Case Number 250o346/17

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Robert Cuthbertson **Siemens plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS **ON 31st JULY 2017**
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: Mr P Morgan of Counsel
For Respondent: Mr M Dulovic non practicing Barrister

JUDGMENT

The claims of unfair and wrongful dismissal are well founded. On the former I award compensation of £ 14870.07. I make no award of damages on the latter because the losses are covered in the former.

REASONS (bold print is my emphasis)

1. Introduction and Issues

The claims are unfair and wrongful dismissal. The response denies both. The issues are
1.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or, if more than one the principal reason, for dismissal?
1.2. Were they, as the respondent alleges, related to the employee's conduct?
1.3. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:
(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal ?
1.4 If it acted fairly substantively but not procedurally, what are the chances it would still fairly have dismissed the employee if a fair procedure had been followed?
1.5. If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct ?
1.6. In the wrongful dismissal claim was he in fact guilty of gross misconduct?

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(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 dismissal
(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 relates to ..... the conduct of the employee."

The Reason
2.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The reason for dismissal must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal. Although it is an error of law to over minutely dissect the reason for dismissal, it is essential to determine its constituent parts.

2.3. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether the conduct is inside or outwith the course of employment, it impacts in some way on the employer/employee relationship.

Fairness
2.4. Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

Reasonable belief and investigation
2.5. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did, it simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable (see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.)

Fair procedure
2.6. In Polkey v AE Dayton it was held a fair procedure must be followed . The requirements of natural justice which have to be complied with during proceedings of a domestic disciplinary enquiry are firstly, the person should know the nature of the accusation against him; secondly, should be given an opportunity to state his case and thirdly, the dismissing officer should act in good faith. Strouthos v London Underground held the employee should only be found guilty of disciplinary offences with which he has been charged. An employee found guilty of and sentenced for something that had not been charged will not have received fair treatment.

Fair Sanction
2.7. Ladbroke Racing v Arnott held a rule which specifically states certain breaches **will** result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of

fairness is superimposed upon the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach, including the degree of its gravity. When considering sanction, a previous good employment record is always a relevant mitigating factor. But rules are not irrelevant. Employees are entitled to place weight on matters important to them. In Meyer Dunmore International v Rodgers, Phillips P put it thus:
"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that it ***is plainly adopted,*** *that it is* ***plainly and clearly set out****, and that great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed. "*

2.8. Even an admission of some misconduct will not automatically make dismissal fair as explained in Whitbread Plc v Hall [2001] IRLR 275:
Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant's immediate superior who … had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."

2.9 . It may be unfair to dismiss an employee for doing what others do without being dismissed see Post Office-v-Fennell and Hadjioannou-v-Coral Casinos . The latter case contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument one employee received a greater sanction than others is relevant where
(a) there is evidence employees have been led to believe certain conduct will be overlooked or dealt with by a sanction less than dismissal
(b) where other evidence shows the purported reason for dismissal is not the genuine principal reason
(c) where, in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.

2.10 British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process, so if he persistently lies, that can be a factor in deciding to dismiss him. Retarded Childrens Aid Society v Day held if an employee does not appear to recognise what he did was wrong and is "*determined to go his own way*" , it would be reasonable for the employer to conclude warning would be futile and may fairly dismiss even for a first offence. . Conversely, if the employee admits fault, apologises and promises never to do the same again, no reasonable employer would dismiss on the basis of the apology being insincere or that the promise may not be delivered upon without some factual basis for so concluding.

Appeals

2.11 Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

Band of Reasonableness

2.12. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt,) held I must not substitute my own view for that of the employer unless its view falls **outside the band of reasonable responses**. However the limits of the band are not whatever the dismissing officer thinks they are . It is for the tribunal to fix them. In UCATT v Brain, Sir John Donaldson put it perfectly thus:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. ."

