



Case Number: 2301973.2016

MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr N Truong

and

Respondent

Primark Stores Ltd

Held at Ashford on 30 August 2017

Representation

Claimant:

In Person

Respondent:

Ms L Bell, Counsel

Employment Judge Kurrein

JUDGMENT

The Claimant's claims of public interest disclosure/unfair dismissal are not well founded and are dismissed.

REASONS

The Claims and Issues

1 At a Preliminary Hearing on 20 December 2016 EJ Wallis defined the claims and issues in this case as follows:-

- 1 The following claims and issues will be considered by the Tribunal at the hearing. No other claims or issues will be considered without the permission of the Tribunal.
- 2 By a claim form presented on 30 September 2016 the Claimant claimed unfair dismissal. He also ticked the box that indicated that he was making a 'whistle-blowing claim'. After discussion about the relevant tests to be applied to such a claim, he confirmed that he was making that claim. I was satisfied that there was an indication of such a claim in the claim form; I noted that he Respondent had recognised this in the response form.
- 3 The Claimant has not yet obtained advice about his claim, but said that he will be seeking the assistance of the CAB shortly. I encouraged him to do so, and to show his adviser this order. I took the opportunity to explain the various tests that the Tribunal would apply, and the procedure that would be followed at the hearing.
- 4 The issues will be as follows:-

Protected disclosures/dismissal - section 43B & 103A Employment Rights Act 1996

- a) was the Claimant's grievance in August 2014 a disclosure of information that the Claimant reasonably believed tended to show that a criminal offence had been committed and/or a legal obligation had been breached;

- b) did the Claimant reasonably believe that the disclosure of information was in the public interest;
- c) if so, was the disclosure the reason (or principal reason) for the dismissal;

Unfair dismissal – section 98 Employment Rights Act 1996

- d) if there was no protected disclosure, or if it was not the reason (or principal reason) for the dismissal, what was the reason for dismissal (the Respondent contends that it was conduct or some other substantial reason, namely the breakdown of the employment relationship);
- e) if the reason was conduct, did the Respondent have a genuine belief that there had been misconduct, based on reasonable grounds following a reasonable investigation;
- f) if the reason was some other substantial reason, can the Respondent show that they had a substantial and fair reason in mind;
- g) was a fair disciplinary procedure followed, having regard to the provisions of the Acas Code;
- h) did the decision to dismiss fall within the range of responses open to a reasonable employer;
- i) if the dismissal was procedurally unfair, should any compensation be reduced by a percentage to reflect what would have been the likely outcome had a fair procedure been followed;
- j) if the dismissal was substantively unfair, should any compensation be reduced to reflect any blameworthy conduct by the Claimant;

Remedy

- k) if the claim is successful, what is the appropriate remedy having regard to any loss of earnings and any steps taken to mitigate such loss.

The Evidence

- 2 I heard the evidence of Mrs F Zeka, People & Culture Manager, Mr G Singh, Store Manager (Bromley), and Mr H Doole, Store Manager (Watford) on behalf of the Respondent. The Claimant, despite my advice that it was against his best interests, declined to give evidence but I received and considered a written statement made by him. I considered the documents to which I was referred and the submissions of the parties. I make the following findings of fact.

Findings of Fact

- 3 The Claimant was born on 18 December 1974 and started his employment with the Respondent as a retail assistant on 20 November 2008, originally on a temporary basis. He worked at the Respondent's Bromley store.
- 4 The Respondent is the well-known "value" retailer. The Respondent has a number of relevant policies. These include a grievance policy and procedure, and a disciplinary policy and procedure. The staff handbook also includes a section on "Customer Service" which states,

"As an employee of Primark Stores Ltd your first duty and prime responsibility is to give courteous and helpful service to customers at all times. There is no duty

more important than this because the customer is the most important single factor in our business.”

- 5 The Claimant was considered by his peers to work to a high standard. His employment was uneventful until the following events took place in 2014.

2014

- 6 On 1 August 2014 the Claimant presented Mrs Zeka with a written grievance, which he relies on as a PID and which, in outline, raised the following issues:-

6.1 He was being harassed, originally by the same people, but he was no longer seeing them.

6.2 “They” were getting new people to do the harassment and intimidation.

7 He set out examples of the harassment and intimidation as consisting of: –

7.1 on his way to work he would notice a member of staff staring at their phone when he changed buses at Stamford who would make eye contact with him;

7.2 when he got off the bus at Bromley another person who worked at the store would be waiting for him looking at their phone;

7.3 when he got to the store two or three of them would be waiting outside looking at their phones;

7.4 when he went upstairs on the escalator one of them would open the door, as if they knew he was coming;

7.5 throughout his working day members of staff would be waiting for him, looking at their phones;

and went on to give further details of other occurrences.

