Case Number: 1600382/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Shaw**

Respondent: **Blue Arrow Ltd**

Heard at: **Cardiff** **On: 5 October 2017**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Ms C Rosney (Solicitor)

JUDGMENT

The judgment of the tribunal is that:-

i) The claimant's claim of Unfair Dismissal is dismissed;

ii) The claimant's claim of wrongful dismissal is well founded.

REASONS

1. By this claim the Claimant brings claims of unfair and wrongful dismissal. The Respondent is an agency which supplies temporary labour to Airbus at its wing manufacturing plant at Broughton. The Claimant was based at the Airbus site in Broughton and was engaged as a skilled fitter in the Single Aisle Paint Shop working on nights. The night shift paint team was a relatively small team comprising some 8 or so operatives. The Claimant was employed from 30 January 2012 until 8 December 2016 and worked as part of the night shift on the Single Aisle Paint Shop alongside full time members of staff of Airbus.

2. In October 2016 an allegation was made of bullying, the alleged victim being a Mr David Jones an employee of Airbus. Two of those alleged to have bullied Mr Jones were employees of Airbus, Mr Andrew Amos and Mr Mike Cross, and the third Mr Shaw, the claimant in this case, was an employee of the Respondent. Airbus commissioned an independent investigation into the allegations against their two employees by Mr Abayomi Alemoru who is Director of Litigation Services of Vista Employer Services Limited who as I understand it amongst other things provide legal employment advice to Airbus. The Respondent concluded that it was sensible for Mr Alemoru also to investigate the allegation against Mr Shaw given that it formed part of the same allegations as those being investigated by Mr Alemoru in respect of the Airbus employees.

3. Mr Alemoru investigated and produced an investigation report dated 11 November 2016. In the course of his investigation he interviewed 14 people including the three under investigation. The alleged behaviour that was said to have been experienced by Mr Jones and which it was alleged to amount to bullying were (1) the unwanted and repeated moving, hiding of tools and personal possessions as some kind of wind up (2) the unwanted and repeated painting of abusive, insulting or rude images and words on coveralls, tool boxes and personal possessions and painting of boots (3) the unwanted and repeated throwing of balls of masking tape dipped in paint or thinner or wrapped around the rags or paper (4) the use of derogatory insulting words to describe certain workers.

4. In his report having summarised the evidence he concluded in respect of the first allegation, that he was satisfied that there was sufficient evidence from which to sustain a reasonable belief that Andy Amos, Lee Shaw and Mike Cross repeatedly moved, hid the tools and personal possessions of Dave Jones and others as some kind of wind up. Similarly in respect of the evidence of the unwanted and repeated painting of foul abusive or insulting images and words on coveralls, tool boxes and personal possessions he found that there was sufficient evidence to sustain a reasonable belief that Andy Amos, Lee Shaw and Mike Cross engaged in that behaviour; and in relation to the third allegation he also concluded that there was sufficient evidence from which to sustain a reasonable belief that Andy Amos, Lee Shaw and Mike Cross engaged in the unwanted and repeated throwing of balls of masking tape dipped in paint thinner or wrapped around rags. The fourth allegation did not concern the Claimant.

5. As a consequence on 17 November 2016 the Claimant was invited to a disciplinary hearing on 21 November to investigate the disciplinary offence of inappropriate behaviour and/or bullying and it stated that “please be aware that this allegation if substantiated would constitute an act of gross

misconduct for which summary dismissal without notice may be an outcome" and it repeated the four allegations which were those investigated by Mr Alemoru (although only three actually involved the claimant).

6. The Disciplinary Officer was Mr Kenneth Freeman who is employed as an Account Manager for Blue Arrow. At the disciplinary hearing the Claimant was accompanied by Darren Reynolds a Senior Trade Union Representative, and Ms Jenna Davies was present in an HR capacity and took notes. During the hearing each of the three allegations was explored. In addition to the matters contained in Mr Alemoru's report Mr Freeman obtained three further witness statements from Airbus employees via Ms Caroline Ward who was the Airbus Manager appointed to hear disciplinary cases in respect of the two Airbus Employees. The Disciplinary Hearing was suspended as the Claimant submitted a grievance against Dave Jones alleging that Dave Jones had behaved in an inappropriate way towards him. This was conducted by Airbus given that Mr Jones was an Airbus employee. That investigation concluded that Mr Jones had sent an inappropriate image to the Claimant on Facebook and as far as the Respondent understands it Mr Jones was issued with a warning.

