Case Number: 2501205/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr C Reed	**AND**	**CF Fertilisers UK Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Middlesbrough** **On:** **7 & 8 March 2017**

Before: **Employment Judge Wade**

Appearances

For the Claimant: **Mr P Morgan of Counsel**
For the Respondent: **Mr M McNally, Solicitor**

JUDGMENT

The claimant's complaints of wrongful and unfair dismissal are not well founded and do not succeed.

REASONS

Introduction

1 This is a case about humour at work that has gone wrong. There are complaints of unfair and wrongful dismissal and the issues were well understood by the parties representatives. I will address those shortly in my conclusions.

Evidence

2 I heard from, clearly I heard from Mr Brudenell and Mr Buchan for the respondent, and from Mr Reed and Mr Francomb in relation to the claimant's case. I had an appropriate bundle of the relevant documents. The essential relevant facts were not in dispute. On other matters I considered all the witnesses to be witnesses of truth.

Findings of fact

3 I have made the following findings.

4 The respondent operates a large chemical site that produces fertiliser, employing about 200 people at Billingham. It is an ICI heritage business and for some years it has been owned by an American firm. The group has considerable human resources support. It is potentially a dangerous site. Its health and safety standards and procedures are routinely highlighted to its staff.

5 The claimant was 41 at the time of his dismissal. He had worked for the respondent for nearly 20 years from apprenticeship upwards. He was well liked. He had an unblemished record and he was regarded as very hardworking and willing to help. He held a post of service controller and he worked in an operations centre to which access was strictly controlled.

6 The respondent's workforce is approximately 95% male. The claimant worked shifts and there were ten or so employees who worked in that building on shift alongside him. Frequently there would be two or only a handful of colleagues present in the control centre on a shift. and there was a kitchen there.

7 On 21 April 2016 Ms Conlin, a consultant, was working in the control centre alongside the claimant and his colleagues. She was advising on a restructuring. She went to make a cup of tea and she saw an offensive mug in the cupboard. She took photos of it. She complained. She went to see Mr Brudenell the next day. She was upset and she later put her complaint in writing. She said this in a letter dated 22 April:-

"Whilst making two drinks I looked into the upper cupboard for two mugs and saw a graffitied mug on the shelf in direct line of sight. The first part of the text scanned appeared to be offensive but my initial perception was general rather than specific. I looked more closely at the graffiti and discovered that there were four items around the mug as speech bubbles in the form of a conversation. After reading the four items of text my perception was that they were the offensive misogynist message directed at me".

8 The graffitied conversation between two owls akin to a cartoon said this:-

"Twit woo who the fuck's that lanky bitch, the whore, we're gonna fuck her up, what a liberty".

9 There were two reasons Ms Conlin may have perceived this as directed at her. Firstly she was tall; secondly the nature of her work was such that she was reviewing staff and their roles and there was a perception that those roles could be changed or made redundant; hence she perceived there might have been hostility towards her.

10 Mr Brudenell commissioned an investigation immediately. The terms of reference were explained to all the ten staff who were interviewed and who had worked in the building. It was put to them in these terms by the investigation officer:-

"There's been an allegation of bullying against an individual [whose] been working at the operation centre. There is no suggestion at this stage that you, [whoever the individual was], has done anything wrong. Please be open and honest",

or words to that effect.

11 During the claimant's interview he explained that he brought the mug in to the operations centre for his friend and colleague, Mr Lane, and that the owl conversation was a reference to Mr Lane's ex-girlfriend. Having brought it in he lost track of it and had not seen it since.

12 Others said that they were aware of the mug in general terms but not the words on it. One said if he'd seen it, it would have gone in the bin. Another said Mr Lane and the claimant "joked about" sometimes, and that their humour could be close to the knuckle. One said that Mr Lane had trouble with relationships and the claimant was a man about town. Another said the claimant had a heart of gold and was a grafter and would never upset anyone.

13 The claimant himself was very upset that word had gone round about the mug; people were asking him when he was going to be sacked. He said he would apologise to Ms Conlin and he said to the investigation officer straight away.