- 8 One of his principal complaints was that members of the Respondent’s contracted security staff were broadcasting CCTV of him “live”, which was being watched by colleagues and/or customers on their phones, and security staff had followed him on his journeys to and from work. He identified 15 members of staff and/or security staff.

9 Mrs Zeka wrote to acknowledge receipt of that grievance by letter dated 28 August 2014, and invited the Claimant to attend a grievance hearing to be conducted by her on 1 September 2014. She set out her understanding of the grievance and informed the Claimant of his right to be accompanied.

10 That meeting took place as planned. The Claimant did not wish to be accompanied. A notetaker was present, whose notes extended over 22 manuscript pages. At its conclusion, the Claimant was told that Mrs Zeka would carry out appropriate investigations and inform him of the outcome of his grievance in due course. He was advised that if he did not agree with that response, he would have the right to appeal. The Claimant signed each page of those notes under a statement acknowledging that they were an accurate reflection of what had been said.

- 11 I accepted Mrs Zeka's evidence that she obtained witness statements from and/or interviewed and/or spoke to each person identified by the Claimant as being involved in harassing or intimidating him. In particular I accepted her evidence that many of the Claimant's colleagues to whom she spoke were puzzled and confused by the nature of the allegations that were being made against them. They did not understand how such an allegation could arise from, for instance, them simply saying "hello" to the Claimant in passing.
- 12 Mrs Zeka wrote to the Claimant on 26 November 2014 to inform him that his grievance had not been upheld. She confirmed that she had spoken with the witnesses identified by the Claimant and in respect of the first 13 incidents alleged by the Claimant gave detailed reasons why she did not uphold those grievances. In respect of the final four grievances she detailed her investigation of the security team and why she did not uphold those grievances. She expressed the hope that the Claimant would accept his grievance had been fully investigated, but in the event he was not content she informed him of his right of appeal.
- 13 The Claimant did not appeal that outcome. I did not accept his allegation that Mrs Zeka had told him he could not appeal: she clearly informed him twice, in writing, of his right to appeal.

2015

- 14 On 26 March 2015, a customer complained to the Respondent that the Claimant had approached and questioned them, suggesting that they had been watching the Claimant on their phone.
- 15 The Claimant was interviewed by a duty manager concerning this incident the next day. In the course of that interview the Claimant confirmed his belief that colleagues and security staff were harassing him by sending information about him, including images and CCTV, to people's phones.
- 16 Another customer complained about a similar incident on 31 March 2015. The customer had looked at their phone upon receiving a text message, whereupon the Claimant had approached him and said, "Hello, can you hear me?" then went on to ask the customer what information he had about him on his phone.
- 17 A manager took the decision that the Claimant should be sent home at 17:00 that day on medical suspension.
- 18 Mrs Zeka interviewed the Claimant about these incidents the next day. She took the decision that it was appropriate to refer the Claimant to occupational health ("OH"), and made a full written referral on 6 April 2015. The OH doctor referred the Claimant to his GP, but did not receive the GP's report until 21 July 2015.
- 19 In the interim the Claimant was transferred to backroom duties on a temporary (and later permanent) basis.
- 20 The GP reported that the Claimant was not psychotic and was not suffering from delusions, because although the Claimant believed himself to be correct concerning the harassment that was taking place, he was prepared to accept

that those beliefs might not be true. He thought the Claimant was not suffering a paranoid psychosis, but may be suffering a paranoid neurosis. He thought the Claimant to be in need of psychiatric assessment, but the Claimant had declined that

- 21 On 10 August 2015 the OH doctor advised the Respondent that he did not consider the Claimant be a disabled person within the Equality Act 2010 and that he should be managed using the Respondent's standard management protocol.
- 22 On 14 September 2015 Mrs Zeka wrote to the Claimant. She set out a summary of the advice she had received and went on to invite him to a capability meeting on 16 September 2015. The Claimant was advised of his right to be accompanied.
- 23 That meeting took place as planned. It was conducted by Mrs Zeka, who was accompanied by a notetaker. The Claimant chose to be unaccompanied. Mrs Zeka concluded by deciding that the Claimant should continue to work in his backroom role, which was confirmed in a letter of 25 September 2015.
- 24 On 1 November 2015 the Claimant distributed a leaflet in the Respondent's male staff changing room accusing his colleagues of making trouble for him. Mrs Zeka sought support and OH advice.

