



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Powell

v

Asda Stores Limited

Heard at: Birmingham

On: 5,6 March 2018

Before: Employment Judge Broughton

Appearances:

For Claimant: in person

Respondent: Mr Rozycki, counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Facts

1. The correct name of the Respondent is as stated above.
2. The Claimant was employed by the Respondent as a check-out operator for around five years.
3. The Respondent had a clear diversity policy. The Claimant was inducted on that and, indeed, received refresher training in relation to the same. That policy spelt out the definition of harassment and the Respondent's disciplinary policy made clear that serious harassment would amount to gross misconduct which could result in summary dismissal.
4. The Claimant seemingly had a clear disciplinary record.
5. Towards the end of 2016, the claimant began to message a young female section leader from the store via Facebook. I shall refer to her as KT.

6. The initial messages appeared friendly and reciprocated. However, early in January 2017, the Claimant's messages became more personal and intrusive and KT stopped responding.

7. In one message the Claimant said,

“Tell me to stop, if you don't want me to message you”

and KT responded

“Yes, you've crossed a line, if you want to speak about work, do so when I'm next on shift”.

Nonetheless, the Claimant continued to message her, including personal comments and asking to use her picture as his screen-saver. As a result, KT raised concerns with the Respondent. She asked for these to be dealt with informally.

8. Earlier in January 2017, the Claimant had been subject to a customer complaint for allegedly referring to the customer as a “dumb blonde”. The Claimant denied this allegation and considered it to have been fabricated, although he could not explain why the customer would do such a thing.

9. The Claimant received counselling as a result of that allegation and, on 18 January 2017, Jane Adams, one of the Respondent's managers spoke to the Claimant about both the customer complaint and that of KT.

10. The Claimant disputed the notes of that meeting. He did, however, acknowledge that

a. he was spoken to about messaging KT,

b. she had complained that he had continued to message her when asked to stop and

c. he had been told the messages were

i. inappropriate and

ii. had upset KT and

iii. had made her uncomfortable and

iv. they included him asking her to use her photo

He also acknowledged that he had been told that any further inappropriate conduct would be treated as a disciplinary matter.

11. Things seemed to improve for a while and there were no further messages, although the Claimant was apparently blocked by KT shortly thereafter.

12. In April 2017 the Claimant put in a holiday request to KT and attached a post-it note saying “Missing you xxx”.

13. A week later, he anonymously left KT a bottle of wine.
14. On 4 May 2017 the Claimant approached KT in the checkout area and showed her that he had downloaded a photo of her onto his phone, possibly as his screen-saver. She was apparently distressed by this and told him to immediately delete it but, instead of doing so, he laughed and walked off.
15. He subsequently claimed that he had deleted it later. That said, he somehow produced two pictures of her in disclosure for the purposes of these proceedings.
16. KT was apparently so distressed that she not only raised a formal grievance with the Respondent, but also made a report to the police.
17. The Respondent commenced an investigation and, having spoken to the Claimant to get his initial responses, the investigator felt that the Claimant was unrepentant. Following further investigation and a risk assessment the Claimant was suspended. That was apparently due to the seriousness of the allegations and, indeed, the perceived risk of allowing the claimant to continue at work until the disciplinary matters were resolved.
18. The Claimant was called to a disciplinary meeting by letter dated 23 May 2017. He was informed that the allegations were of harassment which meant they were potentially gross misconduct.
19. He was provided with all of the relevant documents from the investigation, albeit apparently not the note of the informal warning from January. He was told of his right to representation.
20. The disciplinary hearing took place on the 25 May 2017 before Kim Moran, one of the Respondent's managers.
21. The Claimant admitted the three allegations that were pursued, but denied any ill intent. The Respondent nevertheless concluded that the Claimant was guilty of harassment and decided to dismiss summarily for gross misconduct.
22. He was given the right of appeal and exercised that right on 31 May 2017 raising thirteen specific grounds.
23. The initial hearing was postponed, it seems twice, and, on one of those occasions, it appears the Claimant was not appropriately informed. Ultimately, the appeal was reconvened before Mrs Drummond in July. She considered all of the Claimant's grounds but upheld the original decision.
24. That is a brief outline of the key facts in this case.