14 The interviews for the investigation took place between 2 and 9 May 2016. There was then a lull. The investigation officer tried to make contact with Ms Conlin, but that did not happen until 27 May. The matter that he was trying to clarify at that stage, given that the weight of the evidence then was against the claimant deliberately targeting Ms Conlin, was whether there was any other evidence of that; she did not have any.

15 The investigate officer then produced his report. It included all the statements, the equal opportunities policy, the claimant's training record and images of the mug. He concluded there was a disciplinary case to answer under the equal opportunities policy The claimant had spent three hours completing online equal opportunities training around 2 November 2015, and otherwise had completed regular and job relevant training.

16 The claimant was then invited to a disciplinary hearing by letter on the 8 June. He took part in that with his union representative on 14 June. The hearing lasted two and a half hours and there were adjournments. Mr Brudenell tested the claimant about the allegation of targeting Ms Conlin. The claimant refuted this. He repeated his explanation concerning Mr Lane. Mr Craig, the head of HR, who was also present said this:-

"Writing words like this is inappropriate and unacceptable. It contravenes company standards".The claimant said:-"I totally agree. I'm sincerely sorry. I wouldn't want to upset anyone. It will never happen again. I will apologise. I thought it [the mug] had gone home. If I'd have seen it, it would have gone home".

He accepted the language was offensive and inappropriate and Mr Craig accepted that the claimant was remorseful at that stage.

17 Mr Brudenell took a walk at the end of the hearing, in an adjournment. He decided, having thought carefully about it, to dismiss the claimant. He said it was the hardest decision he had had to make on a disciplinary hearing in his career. He had considered other penalties: demotion and suspension without pay were within the respondent's written disciplinary procedure, but he considered the gravity of the words used was such that dismissal was appropriate.

18 When he delivered his dismissal decision that evening, it became apparent the claimant had not understood that it was not simply the allegation of bullying that he faced, but also the bringing to work of offensive material. That was the disciplinary charge for which he had been dismissed.

19 The dismissal letter recorded those reasons very clearly, including the causing of the offence, that the company was clear in its policies and training, and that the claimant accepted with hindsight, that the words were unacceptable in the workplace.

20 There was then an appeal against Mr Brudenell's decision. A copy of the complaint from Ms Conlin was requested by the claimant's representative. There were many character witness statements supplied on behalf of the claimant, including from a female cleaner in the operations centre who knew the claimant very well. All those character references were very favourable to the claimant.

21 The appeal was heard by Mr Buchan on 13 July 2016. The grounds of appeal ran to some 13 bullet points. They included that the outcome was too harsh, there was no consideration of the claimant's length of service, that the company agreed the cup was not intended for Ms Conlin, that there was no breach of the equalities policy, inadequate training, delay, impact on the claimant's wellbeing, and that the offence should have been treated only as misconduct. There was a repetition of the offer of apology.

22 Mr Buchan heard that appeal. He rejected it. He had been presented with the character evidence. Some of that was critical of Ms Conlin. All of it supported the claimant. The appeal hearing lasted over several hours. There was a full discussion. The union representative put the case that there was a belief that Mr Brudenell had not made the decision himself: he had been told to make it; there was discussion of potential industrial action should there be no reinstatement of the claimant.

23 Mr Buchan then carried out his own investigation. He talked to Mr Brudenell, and made a record of that interview and the points that had been raised with him. He accepted Mr Brudenell's word about making the decision himself. Mr Brudenell explained that he had focused on standards within the company and the context. He said that the claimant was a bit of a "jack the lad" and a "good guy" but not an unblemished record, in the sense of having had other allegations made in the past but which had not "gone anywhere". Ultimately, the reason for his decision was that he took a zero tolerance approach to the offensive words used. He explained his position as to harassment and that Ms Conlin had been offended, and he was clear that the decision not to suspend the claimant when the allegations were made had made no difference to the ultimate outcome.

24 In rejecting the claimant's appeal Mr Buchan explained the respondent's standards and that the impact on Ms Conlin had been real, even if the claimant had been careless and thoughtless, rather than intending an impact on her. He concluded Mr Brudenell's decision was reasonable and his alone.