2016

- 25 On 1 April 2016 one of C's female colleagues, a manager, wrote to Mrs Zeka to complain about the Claimant's conduct toward her. In a meeting that day the Claimant had accused her of being entirely responsible for security staff following him and streaming images and CCTV of him to a website she had set up. When she rejected those allegations and questioned why she, a mother, would do such things the Claimant replied, "Because you are a nasty person, now please stop it", and later told her that if she did not she would face the consequences.
- 26 On 8 April 2016 a security guard, Mr Chandler, made a statement concerning the Claimant's accusations made to him concerning his and his colleagues following the Claimant and streaming CCTV of him to peoples' phones, which he had denied. All security staff were informed that they must tell the Claimant he must raise such issues with the Respondent's management, not the contracted security staff.
- 27 On 14 April the Claimant again approached Mr Chandler and challenged him. Mr Chandler walked away and the Claimant followed him ("because our conversation was not over") and as Mr Chandler went up the escalator shouted, "You are breaking the law" and followed him to the first floor. The latter part of this incident was seen by Mr Singh, who defused it.
- 28 Mrs Zeka interviewed the Claimant, who declined to be accompanied, later that day. He accepted that what Mr Chandler had alleged concerning his conduct was accurate.
- 29 The interview continued the following day when the Claimant was shown CCTV of the incident. He accepted that Mr Chandler had only been

- aggressive “just towards the end” and that customers had been watching when he shouted at Mr Chandler. At the conclusion of that interview the Claimant was suspended from work.
- 30 Mrs Zeka wrote to the Claimant on 29 April 2016 to confirm his suspension, to set out the findings of her investigation and to invite the Claimant to a disciplinary hearing on 5 May 2016 for breach of the dignity at work policy. The Claimant was informed that this was potential gross misconduct, for which he might be dismissed summarily, and advised of his right to be accompanied.
- 31 That hearing took place as planned. It was conducted by Mr Singh, accompanied by a notetaker, and the Claimant attended without accompaniment.
- 32 In the course of that hearing the Claimant maintained his allegations of being bullied and victimised on a daily basis by security staff streaming CCTV of him to people who were watching him: some members of staff, when they saw him, would take out their phones and look at them.
- 33 In common with Mrs Zeka in her interviews with the Claimant Mr Singh asked him whether there was any medical condition of which he was aware that ought to be taken into account. The Claimant denied knowledge of any such condition. The hearing lasted over 80 minutes, and there has been no criticism of the manner in which it was conducted.
- 34 Mr Singh wrote to the Claimant to set out his findings and conclusions on 16 June 2016. He did so, with advice from HR and information from the Claimant’s GP, at length and in great detail. He set out the matters arising from the Claimant’s belief he was being harassed that immediately preceded his suspension, the GP’s belief that the Claimant may have a paranoid neurosis and was in need of psychiatric assessment and the Claimant’s refusal to undergo such.
- 35 Mr Singh went on to review what the Claimant had said in the course of the hearing and to take into account the earlier events, the inability of the Respondent to make any adjustments and his conclusion that there was no evidence at all that security or other staff were acting as the Claimant alleged.
- 36 He concluded that the Claimant was guilty of rudeness to customers and staff, aggressive behaviour to Mr Chandler and was in breach of the Dignity and Respect at Work policy. He took the view the Claimant had no insight into his conduct so there was a real risk it would continue. He concluded that summary dismissal was appropriate, and informed the Claimant of his right of appeal.
- 37 On 22 June 2016 the Claimant set out his grounds of appeal in a letter to HR. He persisted in his allegations of harassment and victimisation and maintained that the letter of dismissal was biased and not a reflection of the truth.
- 38 Although that letter was acknowledged on 29 June 2016 it was not until 5 September, weeks after a reminder from the Claimant, that he was invited to

an appeal hearing to take place on 10 September 2016 and advised of his right to be accompanied.

- 39 That hearing was conducted by Mr Doole, who was with a notetaker, and the Claimant was again unaccompanied. The meeting lasted over two hours and the notes extend to 30 pages.
- 40 In the course of that hearing it appears the Claimant raised virtually all the matters I have set out above. He was clearly adamant that he had been harassed and victimised because CCTV of him was being streamed to staff and customers' phones. Mr Doole, who had a good knowledge of the CCTV system at his store, adjourned to check whether the system in Bromley was the same: it was. Mr Doole also went through the GP and OH information.
- 41 On 14 September 2016 the Claimant wrote to Ms Claire Smith, Head of People and Culture, Buying & Merchandising to complain about his dismissal. He made similar points to those raised in the appeal, alleging he had done nothing wrong and was being bullied and harassed. It does not appear to have been responded to.
- 42 By a letter of 30 September 2016 Mr Doole, like Mr Singh at great length and detail, wrote to the Claimant to set out his findings and conclusions on the five points he perceived the Claimant to have raised. He gave a full reasoned explanation for each of his principal findings and concluded that he should not uphold the appeal. He upheld the decision to dismiss.

