned as follows in the appeal outcome letter dated 19th October 2017:

"Based on the evidence provided, the Company finds the use of the word 'mongo' inappropriate regardless of the context or explanation and this allegation falls under the category of Gross Misconduct. Employees must treat colleagues and others with dignity and respect. Even more so, a manager should always consider whether their words or conduct could be offensive. Whilst the company considered your employment history, we are satisfied that the severity of this one act of misconduct is such that summary dismissal is justified."

Legal Principles

Unfair Dismissal

26. The first question is whether the Respondent has established a potentially fair reason for dismissal on the balance of probabilities. On this issue Ms Dalziel realistically and helpfully conceded on behalf of the Claimant that the Respondent had established the potentially fair reason of conduct. I therefore turn to the question of fairness.

27. On unfair dismissal, there is no burden of proof on either party regarding issues of fairness. The burden is neutral between the parties. The question arising under section 98(4) of the Employment Rights Act 1996 is simply whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissal. I must determine that question in accordance with "equity and the substantial merits of the case".

28. However, it is well-established by decades of case law that I am not entitled simply to substitute my own view for that of the employer. The law recognises that different reasonable employers might react in a variety of reasonable ways to a given situation. I must decide whether the decision to dismiss fell

within the "range of reasonable responses" open to a reasonable employer. That applies just as much to procedural matters as to the selection of the appropriate penalty.

29. Since this is a dismissal based on conduct, the principles summarised in ***BHS Ltd v Burchell*** [1978] IRLR 379 apply. When reading that case care must be taken to remember the changes in the burden of proof since it was decided. There is a three stage test. The first stage is little different in practice from the need for the employer to establish a potentially fair reason for dismissal. The second and third stages (on which the burden of proof is now neutral) are whether the employer had reasonable grounds for a belief in guilt and whether that belief was formed following a reasonable investigation.

Wrongful dismissal

30. Wrongful dismissal claims are essentially claims for breach of the contractual term regarding minimum notice of termination. As a matter of contract, normally an employee may only be dismissed if the employer gives the notice required by contract or, if longer, the notice required by statute. The giving of shorter notice or no notice at all will therefore give rise to a claim for breach of contract. However, that does not apply where the employee is themselves in repudiatory breach of contract. Gross misconduct is one form of repudiatory breach of contract by the employee. If an employee is guilty of gross misconduct then they may be dismissed without notice and without that dismissal giving rise to any claim for breach of contract.

Issues arising

Unfair dismissal

31. It was common ground that a potentially fair reason for dismissal was established. There was no challenge to the reasonableness of the investigation. There were no challenges to any other aspects of procedural

fairness. The sole issue for me was therefore whether the Respondent had reasonable grounds for a belief in guilt.

32. I also invited submissions on contributory fault, since it seemed appropriate and convenient to determine that issue at the same time.

Wrongful dismissal

33. In relation to wrongful dismissal, the issue was simply whether or not I found the Claimant to be guilty of gross misconduct. If so, she had no entitlement to notice pay. If not, then she was entitled to notice pay. This question is to be decided objectively, and is not to be answered by reference to a range of reasonable responses.

Reasoning and Conclusions on Unfair Dismissal

The relevant misconduct

34. Logically, the first question is to ask precisely what misconduct was in the mind of the employer when deciding to dismiss. That is a necessary starting point in order to address the reasonableness of the employer's belief. There are two realistic alternatives on the evidence:

a. the first possibility, urged on me by the Claimant, is that the Respondent dismissed the Claimant for using the word "mongo", without any regard to the precise words used and to their context.

b. Alternatively, the Respondent's case is that it did have regard to the precise words used and to their context when dismissing, but it rejected the Claimant's version of events in those respects and concluded that the Claimant had used the term "mongo" abusively and directly towards the junior co-worker.

35. On the balance of probabilities I prefer the Claimant's analysis. I find that the Respondent dismissed for use of the word "mongo" without any finding as to the full phrase and its meaning. For the Respondent, it was enough that the word had been used, regardless of the wider linguistic context. I make that finding on the balance of probabilities for the following reasons.

    a. Mrs Fyfe (formerly Ms Brady when she took the decision to dismiss the Claimant) was an impressive and helpful witness in many ways, but on this crucial point she gave contradictory evidence. At times she said that the use of the word "mongo" was, on its own, sufficient to dismiss and that was her reasoning. At one point she said, in terms, that she didn't make any findings about context. Later, and largely it must be said in response to my own questions about context, she began to say that she had considered and rejected the context put forward by the Claimant, finding that the word had been used abusively. The change in her evidence meant that I gave her first answer greater weight.

    b. There is no reference to any particular finding regarding the precise words used or their context at the conclusion of the disciplinary hearing. It seems to me unlikely that the notes would be silent on that point if conclusions had been reached on it.

    c. Similarly, there is no reference to any particular finding as to the precise phrase used or its context in the undated dismissal letter. Once again, it seems to me unlikely that the letter would be silent on that important point if conclusions had been reached on it.

    d. That finding is consistent with the earlier approach of the investigation report which had concluded that the context in which the word "mongul" had been used was "a fact that could not be established". I find that the disciplinary hearing was similarly inconclusive on that point, and did not resolve that issue of fact.

e. Finally, the Claimant's analysis is consistent with the approach taken on appeal, where the Respondent's position was that the precise words used were irrelevant.

f. Looking at all of those factors in the round, the only evidence that the Respondent considered the full phrase used was Mrs Fyfe's oral evidence before the Tribunal, but I did not find that convincing for the reasons already given.

36. My finding is therefore that the Respondent had no regard to the full phrase used or to the context of that remark when deciding to dismiss. I find that all reasonable employers would regard context as a potentially important matter because it might well have a bearing on the degree of culpability. Even if it could reasonably be said that there could never be a phrase or context in which the use of a particular term was acceptable or blameless, the full phrase and its context is important when assessing the *degree* of blame and whether the offence is properly regarded as one of gross misconduct.

The reasonableness of the Respondent's belief

37. From that starting point I turn to the evidence which, in the Respondent's submission, supported a reasonable belief in guilt. The issue is not whether there was *some* evidence to support the Respondent's conclusion, the issue is whether the totality of the evidence gathered supported a *reasonable* conclusion that the Claimant was guilty of gross misconduct.

38. In this case, I find that the evidence of the witnesses whose evidence was gathered as part of the investigation and disciplinary process gave a very mixed picture.

a. The aggrieved employee said that the Claimant had called him a "mongo" (or in some notes "mongol") and told him to stop talking like one.

b. Brian McGowan heard the word “mongol” but nothing of the context or the other words used. To that extent his evidence is as consistent with the Claimant’s case as it is with the aggrieved employee’s allegation. Mr McGowan was also in the middle of a discussion with someone else, so he could not reasonably be considered to have been wholly focused on the Claimant’s own words and conduct. Mr McGowan’s evidence was that the aggrieved employee had been upset, whereas the Claimant had described an amicable conversation. However, that difference is potentially explained by the fact that Mr McGowan was talking about his observation of the other employee “a little after”, and not during the conversation with the Claimant.

c. Bernadette Bruce heard the phrase “I’ll help you you fucking mongol”. She alone recalls the swear word “fucking”, and the phrase she recalls is totally different both from the Claimant’s evidence and from that of the aggrieved employee.

d. Debbie Kerrigan remembers the phrase “I’ll help you you mongol”. The evidence is similar to that of Bernadette Bruce without the additional swear word, but is quite different from the allegation made by the aggrieved employee.

e. Lauren Smillie supported the Claimant’s version of events. She was sitting nearby at the relevant time. Even if minor errors existed in her recollection of the precise seating arrangements, she was on any view close enough to give credible evidence and all reasonable employers would give her evidence some weight. There was no suggestion of collusion with the Claimant or that she gave her evidence in bad faith.

f. Maureen Carroll also supported the Claimant’s version of events. She was also sitting nearby, and her evidence could reasonably be given some weight. The Respondent did not submit that there was any collusion or an intention to mislead.

g. Nicole Robertson also supported the Claimant's version of events. She was also sitting nearby and her evidence could reasonably be given weight. There was no suggestion of collusion or improper motive.

h. The evidence obtained for the first time on appeal did not take matters much further. Jayne Muir was not a direct witness to original remark and gave what was essentially a hearsay account of events derived from the aggrieved employee. The same can be said of Suzanne Dawar and Blair Campbell.

