



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Y Baouche

and

Respondent

Plane Catering Limited
(In Creditors Voluntary
Liquidation)

Hearing held at Reading on:

12 December 2017

Appearances:

For the Claimant:

In person

For the Respondent:

Did not attend and not represented

Employment Judge:

Mr SG Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath from the Claimant and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Unfair Dismissal – Section 98 Employment Rights Act 1996

2. The Claimant was dismissed by reason of misconduct on 31 August 2016 and that was the effective date of termination. The dismissal was not unfair. This complaint fails.

Wrongful Dismissal - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

3. The Claimant was guilty of gross misconduct such as to justify summary dismissal. The dismissal was not wrongful. This complaint fails.

Reasons

4. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

- 1 Claimant On 21 December 2016 the Claimant presented complaints of unfair dismissal and wrongful dismissal to the Employment Tribunal.
- 2 Respondent The Respondent presented a response on 17 February 2017. Both claims were resisted. The Respondent claimed that the Claimant had been fairly dismissed on 31 August 2016 by reason of gross misconduct.

HEARING ON 26 JULY 2017

- 3 This case came before me previously on 26 July 2017 as a remedy hearing. A rule 21 Default Judgment had been made in favour of the Claimant in error because the ET3 response form had been overlooked.
- 4 The Respondent went into Creditors Voluntary Liquidation on 2 June 17. The Joint Liquidators confirmed that they had no objection to the Tribunal proceedings continuing but they would not be represented at the Tribunal hearing.
- 5 The remedy hearing was postponed pending service of the ET3 on the Claimant and the Joint Liquidators. The rule 21 judgment was reconsidered and revoked. The case was then re-listed for a full merits hearing to determine both liability and remedy if appropriate

EVIDENCE

- 6 The Tribunal heard evidence on oath from the Claimant Mr Yacine Baouche (Production Manager) and read documents produced by him.
- 7 The Tribunal also read the ET3 response form presented by the Respondent and read documents attached to that form.
- 8 From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

- 9 At the time of the Claimant's dismissal on 31 August 2016 the Respondent had three units in the UK – Ashford, Heston and Hounslow. The Claimant was employed as the Duty Manager at Ashford but in early 2016 he was promoted to Production Manager at Heston.
- 10 On 18 August 2016 the Respondent received a complaint from a female employee at Heston alleging sexual harassment by the Claimant. She alleged

that the Claimant touched her, stared at her, hit her on the backside, pulled her towards him and tried to kiss her and made indecent suggestions to her.

- 11 Following the complaint the Claimant was suspended on full pay on 19 August 2016 and an investigation took place. Over a period of days, further complaints were received and statements were taken from five more female employees and witnesses.
- 12 The Claimant attended an investigation meeting conducted by Mr David King on 26 August 2016 and the allegations were put to him as follows:

“Allegation 1:

‘On one occasion Yacine approached me whilst I was alone, he asked me whether I wanted to have sex with him. I replied no and then he kept trying to persuade me by saying have a think about it. Yacine also gave me a proposition of going on holiday with him and that he would rent a flat for me and him.’

Allegation 1A:

‘On numerous occasions he would grope me as I walked past. I am scared by Yacine and he has said that if I did have sex with him, he would give me the easier jobs at Ashford, however if I told anyone he would get rid of me and I would lose my job.’

Allegation 2:

‘On Saturday 13 August I was packing equipment and he came up behind me and hit me on my backside. I told him to stop but he just laughed.’

Allegation 2A:

‘On Sunday 14 August he touched me again on my backside and again I told him not to. He tried pulling me towards him and he tried to kiss me. I told him to stop and he then said “how’s your pussy – I want to see and touch it”.’

Allegation 3:

‘Yacine came next to her and I was opposite them. I saw Yacine touch her bottom. She then told him to stop, she looked upset and I was worried for her. Yacine laughed at her and walked away.’

Allegation 3A:

I went up to her and asked her why is he touching you? She replied I don’t know and it will be stopped. I feel intimidated by Yacine as he has approached me on another separate occasion.’

Allegation 3B:

'I cannot remember that date but one of the drivers witnessed Yacine approaching me. I was working on the equipment area and Yacine approached me and showed me some pictures of some models on his phone. I told him I wasn't interested and he walked away.'