Wrongful Dismissal

2.13. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. Dishonesty towards the employer is the paradigm example of gross misconduct. Another is wilful failure to obey lawful and reasonable instructions. A main differences between unfair and wrongful dismissal is that in the latter I may substitute my view for the employer's. Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful and damages are the net pay for the notice period less any sums earned in mitigation of loss.. The statutory minimum periods of notice are set out in Section 86 the Act and in this case would be 12 weeks. Clarification of this area of law is to be found in the judgment of Elias LJ in a case heard on 13th December 2016 of Adesokan –v- Sainsbury's Supermarkets Ltd

Remedy

2.14. Under the Act I must explain to the claimant the power to order the respondent to re-instate him in his old job or re-engage her in a similar one. These powers are explained in s 113 to 117. The claimant did not request either .

2.15. There are two elements to compensation: the basic award, an arithmetic calculation set out in s 122 , and the compensatory award explained in s 123 which as far as relevant says:

(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal **shall apply** the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales .

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .

2.16. What is commonly called a Polkey reduction is made where a dismissal is substantively fair, but procedurally not, and if fair procedures had been used, a fair dismissal would or may have occurred anyway. If updated to take account of legislative change, paragraph 54 of the EAT judgment in Software 2000 Limited v Andrews 2007 ICR 825, is an good summary of the applicable principles.

2.17. Section 123(6) as explained in Nelson-v-BBC empowers me to reduce a compensatory award if the conduct of the claimant caused or contributed to the dismissal. Section 122(2) empowers me to reduce the basic award on account of the conduct of the claimant before the dismissal even if it did not cause or contribute to it if I think it just and equitable to do so.

3. Findings of Fact

3.1. I heard the evidence of the claimant and for the respondent the Dismissing Officer, Mr Geoffrey Barnes and the Appeal Officer, Mr Carl Hopper. I had an agreed document bundle and page numbers hereafter refer to that bundle.

3.2. The claimant, born on 13th August 1954, started work for the respondent on 16th February 1976. He was dismissed without notice on 14th November 2016. His job was a trainer of apprentices. Two incidents are the central point of this case. The first happened in the Apprentice Training Centre on 25th October 2016 , the second in the Instructor's Office a little while later on the same day in the presence of one female by the name of Emily, a 26 year old woman who had just been on a trip to Amsterdam and came back and openly discussed sexual matters she had seen whilst there.

3.3. I accept the claimant's evidence in this workplace, a heavy engineering factory, there is a good deal of strong language with sexual connotations and photographs of nude women are displayed in some work bays. A "new girl" employed in a department under the management of Mr Ambler , the person who lodged the complaint against the claimant, had also been engaging in explicit discussion about her husband asking her to shave her private parts. No disciplinary action against her was even contemplated.

3.4. In October 2016, a parcel arrived at reception not addressed to anyone. It was opened and found to be a sex toy meant for one of the Occupational Health Advisors. This caused a good deal of discussion and humour in the workplace. The incidents the claimant was involved in arose during the course of this type of conversation. He loosened his belt, lowered his trousers , it does not matter whether to knee height or above. He exposed his underpants not

his person. He repeated this a short time later in a different room and called to Emily when doing so . On both occasions the pleaded case of the respondent is he "*simulated a sexual act*" . I accept the more graphic description by Emily that he "humped the table".

3.5. This is the conduct in respect of which he was dismissed. In the respondent's disciplinary rules page 38 is the significant page. On the left hand side it gives under the heading of examples of gross misconduct: -

*"Serious actions or behaviour in or outside work that are **likely to** bring the Company's name into disrepute*."

On the right hand side it says gross misconduct: -

"…***can** lead to dismissal either with or without notice*."

Examples of gross misconduct include:
*"Using bad **language** at work."*

3.6. At an investigatory meeting with a Mr Cobb, on 2nd November 2016, Mr Cobb said if he were the claimant's manager all he would do was tell him: - *"Not to be a daft bugger"* The claimant was called to a disciplinary meeting by letter, sent by recorded delivery. The respondent very properly conceded the claimant was away when that letter arrived and it had to be collected by his wife from the Post Office on 14th November which was the actual day of the meeting. He therefore did not have a letter telling him gross misconduct could lead to dismissal, but he may have been able to work that out for himself if he had read the policy.