25 Since the dismissal and in discussion with the union the respondent has provided face to face training on respect at work and equalities; that was as part of the resolution to the threat of industrial action. Mr Brudenell has said in the context of those discussions that his decision was harsh, and that if industrial action resulted in reinstatement he would have to resign as his position at the site and leading it would be untenable.

26 The respect at work training which was previously provided and had been completed by the claimant include (bundle reference pages 393 and 394), the following about harassment:-

"The same behaviour may be inoffensive to one person and deeply inoffensive and intimidating to another, unintentional or misinterpreted behaviour may cause feelings of harassment".

It went on to include as a case study a thumbnail about the sports commentator Andy Gray saying that he was dismissed in 2011 in response to evidence of unacceptable

and offensive behaviour in an off-air incident when he cracked a poor taste joke with a female colleague.

The Law

27 Sections 94 and 98 of the Employment Rights Act 1996 should be included in this judgment (the right not to be unfairly dismissed and the statutory framework to decide such complaints – see below).

28 As to the reason for a dismissal, it is the facts known and beliefs held which cause an employer to dismiss. **British Home Stores v Burchell** is the touchstone for decisions about unfair dismissal, albeit the burden of proof on reason for dismissal is now neutral.

29 **94 The right**

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

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(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.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

30 As to wrongful dismissal, gross misconduct means a deliberate and wilful contradiction of the contractual terms. It involves deliberate wrongdoing or gross negligence (gross negligence was not pursued in this case). See **Sandwell v West Birmingham Hospitals Trust**. There is no rule of law saying what gross misconduct is, but clearly the whole question is whether the conduct is of a type which is incompatible in a very grave way with employment and the contract of employment.

Discussion and Conclusions

Wrongful dismissal

31 I have addressed the wrongful dismissal case first.

32 The respondent has to prove wilful and deliberate misconduct in a grave way and incompatible with the contract of employment. For this particular complaint I am entitled to look at all the material that is before me and beyond that which was available to the respondent at the time, if that is relevant, and make further findings of fact.

33 To answer the question, did the claimant engage in grave and deliberate wrongdoing, incompatible with his contract of employment, I have to analyse and conclude for myself what it is that the claimant did.

34 In my judgment, he created from scratch objectively offensive material as a joke, which he would not have wanted all, including his family, to see. Such things are done by people for humour or otherwise every day of the week. The step that he took, and the line that he crossed which resulted in dismissal in this case, was to bring that material into a workplace, the respondent's workplace, for his friend and colleague.

35 The respondent has a duty of care to make its workplace safe, in the broadest sense of the word, for all of its staff.

36 I take into account that that workplace is one where there was and is no doubt swearing; and no doubt on my findings there was humour amongst colleagues that was "close to the knuckle", as one witness described it.

37 In contrast to that I take into account that this was a workplace which sets standards across the board, whether they are health and safety standards necessary for a potentially dangerous site, or whether they are about behaviours. The respondent trains comprehensively on those standards and it is a workplace which has modernised over the many years in which it has been operating. It is workplace where after the claimant's dismissal there was objection to it amongst the workforce, and from the union at large, and also where before dismissal there were some who expected that dismissal to happen and voiced that to the claimant.

38 I have included in my findings some of the material including the Andy Gray example, that was included in the training. I have reviewed that training, and it is part of

the reason why it took me longer than I expected to reach this decision. I now understand why it would have taken three hours or so to complete it. It is clear to me that although the claimant may not have related that training to his own actions, bringing that offensive material into work was fundamentally incompatible in a grave way with his contract of employment with the respondent. The bringing in of it was wilful and deliberate. The humour was wilful and deliberate: the claimant went to such trouble to create it. He could have bought his friend any number of other items to cheer him up. Offensive humour was his choice.

39 This was not borderline material. Had it featured in a case study in the online training module everyone including the claimant would have identified it as offensive.

40 For these reasons the bringing in to work of offensive material was both deliberate and wilful and incompatible in a grave way with his contract of employment. For that reason I have concluded that it amounted to gross misconduct, rather than ordinary misconduct which was not repudiatory of his contract, as the claimant contended for. For that reason the wrongful dismissal complaint fails.