Allegation 4:

'Outside the Ashford unit a couple of weeks ago while I was on an early shift, Yacine did make a comment that I was not really comfortable with. I'd never really met him myself before but the first thing he said to me when he walked up to me was 'are you the one with the fake tits'. After that he was just staring at me which made me feel so awkward and because of that I just left and went straight back to Heston.'

Allegation 5:

'I want to let you know that back in 2013 before I was a permanent employee of Plane Catering while I was working with the agency under deluxe I had been approached several times by Yacine. I used to work in Ashford and he was one of the managers over there. I was working late one evening when he asked me to come into the office to speak with him. At first I thought I was in trouble or had done something wrong. I went with him to the office when he asked me if I wanted to have a cup of tea or coffee so I again thought he was being over friendly, however he started to rub my leg inappropriately. I asked him to stop what he was doing and he said why you want me to stop? I stated that I had a boyfriend and that I didn't want any trouble while I was on the agency.'

Allegation 5A

'I had a few further incidents with him inappropriately touching me, he then got hold of my mobile number and would text me on a daily basis. I wouldn't reply to his text messages, my partner found out and said it was harassing behaviour and that I should take it to HR or the police to follow up. I told Yacine I was going to make a complaint as I was feeling very uncomfortable with he told me that I wouldn't be transferred off the agency if I said something to the company or to the police he begged me to stay quiet.'

- 13 The Claimant denied the allegations. He was told that there was a need to do some further investigations and he remained suspended from work.
- 14 On 26 August 2016 the Claimant was invited to a disciplinary meeting. A copy of the minutes of the investigation meeting, together with a copy of the Respondent's disciplinary procedure, was sent to him in advance of the meeting.
- 15 The disciplinary meeting took place on 31 August 2016 chaired by Ms Lynne Waite (Chief Operations Officer). The Claimant was accompanied by Mr Said Zenad. The Claimant was told that the reason for the meeting was that

allegations had been made of harassment and bullying and he was told that this may be gross misconduct which can result in summary dismissal. He was asked if he had any further statements or comments to add to his responses at the investigation meeting on 26 August 2016. The Claimant's comments included the following:

"YB: I would like to add that when Charlotte put no recollection on some of the answers to the questions that David asked me I actually just said no I didn't say no I don't recall. I would like the notes changed.

LW: Sure no problem we can amend the notes.

YB: I don't agree with the disciplinary, the person who has accused me of these accusation has had problems with many other male members of staff she has had incidents with Sanjay he went round her house and her partner chased him up the road. Peter McDermott from stores he has problems with her and the police turned up at the Ashford unit, she has had problems with Jason the driver too who got fired for another incident with a driver. I wouldn't ever want to associate myself with somebody like that I would stay away.

I have said my prayers day in and day out over these last few weeks. I have been so stressed with everything that has happened. I have had a clean record for 21 years while I have worked within the industry and while I worked at JAL before working here. I have never been involved in anything like this in twenty years of being in the business.

I have only just started this job which I have waited for, for two and a half years all I did was show colleagues photos of my girls modelling because I am proud of them. I have hugged fellow colleagues such as Charlotte and Monica. I don't care if people don't like me.

YB: I sat with Chloe as Monica is always talking about her, saying how lovely she looks and what a nice girl she is and that she mentioned that she had had her chest done. I didn't say anything explicit I just told her her chest looked nice and spoke with her about Shepperton as I used to live there and we spoke about nightclubs as she lives there. I didn't say anything explicit.

YB: I believe if there is anything else Charlotte has written everything down within the notes from Friday...

I have my records on file for the last twenty years and never has anything like this ever happened to me before."

- 16 At the end of the meeting Ms Waite informed the Claimant that she could only go on the evidence which had been provided to her and that he was summarily dismissed for unlawful harassment under section 8.0 of the company handbook which is gross misconduct. The decision was confirmed in a letter dated 31 August 2016.