3.7. The claimant has been a Justice of the Peace for some 17 years and is a "safeguarder" at work so is very conscious of the risk to young apprentices of improper behaviour in the workplace. I accept his evidence he knew where all of the apprentices were and none would have seen him doing what he did. He would not have done it had he thought otherwise. I accept, as Mr Dulovic submits, it is physically possible apprentices could have come in to that area of the training room without him realising it, but none did.

3.8. At the investigation, the disciplinary hearing and the appeal, the claimant apologised and said he would not do it again. There was very little, if any, investigation into who, if anyone, was offended . Mr Barnes and Mr Hopper were concerned with the potential for people, especially apprentices, to be offended not whether anyone actually was.

3.9. Mr Barnes, when I asked him how he would compare what the claimant did with an obvious example of gross misconduct, such as the sustained subjection of a young apprentice to racial abuse and physical violence, said he would put this **on a par with it** because it happened in an environment where vulnerable youths **may be** about. He drew a distinction between using explicit language to describe a sexual act and somebody miming a sexual act. He said only the latter " crossed the line" of what is acceptable, despite the policy expressly saying bad **language** is gross misconduct but making no mention of actions or gestures . No reasonable employer could hold either view.

3.10. When one looks at page 78, Mr Barnes' dismissal letter, and hearing his evidence today, I am convinced his view was that once the act was admitted and, as the claimant accepted, it was serious behaviour, that it was " *likely to*" bring Siemens into disrepute, was **presumed**. No reasonable employer would equate " *likely to* " with "*possibly could if anyone got to know of it* ", The next step from there which Mr Barnes took was to assume it was necessarily **gross** misconduct . The final, and wholly impermissible step if Arnott has any meaning, was to assume dismissal without notice was a forgone conclusion. Although he said in his evidence he considered lesser sanctions, I am not convinced he gave them any serious consideration.

3.11. The claimant's only previous recorded warning of any description is entitled "Informal Conversation Record" at page 25. Although it was said by both the respondent's witnesses they did not take it into account, there was certainly mention of it at the appeal. It contains some reference to the claimant having used strong language but is nowhere near a warning, let alone a final written warning. Mr Barnes dismissed the claimant without notice.

3.12. Mr Hopper let slip a key factor in his thinking at the appeal. Mr David Ambler first reported the incident The version of his report at page 49 , dated 31st October, contains some inaccuracies but at its highest is a suggestion the claimant took a conversation, which started about the sex toy , too far making Mr Ambler feel " very uncomfortable". This may well be a later signed version of an earlier report . An e-mail chain, pages 44-45 shows a report sent to a Mr Armstrong was forwarded by him (with his comments made before the claimant's version had been sought or any investigation had occurred about "*serious nature*" " *severity*" and " *the person involved and his responsibility for apprentices*) to a Mr Perrymen **and copied to the Managing Director, Mr Hartley** Mr Hopper asked rhetorically if Siemens were not seen to do something about this, would that not send out the wrong impression to parents of young apprentices and the public. I have no problem accepting that view. It has not been suggested by the claimant, and certainly is not suggested by me, **nothing** should have been done. However, like Mr Barnes, Mr Hopper seemed to take the line that once the act was admitted, it amounted to gross misconduct which meant summary dismissal was automatic. Indeed, when I asked him if that was his position, at first he said it was.

3.13. The procedural breach of the letter calling the claimant to the first meeting not arriving in good time was cured by the appeal .The claimant there had the opportunity to say everything he wanted and realised his job was at stake because he had already been dismissed. Substantively, the appeal cured nothing.

3.14. The most significant series of documents , starting at page 90, are examples of people being asked at the appeal stage whether they thought this behaviour by the claimant was in character. All the people asked seemed, when I read the documents, to say sexual language and behaviour was common in the workplace **and not out of character for the claimant**. When I asked the claimant to comment, he freely admitted he does have a reputation as a joker. He admitted engaging in ribald conversation for many years with colleagues, including managers, who did likewise without disciplinary action being contemplated. Mr Dulovic put to the claimant he had "crossed a line" between behaviour which is tolerated and common in this workplace., such as sexual strong language , and his behaviour which **would be clearly unacceptable** . I find **no such line was ever made clear to any employee** and, more

importantly, based on Mr Barnes distinction between mime and language, it is hard to say where the line would be drawn. If it ever had been made clear to the claimant, he would not have dreamed of crossing it, and would never do so again.