Unfair dismissal

41 The issues for me were limited. The respondent showed the Tribunal that the reason for the dismissal related to the claimant's conduct, namely the bringing in of the offensive mug. There was implicit in the claimant's case that he may have been dismissed because of his potential to benefit from generous ICI severance terms should he be dismissed in the future. In reality there was no doubt as to Mr Brudenell's reason for dismissal, maintained on appeal. He and Mr Buchan's evidence as to their genuine belief was not significantly challenged, but I did put the ICI terms as the real reason and that was rejected, in my judgment, honestly.

42 There were two points made in relation to the reasonableness of the investigation. The first was that there was no provision of the Conlin letter to the claimant before the disciplinary hearing and no further investigation of the offence taken by her and the degree to which that offence was general or specific to the belief that the comments were directed at her.

43 The letter of complaint was provided prior to the appeal when its omission was raised. I apply the **Sainsbury's v Hitt** standard of reasonableness, that is whether an investigation is within the band of reasonable investigations in all the circumstances.

44 The telephone statement of the conversation between Ms Conlin and the investigation officer was provided to the claimant. It was easily clear from that note that she had previously provided a written complaint and it could have been sought at that stage by the claimant's union. It was also clear, and that is the reason that I have included it in my findings of fact, that she took offence at two levels. She took offence firstly and generically as anyone might, seeing those words on a mug; secondly she took offence because she then believed, wrongly as it turned out, that the comments were directed at her.

45 In my judgment it would have been beyond the band of reasonable investigations to seek further information, given the comprehensive nature of the initial complaint and the follow up call, to attribute or apportion the degree of offence between each of those two elements.

46 As to the claimant's case on the band of reasonable responses, it so happens that I have found, as the respondent did, that the conduct amounted to gross misconduct. It

does not necessarily follow that the dismissal decision was within the band of reasonable responses or that the respondent acted reasonably in treating it as sufficient reason to dismiss.

47 In reaching my conclusions on that question I take into account the very full and early apologies made by the claimant, both duriing the investigation and subsequently, and indeed throughout his appeal. I also weigh in the mix that the respondent approached this on a zero tolerance basis: the claimant was the subject of that zero tolerance approach in circumstances where he would never have wished to be. Certainly he was very upset by it, when measured against his previous good character and record.

48 It is instructive, having heard everything that I have heard, that Mr Brudenell took time and thought very hard about this decision. It is clear to me that some employers would have taken a different approach: some may have listened to those very remorseful statements by the claimant, concluded that he was remorseful, and that he would never do such a thing again and accepted that, and imposed, perhaps a final written warning as was contended for.

49 That being the case, and that the respondent's own procedure was very clear that penalties can vary, providing a whole suite of penalties in circumstances of gross misconduct, I cannot say that Mr Brundenell settling on dismissal, having considered matters carefully as he clearly did, acted outside a band of reasonable responses of a reasonable employer.

50 Mr Brudenell knows that site, he knows the workforce, he knows the standards of behaviour set. There had been a reasonable investigation and a thorough application of the respondent's disciplinary procedure. It was a matter for him and for Mr Buchan on appeal. There were no substantive unfairness in my findings in the conduct of the dismissal and disciplinary proceedings. In fact, if the respondent had suspended the claimant, it might well have faced an argument that this was a foregone conclusion or words to that effect, when on my findings clearly it was not. For all those reasons the unfair dismissal complaint also fails: the respondent acted reasonably in treating the claimant's conduct in bringing to work the offensive mug as sufficient reason for his dismissal.

51 I would say this, and this is largely directed to Mr Reed and his family's ears because I know that they have sat and supported him throughout the hearing of this case. The Tribunals hear very many wrongful and unfair dismissal cases when people do things that are inadvisable and which they regret deeply. Many of those actions are, and the results of them, devastating for those that lose their jobs, and I do not underestimate that being the case here. That being the case, I have taken as much time as I have needed to examine all the issues raised. I hope that I have been very clear as to why the complaints have not succeeded within the legal framework which applies.

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EMPLOYMENT JUDGE WADE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
11 April 2017

JUDGMENT SENT TO THE PARTIES ON

21 April 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL