



Case Number: 2300789/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr W Williams

and

Respondent

Edible Oils Ltd

Held at Ashford on 7 July 2017

Representation

Claimant:

Dr. N Perova - Counsel

Respondent:

Mr. B Williams – Counsel

Employment Judge Wallis

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant was not unfairly dismissed by the Respondent; the claim therefore fails and is dismissed.

REASONS

Issues

1. The Claimant presented his claim form on 15 March 2017, claiming unfair dismissal. At the start of the hearing we agreed the issues. The Respondent's case was that the Claimant was dismissed by reason of conduct. It was therefore necessary to consider whether the Respondent could demonstrate that they had a genuine belief that there had been misconduct. The next part of the test was to decide whether that belief was based on reasonable grounds following a reasonable investigation.
2. If the Respondent had shown a potentially fair reason for dismissal, I would consider whether a fair procedure had been followed, having regard in particular to the provisions of the ACAS code.
3. I would then look at whether the decision to dismiss was a decision that fell within the band of reasonable responses, in other words, could a reasonable employer reasonably have decided to dismiss the Claimant.
4. If the dismissal was procedurally unfair, I would have to consider whether a fair procedure would have made any difference to the outcome. I would also have to consider, if the dismissal was substantively unfair, whether there had been any blameworthy conduct by the Claimant which would indicate that compensation should be reduced. It was agreed that I would look at liability first.

Documents & Evidence

5. There was an agreed bundle of documents and written statements from the witnesses. There had been some difficulty about the Respondent's witness statements. It transpired that they had been sent by email to the Claimant, but he had not passed them on to his solicitor, who had been instructed on 22 June 2017. His representative therefore not had seen them. I adjourned to read the statements and invited the Claimant's representative to do so. When we reconvened, the Claimant's representative asked whether the Tribunal would adjourn so that she could prepare properly for the hearing. The Respondent objected to that application and suggested that if it were granted, then costs would be sought in the sum of around £1900.

6. Having taken further instructions, the Claimant's representative asked for an additional half an hour in order to complete her preparations. That application was granted.

7. I heard evidence from the investigation officer Mr. Kevin Williams, the warehouse manager; Mr. Andrew Wilson, the manufacturing manager and the person who decided to dismiss the Claimant; and Mr. Trevor Barr, the general manager and the person who heard the appeal against dismissal.

8. I also heard evidence from the Claimant himself Mr. Winston Williams.

Findings of Facts

9. There was no dispute that the Claimant had been employed by the Respondent company and its predecessors since January 1987, some 30 years at the date of dismissal. He worked as a production shift manager, responsible for a team of around 12 people. Before the disciplinary process that led to his dismissal, he had a clear disciplinary record and was considered a good worker.

10. The Respondent's HR team received a complaint from an agency worker Ms. Kadisaite that the Claimant had harassed her sexually. Mr. Kevin Williams was appointed to investigate the complaint. He met with Ms. Kadisaite and took a statement from her. She reported a number of comments made to her by the Claimant, relating to things that he would like to do with her and commenting on her physical appearance. She told Mr. Kevin Williams that she had confided in Mr. Knell, a charge hand, and he had told her to tell the Claimant to stop, and to report it if he did not stop it.

11. Mr. Kevin Williams spoke to Mr. Knell who confirmed that she had spoken to him about an incident. He then interviewed Mrs. Fulara, one of the Claimant's operatives and I was satisfied that he asked her neutral questions. She said that he "talks rude to everyone especially women" and she mentioned some comments he had made which had made her feel uncomfortable. She said that she had reported the matter to her husband, who also works in the warehouse, and he had spoken to the Claimant.

12. Mr. Kevin Williams noted that Mrs. Fulara had no difficulties with the English language although it was her second language as indeed it was for the complainant. He spoke to Mr. Fulara who confirmed that he had spoken to the Claimant asking him not to make comments “like that” to his wife. Mr & Mrs Fulara had been with the company for a number of years and the Claimant himself said that they were good and honest workers.

13. Mr. Kevin Williams also interviewed Mr. Burton who, Ms Kadisaite had said, may have overheard a comment made by the Claimant. Mr. Burton said that he had not heard or seen the Claimant do anything but that Ms Kadisaite had told him that the Claimant had said some things to her which she did not like and he had suggested telling him to stop.

14. Mr Kevin Williams then invited the Claimant to an investigation meeting on 28 October 2016. Ms Perry from HR took notes of that meeting. The Claimant confirmed that he was aware of the Respondent’s harassment policy. He suggested that Mr. Kevin Williams should look at the CCTV footage. As far as the CCTV was concerned, there was nothing in the notes that suggested that the Claimant himself asked to see the CCTV. I noted that Mr. Wilson viewed the CCTV footage with Mr. Kevin Williams before the disciplinary meeting. I found that it would have been a better process had the Claimant been able to view that footage. However, by the time of the disciplinary hearing, it had been over-written. I accepted the Respondent’s explanation that this had happened by accident.

15. The Claimant told Mr. Kevin Williams that there was a certain amount of banter on the operation line, that everyone would laugh and joke, and that it was the others who would make certain comments. He denied saying anything inappropriate to Ms Kadisaite.

16. The Claimant was suspended. Mr. Kevin William watched the CCTV footage, which did not cover all areas of the warehouse. He noted an occasion on 14 October 2016 when the Claimant spoke to Ms Kadisaite for three minutes and as he left he brushed his hand diagonally on her back which seemed to Mr Kevin Williams to be a deliberate movement. Then later that day he noted that the Claimant appeared to stand between Ms. Kadisaite and another girl who were talking and he put his arm around the other girl; she appeared to pull away.

17. On the footage for 20 October 2016 he noted that the Claimant was leaning on the worktop very close to Ms. Kadisaite which he considered appeared strange as it left very little space between them. There was a long conversation of nearly five minutes.

18. Mr Kevin William formed the view from his observations that the Claimant did not attend the receipts area very often on the day shift, but on the night shift when Ms Kadisaite was working alone he appeared there often and left as soon as the fork lift driver returned.

19. The Claimant was invited to a disciplinary meeting to discuss “allegations of sexual harassment against him.” He was told that he had a right to be accompanied, but he chose to attend alone. He was sent copies of the statements taken from Mr. Kevin Williams during his investigation. As mentioned, Mr. Wilson viewed the CCTV footage that had been seen by Mr. Kevin Williams. I noted that during the cross-examination of Mr. Wilson he seemed to be confused about the proximity of the Claimant to Ms. Kadisaite; he said both that the Claimant was standing so close to Ms. Kadisaite that he was touching her, and that he was within 6 to 7 inches of her. I accepted that the impression formed in Mr. Wilson’s mind from viewing the CCTV footage was that he was standing very close to her although not touching. I accepted his evidence that although it appeared to him from the evidence he had read that the allegations were true, at the time he was mindful of the fact that he needed to keep an open mind and consider what the Claimant told him at the disciplinary hearing.

20. Mr. Creasy of HR took notes of the disciplinary hearing which took place on 2 November 2016. The record does not show that the Claimant asked to see the CCTV footage. The Claimant vehemently denied the allegations and suggested that the five minute conversation with Ms. Kadisaite was in respect of her confiding in him that her mother was unwell and she was upset about that. I noted that the Respondent did not ask Ms. Kadisaite or the other witnesses whether the Claimant’s version of events was accurate. However, in all the circumstances, I did not consider that this omission made the process unfair. The task for Mr. Wilson was to weigh up the different versions of events.

21. Each of the allegations was discussed in some details and I was satisfied that the Claimant had every opportunity to put forward his version of events. The meeting was adjourned to allow Mr. Wilson to make a decision.

22. I found that he considered the matter carefully and he checked the points that the Claimant has raised about who allocated shifts and the places in which Ms. Kadisaite worked. Mr. Wilson decided that the Claimant had behaved in an inappropriate way towards Ms. Kadisaite and that his behaviour amounted to sexual harassment. He noted that her complaints were supported by two colleagues and they had used similar language, without prompting, to report those comments. There was nothing to suggest that the colleagues had any reason to fabricate stories about the Claimant. He considered that there was no evidence to suggest that there was collusion between them. It appeared that Ms. Kadisaite, an agency worker, was not a friend of the other colleagues.

23. Mr. Wilson concluded that the Claimant’s behaviour amounted to gross misconduct. He noted that the Claimant had been fully trained in the Respondent’s equality and diversity code and had received refresher training in January 2016. He noted the Claimant’s long service with the Respondent and his clear disciplinary record. However, he considered that his behaviour was completely unacceptable and he considered that all trust in the Claimant had been lost.

24. As a supervisor, he noted that the Claimant was responsible for his staff and he considered that the Claimant had abused that position and the vulnerability of a new agency worker. He therefore considered that a final written warning would not be appropriate. He decided to dismiss the Claimant.

