



EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Ms C Massey

Respondent
TUI UK Retail
Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (RESERVED JUDGMENT)

HELD AT Newcastle-under-Lyme ON 26 & 29 July 2019
15 August 2019 (In Chambers)

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: Mr P Martin (Employment Consultant)
For Respondent: Ms M Tutin (Counsel)

JUDGMENT

The judgment of the tribunal is that:

- 1 BY THE CONSENT OF THE PARTIES, the name and identity of the respondent is amended to **TUI UK Retail Limited**.
- 2 The claimant was fairly dismissed by the respondent: her claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Ms Christine Massey who was employed by the respondent, TUI UK Retail Limited, as a Retail Manager from 9 June 2008 until 23 January 2018 when she was dismissed. The reason given by the respondent at the time of the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 12 April 2018, the claimant claims that she was unfairly dismissed. The respondent named in the claim form was **TUI UK Limited**. At the commencement of the hearing today it was agreed between the parties that the correct name of the claimant's former employer and therefore the appropriate respondent to these proceedings is **TUI UK Retail Limited**. Accordingly, with the consent of the parties, I have ordered that the name and identity of the respondent should be amended.

3 In its response to the claim, the respondent admits that the claimant was dismissed. It is the respondent's case that the claimant was dismissed for a reason relating to her conduct and that the dismissal was fair.

The Evidence

4 I heard oral evidence from three witnesses. The respondent called its evidence first: I heard from Mrs Joanne Ecclestone - Senior Retail Manager who conducted the disciplinary hearing and made the decision that the claimant should be summarily dismissed; and Mrs Sharon Taylor - Birmingham Regional Sales Manager who conducted the claimant's appeal. The claimant gave evidence on her own account and did not call additional witnesses. The claimant had submitted a witness statement for Mrs Julie Woolley; and Mrs Woolley did attend tribunal with a view to giving evidence. It was Ms Tutin's position that Mrs Woolley's evidence was wholly irrelevant to the issues in the case; and, adhering to that position, she did not propose to challenge, or cross examine, her albeit that the respondent does not accept her evidence as accurate. In the circumstances, it was unnecessary for Mrs Woolley to give oral evidence; I have read her witness statement and take such account of it as I find appropriate.

5 In addition to the oral evidence, I was provided with an agreed trial bundle running to 175 pages. I have considered the documents from within the bundle to which I was referred by the parties during the course of the hearing.

6 I found the evidence of Mrs Ecclestone and Mrs Taylor to be wholly consistent: with their witness statements; with the respondent's pleaded case; with each other; and with contemporaneous documents. They were compelling and honest witnesses.

7 There was very little by way of factual discrepancy between the respondent's evidence and that of the claimant. But the claimant was inconsistent in what she said during the disciplinary investigation compared with what she said at the disciplinary meeting and then when giving evidence. I do not find that she was a dishonest witness: but much of her evidence was based on supposition and conjecture. She made assertions, including assertions as to the integrity of Mrs Ecclestone and Mrs Taylor, which she could not justify by reference to evidence. For these reasons I found her to be a less reliable and satisfactory witness; and, to the extent that there were factual discrepancies between her evidence and that of the respondent, I prefer the respondent's evidence.

8 Mrs Woolley made her statement, and attended to give evidence, in the utmost good faith. But her evidence is not relevant to the issues which I have to determine. She gave evidence as to an earlier grievance she took against Mrs Karen Waterhouse. Potentially this evidence strengthened the claimant's case

with regard to her own grievance against Mrs Waterhouse. But this case was not about the claimant's grievance against Mrs Waterhouse; it was about the decisions made by Mrs Ecclestone and Mrs Taylor with regard to the claimant's conduct. Accordingly, I accept Miss Tutin's submission that Mrs Woolley's evidence was irrelevant.

The Facts

9 On 9 June 2008, the claimant commenced employment with the respondent. At all times material to this claim, the claimant was employed as the Retail Manager in charge of the respondent's shop premises in Newcastle-under-Lyme. The claimant was responsible for the management of four staff: SB, AH, KM, and SA.

10 From 2008 until 2014, the claimant had a good employment record - free from disciplinary or grievance concerns. The claimant had a good working relationship with her Regional Sales Manager, Ms Kerry Ferns. Following a reorganisation in 2014, the claimant's shop transferred region and the claimant's Regional Sales Manager thereafter was Ms Karen Waterhouse. It is clear that the claimant did not enjoy a good relationship with Ms Waterhouse.

11 On 7 November 2017, the claimant submitted a grievance against Ms Waterhouse alleging bullying and intimidation. At the same time as raising the grievance, the claimant commenced a period of sick leave described as "stress and anxiety". The grievance was dealt with by Ms Gabrielle Armitage - Divisional Sales Manager and a grievance meeting was conducted on 16 November 2017. The claimant was told that she was entitled to be accompanied at the meeting but she attended alone.

12 On 30 November 2017, Ms Armitage delivered her outcome on the claimant's grievance. The grievance was part upheld: it was found that there was no evidence to support the claimant's claims of bullying or intimidation; but it was found that Ms Waterhouse needed to take a more structured approach in appraising the claimant's performance to enable the claimant to improve in her role as necessary. It was recommended that the claimant have a mediation meeting with Ms Waterhouse; that they set objectives; and thereafter there were regular one-to-one meetings. It was also agreed that the claimant would be referred to Occupational Health. The claimant was advised of her right to appeal against the grievance outcome, but no appeal was pursued.

13 On 5 December 2017, Ms Waterhouse visited the Newcastle shop. The claimant was still off sick and not be in the shop since 7 November 2017. The store had been operated without day-to-day management input during the claimant's absence. It was Ms Waterhouse's responsibility to check on things.

14 Later, on the day of her visit, Ms Waterhouse reported in writing that during her visit to the store that day she was concerned as to the welfare of SA and AH. SA was particularly concerned that she had received a phone call from the claimant which had frightened her; and in which the claimant had threatened her because SA had not backed her up during the investigation of the claimant's grievance against Ms Waterhouse. They advised Ms Waterhouse that they were apprehensive as to the claimant's imminent return to work.

15 The following day, 6 December 2017, Mrs Waterhouse received a collective grievance from all four of the employees at the Newcastle store. This repeated some of the allegations which had been made verbally the previous day and added some previously unreported ones. Ms Waterhouse immediately forwarded the email to Gemma Pearce of HR.

16 On 8 December 2017, the respondent received an OH report advising that the claimant should be fit to return to work within the next four weeks - most likely around the beginning of January 2018. However, the claimant was fit to attend meetings in work and regarding work in the meantime.

17 The grievance initiated by the four employees at the Newcastle shop was investigated by Mr Sam Longmuir – Senior Retail Manager. Mr Longmuir interviewed each of the employees on the 9 or 13 December 2017 and thereafter he attempted to arrange a meeting with the claimant. Notwithstanding the OH advice, the claimant stated that she was unfit to attend a meeting. The claimant offered to respond to questions in writing. Written questions were submitted to the claimant on 21 December 2017 and she responded the same day.

18 Upon consideration of the claimant's responses, together with the statements made by the four employees, Mr Longmuir concluded that there was a disciplinary case to answer and recommended that the matter proceed to a disciplinary hearing to be conducted by Mrs Ecclestone. Mr Longmuir set out the disciplinary charges as follows: -

- (a) Inappropriate conduct and behaviour towards the Team including examples of intimidation which is deemed as harassment as defined in the Bullying and Harassment Policy.
- (b) Using the nickname "BFL" which stands for "Big Fat Lesbian" towards a member of the Team which is deemed discriminatory on the grounds of sexual orientation.
- (c) Failure to meet company standards and fundamental breach of trust and confidence.

19 A disciplinary hearing was originally arranged to take place on 4 January 2018; the meeting was later rearranged for 11 January 2018; and then for 12 January 2018. Following an OH assessment on 11 January 2018, it was

recommended that the meeting should be postponed until week commencing 22 January 2018. The meeting was therefore rescheduled for that date.

20 In her written responses to Mr Longmuir, the claimant admitted that following, the grievance outcome, she had telephoned to enquire why SA had not supported her. She admitted telling SA that she would soon be returning to work and that matters would be "*sorted out*". She stated that she intended this as an assurance to SA that things would be all right - she did not accept SA's interpretation that she was threatening to "*sort her out*". In those written responses, the claimant denied ever calling anyone a Big Fat Lesbian.

21 The claimant remained adamant that she was unfit to attend the meeting. But, she agreed to participate in a disciplinary meeting by telephone conference call. This was conducted by Mrs Ecclestone on 22 January 2019; the claimant had been told that she could be accompanied but she participated alone.

22 The claimant repeated her account of the telephone conversation with SA: she accepted that it was unwise and contrary to policy for her to have contacted SA about the grievance procedure, but she did not feel that anything had been said which would cause SA to feel intimidated or distressed. The claimant now admitted the use of the term Big Fat Lesbian - she denied that it was ever used directly to KM but stated that it was used as office banter by reference to a "certain type of woman".

23 The claimant suggested that the grievance had been orchestrated by Ms Waterhouse as an act of retaliation for the claimant's grievance against her.

24 Mrs Ecclestone deferred making a decision and spoke to each of the staff members individually. She was satisfied that the grievance had been raised when it was principally because of the claimant's telephone calls to SH. Mrs Ecclestone asked each of the complainant's individually whether they have been motivated complain by Ms Waterhouse; they each denied this simply saying that they took the opportunity to report matters to her when she visited the store on 5 December 2017.

25 Having considered the position, Mrs Ecclestone concluded that the claimant was guilty of gross misconduct. She had set out to harass SA for her perceived disloyalty during the grievance investigation and she had participated in and permitted homophobic banter within her shop which was personally offensive to KM - but would still have been unacceptable even if KM was not personally offended. Mrs Ecclestone considered the claimant's long service and previous good record but nevertheless concluded that this conduct was so serious that it warranted summary dismissal. Mrs Ecclestone wrote to the claimant on 29 January 2018 advising her of this decision. The claimant was advised of her right to appeal.

26 On 2 February 2018, the claimant submitted her appeal: this was conducted by Mrs Taylor on 7 February 2018. The hearing was conducted at the Walsall store and the claimant attended in person. The claimant again suggested that the grievance has been orchestrated by Ms Waterhouse.

27 Mrs Taylor considered the position carefully: she concluded that it was inherently unlikely that the four employees were so susceptible to corruption by Ms Waterhouse that they would manufacture a grievance against the claimant. More importantly, the most serious aspects of the conduct alleged against the claimant were admitted by her. She had contacted SA about the grievance outcome; and she had participated in and permitted homophobic banter. Accordingly, Mrs Taylor concluded that there was no merit in the claimant's appeal which was dismissed. The decision to dismiss the claimant was upheld.

The Law

28 Employment Rights Act 1996 (ERA)

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

29 **Cases on Unfair dismissal**

British Homes Stores v Burchell [1978] IRLR 379 (EAT)

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)

Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

30 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

The Claimant's Case

31 It is the claimant's case that her dismissal was unfair both substantively and procedurally. Her case can be summarised as follows: -

- (a) The claimant does not accept that the conduct alleged against her was the true reason for her dismissal. It remains her case that the true reason was retaliation for her grievance against Ms Waterhouse.
- (b) The claimant does not accept that the investigation and the disciplinary process was conducted independently. It was predetermined to ensure that the claimant was dismissed as an act of retaliation as suggested above.
- (c) The procedure was unfair because Mrs Ecclestone went ahead with the hearing on 22 January 2018 when the claimant was unfit to attend.
- (d) The procedure was unfair because the claimant was not sent copies of the statements made by the four employees in advance of the hearing or in advance of the appeal. She did not see them until she brought proceedings in the tribunal.
- (e) Even if the conduct found against her was the true reason for dismissal, the conduct did not warrant summary dismissal; the decision to dismiss was outside the range of reasonable responses.

