CASE NO: 2601206/18

EMPLOYMENT TRIBUNALS

Claimant: Mr M Hargreaves

Respondent: Secretary of State for Justice

Heard at: Nottingham

On: Monday 21 and Tuesday 22 January 2019

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr J Churchill of Counsel
Respondent: Mr E Beevor of Counsel

JUDGMENT

The claim of unfair dismissal succeeds.

REASONS

1. The claim in this case is one of unfair dismissal. The Claimant was a long-standing Prison Officer based at HM Prison Nottingham at the time of material events. He had been there for about 15 years. He had an unblemished disciplinary record and was a member of the internal Race Equality and Diversity Management Team. By its Response the Respondent pleads that the dismissal was fair.

2. Thus I have to determine whether the dismissal was fair or unfair within the range of reasonable responses pursuant to s98(4) of the Employment Rights Act 1996. I am grateful for the opening skeleton argument from Mr Churchill which inter alia sets out the scenario.

Findings of fact

3. Events centre on a complaint raised by a newly appointed Prison Officer, Ms

Lesley Beck (LB), in an Incident Reporting Form[1] dated 25 April 2017. She raised serious issues viz the Claimant, alleging first unacceptable sexist behaviour centring on 10 April; second, racist behaviour on 25 April.

4. There was an ensuing disciplinary investigation by Deputy Governor Mr S Faulkner and who gave evidence before me. I have no criticism to make of him in the sense that he interviewed at arms length by e-mail some of the potential witnesses. This was because they had been on a detachment at HMP Nottingham and were no longer serving there by the time of said investigation. I should make plain that the Claimant had been suspended on full pay as a consequence of these allegations on 28 April 2017.

5. Dealing first with 10 April, the evidence did not support LB. It goes further, inter alia the witness Victoria Briddon[2] was clear that it did not happen.

6. Therefore, Mr Faulkner decided, in terms of his investigation report, that allegations relating to the 10th should no longer be proceeded with.

7. As regards what occurred on 25 April, he had a very full account from LB. Encapsulated it centres on the staff room where there were only 4 persons present. They were herself, Michaela Hirst (MH) - an officer on detachment but long-standing, another officer, Gemma Render (GR) who it seems was on maybe a first detachment, and finally the Claimant.

8. In summary LB alleged that either MH or GR had mentioned that whilst on deployment at Brixton prison, a black prison officer had made an unwanted sexual advance. She alleged that the retort of the Claimant to that was to the effect that "*they are all silver backs, name me a good one*". As a consequence of this, she had proffered up Barrack Obama and Lenny Henry, as to which the Claimant had made scathing remarks about them and ended his remarks with words to the effect that there were "no blacks" in his own village and that he would not tolerate one in his own house because he would have to watch what they did. Furthermore that when either MH or GR had mentioned something about the Chinese, he had said that they were "wishy washy". So, very serious allegations.

9. When first interviewed[3], the Claimant never had put to him the full extent of what LB was alleging. For reasons which are still not clear, Governor Faulkner never had the original incident report of LB and so it was never given to the Claimant.

10. Furthermore, GR who it seems must have been identified as the potential officer who had been at Brixton and not MH, who it was subsequently agreed had not, made plain that she had yet to serve at that establishment[4]. This obviously drives a hole in the account of LB because it undermines the premise upon

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[1] See Bp 75.Before me is a bundle prepared by the Respondent. In referring I use the prefix Bp followed by the page number.

[2] Bp108.

[3] Bp99.

[4] Bp 117 and 119.

which the conversation took place.

11. Interviewed at arms length by e-mail[5] GR had noted that the Claimant had said that " *he never saw a black person once he left the prison to when he got home to his village then getting back into work however I didn't really deem this is a rascist."*[6] Otherwise she was not listening confining herself to chatting with (MH). She was not questioned further. MH, also interviewed by e-mail[7] recalled the Claimant had said" *there aren't any blacks in his village and asked if we could name any good ones, I was busy watching TV (during my lunch hour) and didn't hardly hear anything that was said as I didn't like the tone of this question so I shut off from it."* In a further e-mail she added: " *I was not offended as such, to be honest I thought " what an idiot" and shut off."*

12. In due course at the disciplinary hearing heard by Governor Wheatley (who also gave evidence before me) and at the first date thereof, 21 August 2017, she gave her evidence. Essentially what she had to say was that the Claimant had used the phrase "name me a good black man" but she gave a bit of context which was never explored: "*Just a little bit about Barrack Obama, kind of asking me if I could name a good black man I think was the question"*.