25. A further meeting took place on the 22 November 2016, after the Claimant's period of annual leave for two weeks, at which the decision was explained. The decision letter set out the reasoning behind the decision and the right of appeal.

26. The appeal was heard by Mr. Barr. I was concerned to read that Mr. Barr spoke to Mr Wilson outside the process and that Mr. Wilson told him that in the past, on an unspecified date, another employee had complained that the Claimant had made an inappropriate comment about their clothing and had been standing too close to them. They would not make a formal statement so the only action that was taken was that Mr. Wilson raised it with the Claimant during a one to one meeting. The Claimant denied that anything had occurred. I considered that this should have been raised with the Claimant during the disciplinary hearing, but on balance I accepted Mr. Wilson's evidence that he made his decision on the evidence before him in respect of the complaint by Ms. Kadisaite, and not from those previous complaints which had not been fully investigated.

27. Mr Barr heard the appeal on 14 December 2016. The Claimant in his appeal letter suggested that the allegations were untrue and that the statements by the colleagues were also untrue. He said that the incident recorded by CCTV when he had a long conversation with Ms. Kadisaite was when she was upset about her mother's ill health and he also pointed out that she had made "similar allegations" about Mr. Wilson.

28. I noted that although the Claimant complained in his appeal letter about Mr. Wilson being the subject of a complaint, he did not object to Mr. Wilson considering the disciplinary allegations. I accepted the Respondent's evidence that the complaint about Mr. Wilson was sorted out when it transpired that he had, in general conversation, asked Ms Kadisaite what she was doing at the weekend in order to be polite, and not to foster a relationship, and she misinterpreted that question. I was satisfied that the comments that she said the Claimant had made to her were not the subject of misinterpretation. I found therefore that the complaint about Mr Wilson did not affect the fairness of the procedure.

29. By the time the matter got to the appeal stage the CCTV recording was no longer available. Mr. Barr spoke to Mr Wilson and Mr Kevin Williams about what they had seen on the CCTV footage. I considered that there was an element of unfairness in that the Claimant was not privy to that conversation and he had not seen the CCTV footage himself. However, I accepted the Respondent's witnesses' evidence that the CCTV footage was a small part of their consideration and that it was the evidence of Ms. Kadisaite and her colleagues that persuaded them that the Claimant had acted as alleged.

30. Mr Gayle took notes of the appeal hearing. I was satisfied that the Claimant had every opportunity to put his points. He handed over a document setting out further information in respect of his appeal, referring to his long service with the Respondent, his clear disciplinary record and the fact that there had been no other allegations. He said that on one occasion he had to tell Ms. Kadisaite not to play games on her phone during working hours. Mr. Barr adjourned the hearing and decided to speak to the witnesses himself. I was concerned that he decided to re-investigate the matter, when there had been an investigation already, the details of which had been supplied to the Claimant. Mr Barr's re-investigation was not shared with the Claimant. Mr Barr was questioned about this and I accepted that he was mindful of the Claimant's long service with the Respondent and he wanted to ensure that the correct decision had been made. He therefore spoke to the witnesses to get a feel for whether the evidence was credible. I found that this could have been handled better by the Respondent, but that on balance it did not impact on the overall fairness of the procedure.

31. Mr Barr spoke to Mr. Burton, who told him "Winston is Winston" (referring to the Claimant) and said that he did not want to get involved. He spoke to Mr. Knell who confirmed that Ms. Kadisaite had approached him about the Claimant's behaviour. He spoke to Mrs Fulara who confirmed that the Claimant "always made flirty comments". He spoke to Mr Fulara and he confirmed what he had told Mr. Kevin Williams.

32. Mr. Barr formed the view that Mr and Mrs Fulara spoke English to an acceptable standard that made it unlikely that there had been any misunderstanding; and that Mr. Fulara was an excellent performer and "always completely professional." He found it difficult to believe that there had been some kind of conspiracy against the Claimant.

33. Mr. Barr raised the issue about Mr. Wilson's comment about what Ms Kadisaite was doing at the weekend, and Mr. Burton, Mrs Fulara and Mr Kaur denied hearing Ms. Kadisaite complain about that comment.

34. Mr Barr spoke to Mr. Wilson about whether there had been any previous issues with the Claimant. This was when Mr. Wilson told him about the conversation at the one to one meeting, which was never fully investigated. I accepted Mr Barr's evidence that he could not give this "any more weight". I accepted that he gave that suggestion no weight, but I would urge the Respondent to ensure that any statements or information obtained in a re-investigation is put to an employee before any further decisions are made in order to ensure complete transparency of the process.