7. Following the conclusion of that grievance process the disciplinary hearing was reconvened on 8 December 2016 with the same individuals present. In respect of the first allegation of moving or hiding tools or personal possessions this allegation was supported by the evidence of Dave Jones himself, Dave Daniels, Ian McGrail and Wayne Greatbanks. The Claimant denied this and alleged that he did not get on with Wayne Greatbanks and denied that Ian McGrail had worked in the Paint Shop. Mr Freeman concluded that even if he ignored the evidence of Mr Greatbanks with whom the Claimant said he had had some issues in the past, there was no explanation as to why the other witnesses would give untruthful evidence, and confirmed with Caroline Ward that the evidence showed that Mr McGrail had worked in the Paint Shop alongside the Claimant. Accordingly on the balance of probabilities Mr Freeman was satisfied that the behaviour had occurred as alleged and that it was unwanted and had caused Dave Jones distress.

8. In respect of allegation two the unwanted and repeated painting of abusive, insulting and rude images and words on coveralls, tool box and personal possessions and painting of boots, again he considered that the allegation was supported by the evidence of Mr Jones himself, Mr Dave Daniels, Mr Ian McGrail and again concluded that in the absence of any explanation of why these people should lie, and again even if disregarding Wayne Greatbanks evidence, that he was satisfied that the Claimant had been observed painting images of penises on tool boxes and coveralls and that whilst there was no specific evidence that they had seen the

Claimant paint a penis on Dave Jones tool box or coveralls, that it could be reasonably inferred from the evidence that the Claimant had either been directly responsible or had been involved in the painting of a penis on Dave Jones tool box and/or coveralls. He was therefore satisfied that this allegation was made out.

9. In respect of allegation 3, again the unwanted and repeated throwing of balls and masking tape dipped in paint or thinners. This again was confirmed by the evidence of Dave Jones, Wayne Greatbanks, Dave Daniels and Chris Denyer and again with the exception of Wayne Greatbanks there was no evidence as to why any of these people should lie and he accordingly considered that this allegation was made out. It followed that he regarded the allegations as proven.

10. In terms of the question of sanction the matters alleged by the Claimant were that the things that were alleged were part of the culture of the team on nights, although Mr Freeman took into account that this was not consistent with his claim that the incident did not happen, and Mr Freeman was therefore satisfied that something which the Claimant claimed did not happen could not be part of any culture. In addition he considered the evidence of the Claimant that Dave Jones should not be believed when he said that the Claimant had treated him unacceptably, and what was said on the Claimant's behalf that he had not had any Dignity At Work training, and further his length of service and clean disciplinary record. However he concluded that none of this sufficiently mitigated the Claimant's conduct. Given that the Claimant had denied the behaviour he did not believe that there was any mitigation and considered it was necessary for the Respondents to supply workers who have high standards of conduct and therefore dismissal was the appropriate sanction.

11. The Claimant appealed that decision. The appeal was heard by Ms Lynsey Derosa who was employed as an Account Director by the Respondent. The hearing took place on 4 January 2017 and once again the Claimant was accompanied by Darren Reynolds. The Claimant at that stage raised the possibility of there being two further witnesses Mark Jenkins and Mike Collins who had witnessed events and who would support his version of events. Ms Derosa therefore spoke to both Mark Jenkins and Mike Collins and also to Dave Jones himself. She addressed the points made at the appeal, the first of which is that the investigation was unfair as it was not conducted by Blue Arrow's own managers but the Legal Advisers of Airbus she was satisfied that this fell within the company's disciplinary policy and that it was clearly an impartial investigation and that therefore there was no unfairness to the Claimant as a consequence. Secondly it was alleged that the statements in the disciplinary pack had not been signed, however again she concluded that each person who was interviewed had an opportunity to check the record