3.16 Mr Dulovic submitted the claimant's answers suggested he had acted **deliberately**, an important component of gross misconduct, in that he had thought whether there were any apprentices in the area and then, having thought about it, consciously decided to do what he did. I do not agree. The claimant's evidence is clear and I accept it. He acted impetuously at first and when others appeared amused repeated it in the total privacy of the Instructor's office Had he thought apprentices may have been present, he would not have done it the first time. The best description of what the claimant did is contained in the statement of a Mr Keenan who witnessed it and said at the appeal, page 90, it was "…*perhaps a moment of madness*."

4 Conclusions

4.1. The investigation in this case was not ideal but I would have held it to be within the band of reasonableness despite the failure to ask anybody if they were offended by what happened or ask how this compared with what was commonly tolerated in the workplace . The main point is the proportionality of the sanction.

4.2. I wholly agree that, where vulnerable youths may be present, explicit sexual language and behaviour should not be . If I accept apprentices in their late teens or early 20's can properly be described as vulnerable , I agree some step was necessary. My reason for citing Strouthos is that the claimant was led to believe he was charged with an act of immature bawdiness , to which he admitted at the first opportunity. He describes his own behaviour as silly and childish . He never dreamed it would result in dismissal . At the disciplinary hearing it was "escalated" to either , as he put it at the appeal , being a "pervert", or at least a person who would knowingly expose apprentices to inappropriate behaviour likely to corrupt their morals . There was no evidential basis for that escalation. The sanction would have been more understandable if there had been.

4.3. My reason for citing Meyer Dunmore and Paul at paragraphs 2.7 and 2.9. above is that employees behaviour which no reasonable person could distinguish as being less serious than this behaviour has been tolerated from the claimant and other for years and suddenly , because the Managing Director got to know of it, was visited by the ultimate sanction of summary dismissal. The culture in the workplace had the effect explained in Paul,

4.4. The guidance in Arnott, specifically in regard to the mitigating factor of untarnished long service, was ignored. So was the claimant's admission of the act at the first opportunity , sincere apology, and genuine contrition. Both Mr Barnes and Mr Hopper, **comparatively** junior managers, applied this wholly disproportionate sanction in the belief the Managing Director would want , metaphorically, a "head to roll" , though there is no evidence he did.

4.5. It is not for me to say what effect the conduct of the claimant should have on his status as a magistrate . However, If any magistrate passed sentence on a first time offender, who admitted guilt at the first opportunity , made a sincere apology, and showed genuine contrition,

an immediate custodial sentence at the top end of the permitted range , I would question such a person's suitability . That is analogous to what the respondent did here.

4.6. I find the decision to dismiss is one which no reasonable employer could have taken and was well outside the band of reasonable responses. It is rare for me to decide a case on that basis, but this is one of those rare cases. It follows I find the conduct in which the claimant engaged comes nowhere close to satisfying the definition of gross misconduct. The dismissal is therefore both wrongful and unfair.

4.7 The claimant's culpable and blameworthy conduct contributed to the dismissal, and I will also reduce the basic award on account of his conduct before the dismissal as it is just and equitable to do so. The guidance is that if the dismissal is caused partly by the claimant, the discount should be 25%, equally 50%, mainly 75%, and entirely100%. . In my view, this case, merits a reduction of only 25%.

4.8. Having announced the decision on liability and percentage deductions , I noted from the schedule of loss the claimant had claimed nothing from the end of his notice period. His losses during that period are not subject to the duty to mitigate – see Norton Tool Company v Tewson, affirmed in Burlo v Langley. Thereafter, the claimant freely accepts he made no effort to find work but advanced his retirement from the date on which he planned to , his 63rd birthday on 13 August 2017. Combined with the fact there is no claim in the schedule of loss, I do not believe it would be just and equitable to make any further compensatory award, including for loss of statutory rights. The arithmetic calculations were agreed by the parties.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 10th AUGUST 2017

JUDGMENT SENT TO THE PARTIES ON 15 August 2017

G Palmer

FOR THE TRIBUNAL