35. Mr. Barr considered the matter carefully. He noted that the Claimant had consistently denied the allegations and showed no remorse which he accepted could have been an indication of his innocence. He weighed up the Claimant's length of service with the Respondent company and considered whether that should indicate that his account should be believed in preference to the account of the others. Mr. Barr clearly explained in evidence how he came to the view that the Claimant had

conducted himself in the manner described by Ms. Kadisaite. He noted that Ms. Kadisaite's evidence was very clear and that it was supported by Mrs. Fulara and by Mr. Fulara. He noted that the three individuals did not mix together or have any obvious motive against the Claimant. Other employees confirmed that Ms. Kadisaite has confided in them before raising a formal complaint. He noted that there was no evidence that she had made a similar complaint about Mr. Wilson. He noted that the CCTV footage did not cover some of the areas in which the Claimant's behaviour was said to have taken place. He accepted that the long conversation could have been about Ms. Kadisaite's mother's ill health, but he noted what Mr. Kevin William and Mr Wilson had said about the Claimant's body language towards Ms. Kadisaite as shown on CCTV, which seemed completely inappropriate whatever the nature of the discussion.

36. Having weighed up all of those matters Mr. Barr considered carefully the sanction and decided that because of the serious nature of the behaviour, the Claimant could not remain with the Respondent company. The Claimant was sent a detailed letter setting out his decision.

Submissions

37. On behalf of the Claimant, Dr Perova suggested that the Claimant and Mr. Wilson had a tense relationship and that Mr. Wilson was trying to find an excuse to dismiss the Claimant. She submitted that there was no genuine belief that there had been misconduct. She submitted that there was no reasonable ground for such a belief and the Respondent's witnesses had not been credible. They had all assumed that Ms. Kadisaite was telling the truth and the Claimant was lying. The Claimant's version of events was not put to Ms. Kadisaite.

38. The allegations were inconsistent because first she said it all began on 13 October 2016, and then she said it began from first week of her employment. The Respondent did not challenge her on that. Mrs. Fulara was also inconsistent because initially she gave some examples such as "sexy eyes" and then later she said "flirty comments". That appeared to support the Claimant's evidence that he liked banter and that no one took it seriously.

39. She submitted that it was convenient that the CCTV footage has disappeared before the disciplinary meeting and that the Claimant had not seen it. Mr Kevin Williams and Mr. Wilson had not seen some of the gestures that Ms. Kadisaite had referred to in her complaint. The reason the Claimant stood close to Ms. Kadisaite was that she was upset about her mother's ill health.

40. She submitted that there was not a reasonable investigation because the Respondent simply accepted that Ms. Kadisaite was correct.

41. Mrs Fulara was right when she spoke to Mr. Barr and said that the Claimant made "flirty comments"; this should not have led to dismissal but a final written warning in accordance with the Respondent's disciplinary procedure. .

42. The decision did not fall within the band of reasonable responses. The Respondent did not like the Claimant and found an excuse to dismiss him.

43. With regard to Polkey and contributory conduct, the Claimant had denied the allegations, he may have said things like “you have nice eyes” but that did not mean harassment; she submitted that there should be no reduction for contributory conduct.

44. On behalf of the Respondent, Mr. Williams noted that the claim form said that the dismissal was unfair because the allegation did not happen and that the Claimant wanted to clear his name. That was not the issue to be decided. He accepted that the Respondent could have done things better and that the procedure was not perfect. However, it was clear from the evidence that the Claimant was not telling the truth. The Respondent had to carry out a balancing exercise and it was tipped against the Claimant by the evidence of Mr and Mrs Fulara.

45. He noted that the Claimant’s best case was in respect of the procedure that was followed, although the Claimant’s submissions did not cover that. The Claimant had accepted in evidence that if the allegations were correct it would have amounted to gross misconduct and that would have attracted a penalty of dismissal. The Respondent carried out the balancing exercise and came to that view.

46. The issue over the CCTV he submitted was a red herring because the Respondent’s witnesses said that it did not influence them and that it was the evidence of Mrs. Fulara that tipped the balance. In any event, the Claimant had not asked to see the CCTV footage himself, he asked his manager to view it.

47. He accepted that some of the evidence particularly from Mr. Wilson, required clarification by way of questions from the judge and re-examination, but ultimately he hoped that he had demonstrated that Mr. Wilson had approached the evidence in the way that might be expected.