13. If that was it, I can understand why the employer considered that behaviour was unacceptable, hence the reason to dismiss the Claimant which was first pronounced at the end of the second date of the disciplinary (which was on 10 October 2017) as reaffirmed on appeal by the final witness in that respect that I heard from for the Respondent, which was Ms T Clark, who is a very senior member of the Prison Service.

14. However, what troubles me greatly is that by the time of the first disciplinary hearing, the Claimant had submitted an email[8] dated 20 July to the Respondent. I have no doubt that he sent it in reply to what I would describe as the step 1 disciplinary hearing letter dated 10 July 2017 inviting him to the disciplinary hearing and enclosing the investigation report and inviting him to provide *"any enclosures you would like to be considered…*" The point is that he gave a much fuller account of what had occurred and set out the context. I note in passing that he is a man of trenchant political opinions who seems to have a good grasp of inter alia Middle Eastern politics. He also has a dim view of celebrities being paid, as he would allege, expenses for ostensibly taking part in charitable TV activities when the expenses are out of all proportion to what would actually have been incurred.

15. What he was essentially saying (which is consistent with what he said when first interviewed[9] by Deputy Governor Faulkner) was that when he had come into the staff room at lunchtime he had wanted to have his break and as is his usual custom enjoy watching the news on the TV, but that LB in particular was

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[5] Bp117

[6] As the Claimant lives in a rural village and this was a statement of fact; if taken in isolation of itself absent the context and to which I will come , it would not be racist.

[7] Bp111-5.

[8] Bp 164 (1-3)

[9] 21 June 2017- Bp99-1020

watching what he thought was a rather silly programme, as to which he commented and then asked if he might watch the news. This was met with hostility and she "*then became argumentative wanting to question everything*". That is how he says: "*She then started talking about politics amongst everything else. Lesley Beck said what do you think about Obama and Lenny Henry*". He then set out his strident opinions, as to which I will not repeat as they are recited in the e-mail in particular, as to why he thought that they were "*cunts*". The reasons he gives would not be racist, they would be opinions based upon their activities or failures. They do not permit of themselves a racist inference.

16. So, context is everything in this case as Mr Churchill has quite properly pointed out. I was somewhat disturbed at the evidence of Governor Wheatley. Despite the fact that it is quite obvious that early into that disciplinary hearing[10], the Claimant and his representative from the POA (J Hodson) made reference to this email and that he would find in there the Claimant's full explanation and that "*I sent to you. To the Governor's secretary which I presume you read*" not once did he stop to ask what was in the email or seek to obtain it. His evidence before me was categoric, he never got it. I put to him that if that was right, as he had a PA (Lorraine Morgan (LM)), that would have been a serious shortcoming by the Prison Service as the e-mail had been clearly sent to her. He did not disagree.

17. On the second day of the Hearing, having been granted leave to call an additional witness, the Respondent called LM. She is a very long-standing PA at HMP Nottingham serving in that capacity each incumbent Governor. I found her to be a woman of the utmost integrity and consistent and compelling. She was clear that she received the email when it was sent and that she promptly handed it over to Governor Wheatley, indeed she would have made sure he had it knowing of the upcoming disciplinary hearing. I believe her. Thus I find that the evidence of Governor Wheatley is somewhat fatally undermined. I bear in mind that LB had failed to attend the disciplinary hearing. I can only conclude that apropos the authorities put before me, and in this case I am particularly focussing on the seminal authorities in decisions where the outcome if the misconduct is proven is likely to be career ending as would be the case here and thus encapsulated in ***Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457*** **CA** as applied circa that time by the late Judge Jeremy McMullen in ***Benton v TGD Chemical Ltd [UKEAT/0166/10/DM],*** [11] that this Governor was not about exploring evidence that was exculpatory, rather than simply seizing upon that which damned the Claimant.