Submissions

- 43 I heard brief submission on behalf of each of the parties. It is neither necessary nor proportionate to set them out.

Public Interest Disclosure

The Law

- 44 The following provision of the Employment Rights Act 1996 is central to this claim:-

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

- 45 In order to be a “protected” disclosure the onus is on the Claimant to establish on the balance of probabilities that he has made a “qualifying disclosure” as defined above.
- 46 I accept that the disclosure by a security guard of data such as CCTV or images of an employee to other employees or members of the public without lawful excuse is potentially a breach of the Data Protection Act 1996: it would fall within S.43B(1)(b).
- 47 However, I have concluded that the Claimant has failed to establish on the balance of probabilities that he reasonably believed that a security guard was acting in that way.
- 48 I accept that it might be technically feasible for a person to live stream (to Facebook or similar) digital video from a mobile phone videoing a security monitor.
- 49 However, it would be unlikely in the extreme that colleagues, and certainly customers or other members of the public, would be aware of the location of the web address to which the video was being streamed so as to be able to watch it.
- 50 Bearing in mind the Claimant’s GP’s tentative diagnosis of a paranoid neurosis I have concluded that that is a far more likely explanation for the Claimant’s beliefs.
- 51 In the above circumstances this aspect of the Claimant’s claim is not well founded and must be dismissed.

Unfair Dismissal

The Law

- 52 This is set out in the following provision of the Employment Rights Act 1996:-

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)

(3)

(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.”

53 In considering this aspect of the claim I have had regard to the following authorities:-

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

The Reason for Dismissal

54 It was the Respondent's case that the Claimant had been dismissed for:-

54.1 a reason relating to conduct; alternatively

54.2 for some other substantial reason, being a breakdown in the relationship of trust and confidence.

55 I have concluded on the basis of all the evidence before me that the Respondent has established on the balance of probabilities that the Claimant's conduct was the true reason for this dismissal. It was that which was in the mind of Mr Singh and what he set out at length in his letter of dismissal.

56 In the alternative, I accept that it would be open to me to find that it was the breakdown in trust and confidence set out in the pre-penultimate paragraph of Mr Singh's letter setting out his reasons: it was the risk perceived by Mr Singh that the Claimant's conduct would continue that makes his continued employment untenable. Put simply, the Respondent could not trust the Claimant to behave appropriately.

57 In the above circumstances the dismissal was for a potentially fair reason.

Further Findings and Conclusion

58 In making the following findings I bear in mind that this is a case where the evidence of the Claimant's conduct was not substantially in dispute.

59 I took the view that the investigation carried out by Mrs Zeka was entirely reasonable in scope and depth. She interviewed or obtained statements from each of those involved. She provided copies of those to the Claimant. She viewed the CCTV with the Claimant and asked for his comments on it. She obtained OH and medical information that may have assisted the Claimant.

60 I thought Mr Singh to have been particularly thorough in conducting the disciplinary hearing: he clearly gave the Claimant every opportunity to raise any issue he wished to. There has been no criticism of the manner in which he conducted himself during that hearing. I have no doubt that following his deliberations he held an honest belief, based on reasonable grounds, that the Claimant was guilty of the breaches of the Dignity and Respect at Work policy

- he was accused of. There was a substantial body of evidence to support that finding, not least a number of admissions by the Claimant.
- 61 I formed a similar impression of Mr Doole's conduct of the appeal. He gave the Claimant every chance to say what he wished, checked the CCTV system for himself and gave detailed reasons for his decision. They were not challenged.
- 62 I accepted the Respondent's submission that the sanction of dismissal was within the band of reasonable responses open to this employer in the circumstances of the case. The Claimant's conduct was upsetting to security staff, colleagues and customers and there was no suggestion that the Claimant was willing or able to stop it recurring.
- 63 My only concerns in this case were the substantial delays that occurred at each of the suspension to disciplinary, disciplinary to decision, appeal to hearing and hearing to decision stages. They are much longer than would appear to be reasonable or necessary, however I do not consider those delays to be sufficient of themselves to make this dismissal unfair.
- 64 In light of all my above findings this claim is not well founded and must be dismissed.

Employment Judge Kurrein

1 September 2017