Law and issues

25. The law which I must apply comes from Section 98 of the Employment Rights Act 1996 and specifically subsections 2 and 4.
26. I have to consider whether the Respondent had a potentially fair reason for the dismissal and, in this case, they relied on conduct.
27. If they did have such a reason, then I have to go on to consider whether, in all the circumstances, the decision was fair. Included in that I must consider their size and resources.
28. How I go about that process has been clarified in case law and specifically the case of Burchell –v- BHS Stores (which I explained to the parties at the outset of the hearing) such that the issues before me were
 - a. whether or not the Respondent had a genuine belief in the Claimant’s misconduct and if so,
 - b. whether that belief was a reasonable one following a reasonable investigation. By that I mean an investigation which fell within the band of reasonable responses and not necessarily a perfect one
 - c. whether they followed a fair procedure and, finally,
 - d. whether or not dismissal as a sanction was a reasonable response, being one which fell within the band of reasonable responses that may have been available to reasonable employers in the circumstances of this case.

Decision

29. Turning then to my decision, the Claimant effectively raised challenges under each of the four headings which I was to consider.
30. The first was effectively a challenge to the genuineness of the Respondent’s belief. It was his case effectively that the Respondent had been on some kind of witch-hunt determined to remove him from the business following the customer complaint received in January 2017.
31. Such an allegation was unsustainable. There was no obvious reason for an independent customer to fabricate a complaint. That, of itself, may have been enough for the Respondent to prefer the customer’s evidence over that of the Claimant and proceed down a disciplinary route. They did not do so, at least not formally, instead dealing with the matter as a relatively minor one by way of counselling.
32. The Claimant did not raise any grievance about that at the time.

33. It was clear on the evidence that the Claimant had continued to message KT after being asked to stop. Some of those messages appeared to be personal and/or inappropriate or at least reasonably perceived as such, even if there was no ill-intent.
34. KT complained and, again, notwithstanding the fact that she raised that matter informally, it would have been open to the Respondent (under their procedures and as generally recognised when dealing with allegations of harassment) to have gone down a formal disciplinary route at that stage, but they did not.
35. When the Claimant started to again make approaches towards KT, there was no further report by her until the photo issue and, whilst the Claimant sought to suggest that that illustrated that she was not unduly adversely affected, it also would suggest that she was not “out to get him”.
36. Moreover, the Claimant admitted the principal three allegations for which he was dismissed.
37. In addition, the Respondent did not in fact uphold some of the other allegations, such as an allegation that the Claimant had attended the store on his day off and bought a drink which apparently had the name “pussy-juice”. It was alleged that he had made an inappropriate comment to the Claimant about the same. That allegation was not pursued by the Respondent despite the fact that
 - a. it had been raised by KT and
 - b. there was a further witness confirming it and
 - c. the Claimant at the initial stage of the disciplinary proceedings did not deny it, merely saying he didn’t recall it
38. The fact that this was not pursued and all the reasons I have previously given do not support the Claimant’s conspiracy theory. Accordingly, I accept the Respondent’s otherwise unchallenged evidence that they had a genuine belief in the Claimant’s misconduct.
39. It seems to me that in relation to the three allegations upheld that the Respondent’s belief must also have been a reasonable one given that the Claimant admitted them.
40. Whilst the Claimant certainly did raise issues with regard to the investigation, it seems to me that these would not have affected the Respondent’s conclusions, given the Claimant’s admission.
41. That said, the claimant alleged that KT had initially accepted him as a friend on Facebook but had suggested otherwise. It seems to me that this was not relevant to the issues at hand, nor was it considered to be by the dismissing officer because the issue was taken from the point at which KT

had asked the Claimant to stop messaging her. It was the fact that he had not desisted which then led to the informal warning which he received in January 2017. That was not in dispute.