of their evidence and were satisfied and she did not view the absence of signature as significant. Overall she did not consider there was anything to suggest that the investigation was anything but impartial. The next point was that there were a number of individuals whom the Claimant believed had not witnessed anything or were not working in the Paint Shop or the night shift. Ms Derosa took the view of the evidence of Mr Collins and Mr Jenkins that whilst they did not witness any of the incidents seen by other colleagues, was not evidence which caused her to conclude that what those other witnesses had said was unreliable. Whilst the Claimant believed that the allegations were not substantiated in as much as Dave Jones had been a willing participant in the banter and that each behaved towards the other in the same way, she was satisfied that Mr Jones had not mutually engaged in the conduct and that specifically the Claimant had denied doing things which there was evidence he had done, and that it was inconsistent to claim that those behaviours were part of banter or culture. The other points raised were that the Claimant himself had been subjected to similar treatment, that he had admitted painting Dave Jones work boots, but not the other matters; that he had never been spoken to regarding his behaviour, nor received any Dignity At Work training and also that he had been failed by Blue Arrow in that he had been subject to inappropriate behaviour and that he was saddened because Dave Jones had never indicated to him or anyone else that he was distressed, and in addition that the severity of the punishment was too harsh.

12. Looked at overall Ms Derosa concluded that she was satisfied that the Claimant was guilty of bullying Dave Jones. However her evidence which I accept is that the question which gave her most difficulty was that of sanction. In her witness statement she states "*I gave a great deal of consideration to whether despite the fact Lee was guilty of bullying in the circumstances it was appropriate that he should lose his job over it or whether a warning would have been an appropriate sanction. Even if I accepted that Lee had also been subject to some sort of inappropriate behaviour from Dave Jones I still could not get away from the fact that I was satisfied that two wrongs did not make a right. Also Lee had never previously complained about them until the disciplinary proceedings had been brought up against him. Further, throughout the investigation disciplinary Lee continued to deny that he had done anything wrong and did not express any remorse or acknowledgment for his actions. I considered whether it would have been appropriate to overturn the dismissal and issue him with a final written warning instead, however I was satisfied that the purpose of warnings is to bring about an improvement in behaviour given the fact that Lee had refused to accept that he had done anything wrong I therefore had no confidence that he would learn from this and his behaviour would not be repeated."* She went on to conclude that *"taking everything into consideration I was satisfied*

that dismissal was an appropriate sanction" and this conclusion was communicated to the Claimant on 27 January 2017.

13. Arising from that recitation of the facts my conclusions are as follows. This being a conduct dismissal there are four questions I have to answer. The first is whether the Respondent has shown that the genuine reason for dismissal was a belief that the Claimant had committed the misconduct alleged against him. It has not been suggested to either Mr Freeman or Ms Derosa that there was any other reason other than the genuine belief in the misconduct and having heard from them both I am satisfied that that was the genuine reason why the Claimant was dismissed.

14. That leads on to the three Burchell questions which are whether there was a reasonable investigation, whether reasonable conclusions were drawn from that investigation and whether dismissal was a reasonable sanction. In considering those questions I bear in mind that in respect of each of them the range of reasonable responses test applies and thus accordingly the questions I have to ask are whether a reasonable employer could have investigated in the way the Respondent did, whether a reasonable employer could have drawn the conclusions the Respondent did, and finally whether a reasonable employer could have considered dismissal an appropriate sanction.

15. In terms of the investigation there is only one substantial complaint which is that the Respondent should have conducted its own internal investigation and should not have allowed the investigation of the Claimant to form part of Mr Alemoru's investigation of the Airbus employees. In my view the decision to allow the investigation of the Claimant to take part as part of the overall investigation of the Airbus employees was clearly within the range open to the Respondent Mr Alemoru was investigating precisely the same incidents that were alleged against the claimant, the bulk of the witnesses were Airbus employees and in my judgement it would make no sense for the Respondent to have attempted to have made its own separate investigation into those same allegations. It follows that in my judgement it was perfectly reasonable for the Respondent to allow the allegations against the Claimant to be investigated as part of the wider investigation of the allegations against the Airbus employees.