- 17 On 2 September 2016 the Claimant appealed against the dismissal decision and an appeal hearing was held on 15 September 2016 chaired by Stuart Guinea (Chief Executive Officer). The Claimant declined to be accompanied:

“The grounds of my appeal are:

There was insufficient consideration of my explanation of the circumstances leading up to the dismissal.

That dismissal was too harsh a penalty given the circumstances.

That dismissal was inadequate due to the absence of evidence to establish facts.

My previous disciplinary record is clear and should have been considered.

I have had long service with the company which I feel should have been considered before imposing that dismissal.

The most important point is that this dismissal was unfair because as I have previously stated during my hearing, I have done nothing wrong and all of these allegations are just and only false, fabricated against me.”

- 18 At the hearing the Claimant said that two of the women approached him to have sex and he refused and that was why they were now complaining about him. The Claimant said: *“I haven’t approached anyone – it’s a conspiracy, I haven’t done anything wrong.”* He handed over four character references.

- 19 At the end of the meeting, the Claimant was informed that the decision to dismiss was upheld and that was confirmed in a letter dated 16 September 2016:

“As confirmed to you verbally as the outcome of that meeting, there is no evidence or other justification to warrant the decision being reversed and I therefore confirm the decision to dismiss you for Gross Misconduct is upheld.”

RELEVANT LAW

Employment Rights Act 1996

- 20 Section 94. *The right.*

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

- 21 Section 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- ...

(b) relates to the conduct of the employee, ...

(3) 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.

- 22 For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
- 23 Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
- 24 Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.
- 25 Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.
- 26 In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to

decide whether the employer acted reasonably and whether or not the process was fair.

DECISION

Unfair Dismissal

- 27 The Tribunal found that the reason for dismissal was misconduct.
- 28 In his witness statement the Claimant suggested that it was common practice for the Respondent to sack or make redundant employees when it was short of money. The Claimant said that his position had been removed from the company structure while he was suspended as part of a restructuring.
- 29 This was denied by the Respondent and there was no reliable evidence to support the suggestion that the reason for dismissal was anything other than misconduct.
- 30 In his witness statement the Claimant said:

“27. I genuinely believe that the allegations were invented in order to sack me. I therefore decided to seek independent legal advice on the manner in which I had been treated. Hallens Solicitors accordingly wrote to the Respondent on my behalf. It explained that there had been no cause for concern in respect of my performance or attitude until I transferred to the Heston Unit. Then I was suspended within days of my appointment. There had been no concerns regarding my work performance or attitude prior to my dismissal. It was clear the three female colleagues had conspired and fabricated their statements. No thorough investigation had taken place and into my defence. I had produced witness statements confirming there had been collusion and conspiracy between the complainants but still the Respondent chose not to investigate and upheld my dismissal on appeal.

29. The Respondent replied by way of letter dated 17 October 2016. It alleged that it had received five complaints against me which were backed up by two further witness statements. At no point had these been produced. I had only ever received three statements from the three complainants. The Respondent had only disclosed and relied on three. It further claimed that prior to my disciplinary hearing I had accepted and acknowledged my guilt and that I had commented that I did not understand what I had done wrong. This is sheer fabrication. I said nothing of the sort. The Respondent is lying to justify my dismissal. The Respondent further confirmed that it was not prepared to accept the statements provided by my two witnesses because it believed I had made them up. Words failed me.”

- 31 Although the Claimant said that he only received three witness statements, in fact all the allegations were individually put to him (Allegations 1, 1A, 2, 2A, 3, 3A, 3B, 4, 5, and 5A) at the investigation meeting on 26 August 2016. A copy of the meeting minutes which included those allegations, was sent to the Claimant in advance of the disciplinary hearing on 31 August 2016.

- 32 Although not all the statements made by the complainants had been handed to the Claimant, he was made fully aware of the allegations and the statements were anonymised at the request of the complainants. It was a reasonable course of action for the Respondent to take in circumstances where complaints of sexual harassment had been made.
- 33 The statements provided by the Claimant from Mr Said Zenad and Mr Abib Amini, were considered by the Respondent. The statements included the following:

Said Zenad

"To whom it may concern

This email was sent by me to Mr Baouche to give it as a reference.