48. He submitted that the Claimant had not offered any evidence that would assist him. Although he suggested that he had reprimanded Ms. Kadisaite about using her telephone that did not explain the evidence of Mrs. Fulara and her husband. That was a hurdle that the Claimant was unable to overcome.

49. The Claimant suggested that he had been dismissed because Mr. Wilson has told him that he was paid too much and that they have too many shift managers. That however was not relevant to the allegations from Mr. Kadisaite and in any event Mr. Wilson denied having said that.

50. The Claimant did not object to Mr. Wilson conducting the disciplinary hearing, neither was it a ground of his appeal.

51. He submitted that the likely scenario was that there had been banter from the Claimant, he had not been challenged about it, then Ms. Kadisaite complained about it and the others supported her. He accepted that if there was another such

occasion, then the Respondent would do things better. He reminded the Tribunal that it could not substitute its own view. He submitted that the dismissal was fair in all the circumstances.

The Law

52. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.
53. In this case, the reason relied upon by the Respondent is conduct. In the case of British Home Stores v Burchell [1978] IRLR 379 it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see Post Office v Foley; Boys and Girls Welfare Society v McDonald). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09). So, the burden of proof is neutral in respect of the second and third questions laid down in Burchell namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.
54. In Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 it was held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss.
55. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the

Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

Conclusions

56. I concluded that the reason for dismissal was conduct. Although the Claimant suggested that it was because of his rate of pay and/or perhaps because there were too many shift managers, that point was not raised at the disciplinary hearing or the appeal hearing and there was insufficient evidence to support the Claimant about that, whereas there was ample evidence to show that the reason was conduct, in other words, the complaint made by Ms. Kadisaite, which was supported by other workers.

57. I concluded that the Respondent had a genuine belief that the Claimant had acted as alleged. Not only was the complaint clear and detailed, there was some CCTV footage support and, more importantly, there was the evidence of Mr and Mrs Fulara who the Claimant himself described as good and honest people. The Respondent, I accepted, had a difficult job in considering the allegations because as far as they knew the Claimant had long service and was a good and trusted worker; on the other hand, Mr & Mrs Fulara were known to be good and professional workers and they also had relatively long service, although not as long as the Claimant. I concluded that it was not unreasonable for the Respondent, having weighed up that evidence, to form the belief that the allegations were true.

58. I concluded that there had been a reasonable investigation by Mr Kevin Williams. He had interviewed the relevant witnesses and taken notes of their statements. I concluded that the investigation produced reasonable grounds for the belief that the allegations were true. In addition, there had been some further investigation by Mr. Wilson and latterly by Mr. Barr. I have noted my concerns about that, because it was not shared with the Claimant before any decision was made. On balance, however, I considered that the further investigations simply reiterated what Mr. Kevin Williams had discovered during his investigations.

59. As far as the procedures are concerned, on balance I considered that it was fair in all the circumstances. Certainly, the Claimant was aware of the allegations at all stages. He had the opportunity to put his case at the investigation stage, disciplinary stage and the appeal stage. He decided not to be accompanied, although he was told of his right to do so. He had copies of the relevant documentation before the meetings took place.

60. As set out above, I had some concerns about the further investigations and the fact that he was not privy to those, and of course he had not seen the CCTV footage. In all those circumstances of the case, however, I concluded that overall the procedure was fair, he had been given every opportunity to answer all of the allegations, and the flaws in the procedure that I identified had a minimal impact on the fairness of the process.

61. Turning then to the band of reasonable responses, I cannot substitute my view for that of the Respondent. It matters not whether I believed the Claimant's strong denials, nor whether I would have dismissed the Claimant or whether I would have conducted other investigations. The question is whether a reasonable employer could reasonably have decided to dismiss the Claimant in all the circumstances. The circumstances were that he was a long-serving and trusted employee, but the allegations against him were clear and detailed and they were supported by other employees of a good character, who were not led into making those statements. The Claimant had been trained on the Respondent's equality policy and had refresher training earlier that year. If a reasonable employer decided that the Claimant had acted in the way alleged, and I concluded that such a decision would not be outwith the evidence available, then I concluded that such a reasonable employer could have reasonably decided to dismiss the Claimant, noting that he was in a management position for some 12 employees and that it was necessary to be able to trust that he would operate within the boundaries of the Respondent's practices and policies.

62. For all of those reasons, I concluded that the dismissal was not unfair. The claim was therefore unsuccessful and it was dismissed.

Employment Judge Wallis

8 August 2017