42. Another point raised by the Claimant was that one of the witnesses to the subsequent phone incident could not, on his case, have seen whatever he was showing to KT in the checkout area. The CCTV evidence on that was inconclusive but, again, given the Claimant's admission that he did show KT the phone and it was showing a photo of her makes this point academic. I note that the claimant acknowledged during the disciplinary procedure that KT had asked him to delete the photo and he had walked off laughing. It matters not, therefore, whether there was an independent witness.
43. The claimant also raised an issue with regard to having requested rota records during the appeal process. This was to prove that he had worked regularly with KT, but that was not a fact that was in material dispute.
44. I note that in the context of the fairness and reasonableness of the actions of the Respondent, the fact is that they did not uphold all of the allegations raised by KT. That tends to suggest that they were approaching things fairly and reasonably with the appropriate degree of impartiality.
45. The Claimant did query the involvement of some managers in the process, but it seems to me there is no reason why a previous line manager should not have been involved in the proceedings nor, indeed, why a manager involved in the customer complaint should not have been a note-taker in these disciplinary proceedings.
46. All managers involved were sufficiently independent, including the appeal manager who, at the Claimant's request, was somebody who had no connection with the store.
47. That said, there were some unfortunate issues in relation to the appeal with regard to the postponements, some delay and apparently a failure to provide the notes until much later. It seems to me, however, that those failings, such as they were, were not serious enough to undermine the fairness of the procedure generally.
48. The Claimant did have an appeal and was able to raise his grounds, he was able to be represented and it was heard within a couple of months. The various grounds were considered and he was notified of the outcome promptly, notwithstanding the delay in subsequently providing him with the notes.
49. The Respondent had a genuine belief, that belief was a reasonable one and it followed on from a reasonable investigation. I reiterate that the investigation and the process would not have to be perfect, merely within the band of reasonable responses of a reasonable employer. In this case I find that it was.

50. The real issue in this case was one of sanction. The Claimant had suggested in evidence before me that, perhaps, a final written warning and even a possible change of shift or transfer to a different store would have been a more appropriate sanction. It seems to me that other employers may well have taken that route but, in this case, the evidence before me was that

- a. the Claimant had been told by KT to stop messaging her in January and he didn't,
- b. he was then told by the Respondent later in January to stop his unwanted conduct in relation to KT or face a disciplinary and he didn't.
- c. It may be that the events of April (the post-it note and the bottle of wine) were intended to be friendly but it was equally clear that KT perceived them otherwise and the Claimant had been warned that this may well be how she would perceived such acts.
- d. the Claimant had previously asked KT's permission to use her photo and he had not received it. Nonetheless he downloaded such a photo, knowing he had been blocked from her Facebook account, and showed it to her.
- e. She asked him to delete it immediately. He walked off laughing.

It seems to me almost impossible to perceive that as anything that could reasonably be considered to be friendly or fun or banter. It clearly upset KT, not only to the point of raising a grievance but also going to the police.

51. The Claimant admitted the allegation and, indeed, all three of the allegations, yet never apologised until submissions before me. He never made clear to the Respondent that there would be no repeat, nor how they could be sure that would be the case.

52. I am reminded that the legal definition of harassment does not require intent or purpose on the part of the harasser. It is enough that someone engaging in unwanted conduct creates a hostile or offensive working environment.

53. It was clear that the Claimant knew that his actions were unwanted and, in the reasonable perception of KT, they did create such an environment. Accordingly, I can't say that no reasonable employer would have dismissed in the circumstances of this case.

54. The Respondent did consider lesser sanctions but couldn't risk continuing to employ somebody who did not appear to fully accept the gravity of what they had done, nor the effect on the individual concerned. They were

dealing with someone who had harassed a colleague after warning, when there was no apology and no clear acknowledgment that what had been done was wrong, nor how behaviours would change in the future

55. Those circumstances could not mean that dismissal was outside the band of reasonable responses and, as a result, the dismissal was not unfair.

Employment Judge Broughton

Date: 13 April 2018