16. Secondly it is clear that Mr Alemoru's investigation was extremely thorough and in respect of the conclusions he drew they are all conclusions which are supported by the evidence that was obtained by him. In my judgement it was an extremely thorough investigation and clearly fell within the band of reasonable investigations which the Respondent could have taken.

17. Dealing with the conclusions it appears to me that the Respondents position that the Claimant was guilty of gross misconduct is again one that was clearly open to it. As is set out in Mr Alemoru's investigation report and in the case of Mr Freeman and Ms Derosa in their witness statements, they state precisely what evidence they took into account and what they ignored, and why they formed the conclusions they did. In my judgement the conclusions they reached were ones which were eminently open to them on the evidence. The specific objections the Claimant makes are that he believes he has produced clear evidence that as he asserted during the process that Mr Ian McGrail was not in fact employed at the Paint Shop and therefore he couldn't have witnessed the events and that he therefore must be lying in his evidence. It follows from that the Claimant submits that if there is at least one witness who is demonstrably lying then no reliance can be placed on any of the evidence. There are in my Judgment two answers to that. The first is that the question of the conclusions must be judged on the evidence before those who were considering them and at the time of the disciplinary hearing and appeal hearing. Both Mr Freeman and Ms Derosa had evidence from Airbus from Caroline Ward that Mr McGrail was indeed working on the Paint Shop for at least part of the period during which the Claimant was. In addition there is evidence again from Caroline Ward that the evidence the Claimant relies upon does not demonstrate what he believes it to have done. Put simply the evidence appears to suggest that Mr McGrail was working on Flowline and therefore not the Paint Shop at the relevant times. The evidence of Ms Ward is that in fact due to medical reasons that Mr McGrail was working in and allocated to the Paint Shop and that all the evidence showed is that he was in fact allocated for cost purposes to Flowline. It doesn't in reality demonstrate where he was actually working and therefore doesn't support the contention and doesn't bear the weight the Claimant seeks to place upon it. Thirdly as Mr Freeman states even if he had ignored the evidence of Mr McGrail there was still a wealth of evidence to demonstrate that the Claimant was guilty of the conduct alleged against him. In my view this is unquestionably true.

18. That leaves the final question of sanction. For the reasons given by Mr Freeman and Ms Derosa in my judgement the sanction which was one which was reasonably open to the Claimant the matters set out in particular in Ms Derosa's witness statement are clearly matters which may have led another employer to conclude that a final written warning was an appropriate sanction, but the reasons given by Mr Freeman and Ms Derosa are not irrational and are not unreasonable and accordingly in my Judgment the Respondent was entitled to conclude the Claimant was guilty of gross misconduct in that his conduct fell within the definition of bullying in the Dignity at Work policy and that it was sufficiently serious that dismissal was a reasonable sanction.

Wrongful Dismissal (Notice Pay)

19. In terms of wrongful dismissal the only evidence I have heard is from Mr Freeman and Ms Derosa and for the reasons given above I am entirely satisfied that they were entitled to reach the conclusions that they did. In the case of a wrongful dismissal claim however, I need to be satisfied that the Claimant had actually committed the misconduct rather than being satisfied that it was open to the Respondent to conclude that he had. As the Respondent has only placed before me the evidence in the form of the investigation report that raises the question whether it is possible to say on the balance of probability, having not heard from any of those witnesses, not seeing them cross examined and not therefore being able to judge for myself, whether it would be appropriate to conclude that there is sufficient evidence to demonstrate that the Respondent was entitled summarily to dismiss the Claimant.

20. In my judgement, despite the fact that there is a wealth of evidence in the investigatory report there is no direct evidence before me that the claimant did commit any of the acts of misconduct. It follows that in my judgment the claim for wrongful dismissal is well founded.

21. In the event that the parties are unable to agree a figure for notice pay they should notify the tribunal within 28 days of promulgation of this judgment and the case will be listed for a remedy hearing.

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Employment Judge P Cadney
Dated: 22 November 2017

JUDGMENT SENT TO THE PARTIES ON

23 November 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.