As I set down in the staff canteen in my lunch break with the store worker przemyslaw he told me that Kinga contacted Izabella one of our previous staff and told her if she want to make a complain about Yacin. And that Izabella say no as she didn't have any problem with him.

Please if you have any questions about this don't hesitate to contact me anytime.

Kind regards

Said Zenad."

Abib Amini

"My name is Abib Amini. I have known Kinga for nearly 1 and a half years now. I first met her in ashford unit where I first started working for plane catering, she was always very friendly but at the same time she was very flirty not only with me but with everyone. I gave my number to her as I thought we was friends but it seemed she wanted to be more than just friends so she kept texting me everyday until she started sending me her pictures and asking me for pictures all this time I'm taking everything as a joke as I did not find her attractive or had any feeling for her so I kept refusing to send her pictures till it came to a day when I was with my cousin and she messaged me. I took this opportunity to take a photo with my cousin and send it to her saying "that's my boyfriend". In order to push her away I lied to her that I was gay and had a boyfriend and was not interested in her. After that she kept asking if I was really gay and I kept saying yes and avoiding her till she moved on and found Peter, and started flirting with Peter. In my opinion Kinga is a very flirty person that's can't really be trusted around men.

After all the issues happening with mrYassin, not to sure about the days but it was like a few days after Yassin was dismissed, I saw Kinga speaking to Nichole and asking her to make a statement. I didn't not take much notice of the situation as at the time I did not know Yassin was dismissed.

This was all I had to say hope it's been useful."

- 34 The Claimant said that in those statements there was evidence that the complainants had colluded and conspired with each other. However, the Respondent took the view that both statements were on blank paper, unsigned and undated and written in the same font and with the same grammar, and that neither statement provided any tangible evidence of fact that would allow for the decision to be overruled. The additional statements provided by the Claimant were character references regarding the Claimant's ability to do his job. The Respondent also took account of the fact that the 4 female complainants were unrelated and working within different departments to the original complaint made on 18 August 2016. Accordingly, there were 4 complainants and a further 3 statements in support of the complaints.
- 35 There was no reliable evidence put before the Respondent or the Tribunal of the existence of a conspiracy against the Claimant.
- 36 The Tribunal found that the dismissal was substantively fair.
- 37 Insofar as procedural fairness was concerned, the Respondent complied with its own policies and also complied with the ACAS Code of Practice. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.
- 38 The Tribunal found that the Burchell tests were satisfied on the charges found proved by the Respondent. There was a reasonable investigation and the Claimant was informed of all the evidence against him before the disciplinary hearing. He was given the opportunity at the hearing to give his own account and he was allowed to be accompanied by his trade union representative. The investigation both before and at the disciplinary hearing provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Claimant's misconduct. The outcome of the hearing was confirmed in a reasoned and detailed decision letter. The Claimant was allowed an appeal and an appeal hearing was held. A written outcome of the appeal was given.
- 39 It was apparent from the dismissal and appeal outcome letters that account was taken of the Claimant's previous work record and consideration was given to the appropriate sanction. The disciplinary process was well documented and transparently conducted.
- 40 There was no procedural unfairness.
- 41 The Respondent had statements from 4 female complainants and 3 statements in support of the complaints. It was entitled to accept the complaints at face value and to regard them as separate, unrelated allegations of sexual harassment which was not contradicted by anything produced by the Claimant in support of his conspiracy theory. The Respondent acted reasonably in doing so.

- 42 The Tribunal found, on the basis of the detailed documentation produced by the Respondent, that both the investigation and the dismissal were within the range of reasonable responses.
- 43 The dismissal was not unfair.

Wrongful dismissal

- 44 The test for wrongful dismissal is different to the test for unfair dismissal. In wrongful dismissal the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the Tribunal considers the employee to have been guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.
- 45 The Tribunal looked objectively at the evidence placed before it and found evidence of gross misconduct such as to justify summary dismissal based upon the same evidence relied upon by the Respondent referred to above. There was cogent written evidence that the Claimant had, by sexual harassment of female colleagues, conducted himself in such a way as to commit a fundamental breach of his contract of employment.
- 46 The dismissal was not wrongful.

Employment Judge Vowles

Date:11/1/ 2018

Sent to the parties on

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For the Tribunal office