39. The question is what conclusion might reasonably be drawn from that. The Claimant had no obvious motive to make an abusive remark deliberately and there was no suggestion that she had ever made similar remarks in the past. On the other hand, there was no suggestion that the aggrieved employee had any motive to make a false complaint. Reasonable employers would also allow for the possibility that witnesses, potentially including the aggrieved employee himself, had misheard and were therefore honestly mistaken as to what had been said by the Claimant.

40. Looking at the evidence available to the Respondent as a whole there were diverse accounts. Little consistent picture emerged. Although several witnesses said that the Claimant had used the word "mongo" (or similar) in the context of an abusive phrase directed at the aggrieved employee, that employee did not in fact remember the remark in quite the same way. Against that must be set the evidence of three apparently independent and credible witnesses, sitting nearby, who supported the Claimant's version of events.

41. My conclusion is that, taken as a whole, the evidence was insufficient to sustain a *reasonable* belief that the aggrieved employee's allegation was well-founded. It was insufficient to sustain a reasonable belief that the Claimant had used the word "mongo" (or similar) as part of an abusive remark, targeted at another employee.

42. However, there was evidence sufficient to support a reasonable belief that the Claimant had used the word “mongo” as part of the phrase “mingo mongo maths”, as she had always admitted.

Sanction

43. Reasonable employers could conclude that the phrase “mingo mongo maths” was capable of causing offence, whether heard accurately or inaccurately. It was therefore unacceptable, and it was a breach of this Respondent’s bullying and harassment policy. The policy provides that staff must treat colleagues with dignity and respect and should always consider whether their words or conduct could be offensive. Even unintentional harassment is unacceptable under the policy, and harassment is defined as including words which create a hostile, degrading, humiliating or offensive environment. The policy also emphasises that a single incident could constitute harassment.

44. However, in terms of sanction, the policy states that misconduct of that sort “may” amount to gross misconduct leading to summary dismissal. It does not mandate that result as the only possible outcome.

45. The Claimant could reasonably be expected to set an example since she was a Team Leader, and that is therefore an aggravating feature.

46. However, and despite that aggravating feature and the terms of the policy, I find that no reasonable employer would have considered that dismissal was the appropriate sanction. Dismissal therefore fell outside the range of reasonable responses. My reasons are as follows:

a. “mingo mongo maths” is a meaningless phrase, not in general use. It is not a well-known term of abuse, and while it is liable to be misheard or misunderstood, it has no obvious connotation. It is quite different from referring directly to a human being as a “mongo” or similar. I do not accept that a reasonable employer would conclude that an implicit reference to disability had been made.

b. The case against the Claimant was based on a single allegation, without precedent or repetition.

c. The Claimant attempted to apologise, although she was prevented from contacting the aggrieved employee to do so.

d. The Claimant had an otherwise unblemished disciplinary record.

e. For those reasons no reasonable employer would have regarded the use of the phrase on a single occasion as being a sufficiently serious breach of policy, or as being a sufficiently serious act of misconduct, to justify summary dismissal.

Conclusion

47. The dismissal was unfair for those reasons. It fell outside the range of reasonable responses. I therefore make a declaration that the Claimant unfairly dismissed.

Contributory fault

48. It is also my finding that there should be a reduction in compensation to reflect contributory fault. I make the same percentage reduction in the basic award and the compensatory award. I find that the Claimant's conduct was blameworthy and that it contributed to her dismissal. She used a clumsy and ill advised phrase. She failed to take sufficient care with her words. Her use of the word "mongo" might have been innocently intended, but it was liable to cause offence. I find that a 20% reduction in compensation would be just and equitable in all the circumstances.

<u>Wrongful Dismissal</u>

49. I find that the Claimant's conduct was blameworthy, but that it fell well short of gross misconduct when properly understood in context. That context includes the full phrase and the way in which it was intended. The Claimant was dismissed without notice, and in those circumstances summary dismissal

amounts to a breach of contract. The Claimant is entitled to notice pay as damages for breach of contract.

Employment Judge: M Whitcombe
Date of Judgment: 14 June 2018
Entered in register: 26 June 2018
and copied to parties