The Respondent's Case

32 The respondent's case is and remains that this was a straightforward dismissal for misconduct; and that the dismissal was fair applying the relevant statutory provisions and case law.

Discussion & Conclusions

The Reason for the Dismissal

33 It is easy to understand why the claimant believes that her dismissal was linked to her grievance against Ms Waterhouse; but, this analysis does not bear scrutiny. For it to be the case that the claimant was dismissed as an act of retaliation, it would follow that all four of the claimant's former colleagues had been corrupted by Ms Waterhouse. This is inherently unlikely: but, in any event, I am satisfied that Mrs Ecclestone properly investigated the possibility and reached the conclusion that the four employees had made a genuine complaint.

34 Furthermore, for the claimant's theory to be correct it would have to follow that Mr Longmuir, Mrs Ecclestone, and Mrs Taylor were all brought into the conspiracy. Again, this seems inherently unlikely: I had the advantage of hearing first-hand the evidence of Mrs Ecclestone and Mrs Taylor; both of whom

impressed me as independent and brought their own minds to bear on the situation without improper influences.

35 I am therefore satisfied that the reason for the claimant's dismissal, and the sole reason, was the misconduct found against her by Mrs Ecclestone and upheld by Mrs Taylor. That conduct comprised the harassment of SA and a perceived threat against her for disloyalty to the claimant in the context of the grievance against Ms Waterhouse, and participating in, and permitting, homophobic banter in the shop which was hurtful and offensive to KM.

Genuine Belief

36 I am quite satisfied that both Mrs Ecclestone and Mrs Taylor genuinely believed that the claimant was guilty of the misconduct they found.

Reasonable Belief

37 This belief was founded on ample evidence. The four employees concerned had raised an unprompted grievance; they had all made statements to Mr Longmuir; and Mrs Ecclestone spoke to them all individually. Mrs Ecclestone was satisfied that their grievances were genuine and the conduct which emerged was serious.

Sufficient Investigation

38 Mr Longmuir's investigation was comprehensive. He spoke to everyone that he needed to speak to; and took the claimant's account in writing as she had requested.

Procedural Fairness

39 Mrs Ecclestone was entitled to proceed in line with OH advice which was that the claimant was fit to attend a meeting by 22 January 2018. It was unnecessary to delay the meeting in response to the claimant's unsupported assertion that she was unfit to attend.

40 I considered carefully the claimant submission with regard to the failure of the respondent to provide her with the statements made by her former colleagues. There was a degree of procedural muddle here. Mr Longmuir was actually investigating a grievance; and the statements were obtained from the claimant's former colleagues in accordance with the grievance procedure which carries an implication of confidentiality. It is arguable that, once a disciplinary case emerged, a formal disciplinary investigation should have commenced; the colleagues should have been re-interviewed on the basis that their statements would be disclosed. None of this was done, but in my judgement, it was

unnecessary in this case because, on the relevant facts, the claimant admitted the misconduct. She admitted contacting SA when it was clearly unwise and inappropriate for her to do so; and she eventually admitted participating in the homophobic banter. The claimant must have been aware of the potential for this to be offensive to JM. But, even if it had not been, the respondent was entitled to conclude that it was not acceptable for one of its Managers to permit or to participate in such behaviour. The claimant having admitted this conduct, in my judgement, no unfairness arises from the respondent's failure to provide her with copies of witness statements.

Sanction

41 The claimant had an unblemished employment record and many years of good service. On this basis, it is arguable that the decision to summarily dismiss was a harsh decision. But that is not the test I must apply. In my judgement, it cannot be properly argued that this decision is outside the range of reasonable responses. I cannot substitute my own decision; and, as the sanction was within that range, the tribunal cannot interfere.

42 Accordingly, and for these reasons, I find that the claimant was fairly dismissed. Her claim for unfair dismissal is not well founded; and is dismissed

Employment Judge Gaskell
18 October 2019