18. The reason I say all that is that if he had read said email, then he would have been obliged to put to MH whether or not the phrase "name me a good black man" could have been said in the context of this somewhat heated discussion which had been incepted by LB. He would have had to bear in mind that GR could not have been the inceptor for what happened viz reference to the incident at Brixton prison because she had never been at HMP Brixton. The same we know applies to MH. Therefore, the entire premise of LB's version of events would be undermined. And of course her credibility was to some extent

[10] Commencing at Bp183: see Bp194 in particular.

[11] The decisions follow through from A v B (2003) IRLR 405 EAT

undermined in that her allegation viz the 10 April had not been upheld in terms of the investigation by Deputy Governor Mr S Faulkner. Thus, he would in terms of a reasonable investigation need to focus on the context as put by the Claimant. This he never did.

19. As regards to the appellant officer, it does not cure this failure. I am of course reminded of the seminal authority in terms of the significance of appeals, namely ***Taylor v OCS Group Ltd [2006] ICR 1602 CA***. The appeal is an integral part of the proceeding. At that appeal hearing on 29 November 2017 the Claimant and Mr Hobson, acting again as his POA rep, again raised the e-mail[12]. Ms Clarke did not obtain a copy of the same thus compounding the failure of Governor Wheatley. If she had, then of course MH could have been re-called and the contents of the e-mail put to her.

20. That leaves LB; the evidence of Governor Wheatley was to the effect that she was unwilling to attend: period. But that flew in the face of the email tranche that I had before me relating to the run up of the first disciplinary hearing day. In her email[13] to LM, as Lorraine confirmed it today, VB was not hostile to giving evidence. Her point was that she would be on holiday at the time of the disciplinary hearing. It was left that the Respondent would contact her as to a revised date. There are no emails as to what then happened, but I learned from LM that the conversation she later on had with LB was to the effect that she now had a new job[14] so in that respect was not happy to attend. Mr Churchill asked if any steps were made to ask her who her employer was in order that perhaps contact could be made to explain to the employer the importance of her attending to give evidence. This never happened.

21. I conclude that when Mr Wheatley says she was an unwilling witness, that is to say hostile, that is not correct. Having said that, if of course she was unwilling and not wanting to give evidence, it begs the question as to why. If it is that she no longer wished to proceed or prosecute her complaint so to speak, then the Respondent employer acting reasonably[15], and particularly one of the size and administrative resources of the Respondent, needs to consider as to what weight it gives to her evidence. In other words, what it comes back to is given the conclusion of Deputy Governor Faulkner as to the 10th April and then the fact that GR had not been at HMP Brixton, then would not a reasonable employer have been bound to be at least cautious as to her evidence given Governor Wheatley believed her to now be an unwilling witness? Thus, I come back to the only consistent witness for the prosecution, so to speak, which is MH, albeit the Claimant himself had also always been consistent. A reasonable employer would have to evaluate the veracity of her evidence in the context, but the context was never properly explored with her and the email never put.

22. It therefore follows that I conclude that having regard to the higher test apropos the band of reasonable responses applying ***Salford*** that this dismissal was unfair.

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[12] Bp 253c.

[13] Bp165.

[14] Not as a prison officer.

[15] That is within the range of reasonable responses but apropos ie ***Salford***

Make any difference?

23. This is one of those cases where this Judge cannot say safely on the evidence conclude that but for these failures the outcome would have been the same. Raised before me was a good point by Mr Beevor summarised thus. Why would Lenny Henry and Barack Obama come up as being preferred as good black men unless the premise that there were not any good black men had been raised? At first blush, it is a highly attractive proposition. But, I come back to the context. If, taking the Claimant's email, LB had become strident and herself initiated this conversation, then the Claimant's retorts are in that context not racist.

24. What it comes back to is that in this case, Mr Churchill is right. Context is everything and it was not reasonably considered by the Respondent apropos the test that I have gone to. It thus follows that I cannot conclude on the balance of probabilities that in any event the Claimant committed an act of misconduct in the context. Thus, I cannot conclude that he would have been dismissed in any event. Finally, I cannot therefore conclude that he contributed to his own dismissal.

25. I adjourn remedy. The parties will inform the tribunal within 14 days of today's date as to whether a remedy hearing is required and if so the time estimate for the same.

Postscript

26. The parties having confirmed on 5th February that a remedy hearing is required with a time estimate of half a day**, it will now be listed before me at Nottingham**.

Employment Judge P Britton

Date: 5 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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