



EMPLOYMENT TRIBUNALS

Claimant: Mrs Deborah Goddard
Respondent: Leicester City Council
Heard at: Leicester
On: 20 – 24 November 2017
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr Ivan Goddard (Claimant's spouse)
Ms Amanda Baker (Family friend)
Respondent: Ms Dee Masters of Counsel

JUDGMENT

The judgment of the tribunal is that:-

1. The Claimant was unfairly dismissed.
2. The dismissal was procedurally unfair but if a fair procedure had been applied the Claimant would have been dismissed fairly in any event. A *Polkey* reduction of 100% is appropriate.
3. The application for reinstatement or re-engagement is refused.
4. The Claimant's complaint of breach of contract is dismissed.

REASONS

1. Mrs Deborah Goddard, who was employed by the Respondent as a Domestic Cleaner from 5 October 2005 to 6 October 2016, brings a complaint of unfair dismissal. By virtue of an amendment granted at a Preliminary Hearing on 3 May 2017, she also brings a claim for breach of contract.

2. The Claimant has throughout these proceedings represented herself and assisted by her husband who has written a number of letters on her behalf in the course of proceedings and also attended as his wife's representative at earlier Preliminary Hearings. At this full merits hearing,

after commencing the advocacy on his wife's behalf he gave way to Miss Baker, a family friend who, despite not having any legal qualifications and experience, has put the case very ably on the Claimant's behalf.

THE FACTS

3. Mrs Goddard was employed at Border House, a homeless hostel for families and pregnant single women, as a Hostel Domestic. Service users of the hostel are from a range of ethnic backgrounds.

4. The Claimant was part of a Domestic team of 8 such workers who reported to a Premises Officer. The main role of Domestics is to ensure the cleanliness and good upkeep of the flats. They often come into contact with service users. There were issues and some minor conflict between staff but this was not on racial lines. Mrs Janice Haslam, another Domestic was part of the same team as the Claimant. Also employed within the team was Mrs Lorna Oswin, Mrs Heather Sills and Mrs Glenda Barnett, the latter being the Domestic Supervisor and line manager for both the Claimant and Mrs Haslam. Mrs Barnett's line manager was Mrs Betty Clark, the Assistant Hostel Manager. Mrs Clark's line manager was Mr Patrick Kelly. Mrs Haslam is of African Caribbean origin and black skin colour as is Mrs Clark. The Claimant, Mrs Barnett and Mr Clark are all of white skin colour.

5. In the run up to the events leading to events of this case, Mrs Haslam and Mrs Goddard, who had been friends for some years, had suffered a serious falling out. Mrs Goddard claimed that Mrs Haslam wanted support for a personal injury claim and Mrs Goddard appeared unwilling to provide that support. Whatever the reasons behind the state of affairs, relationships had soured to the point where unfavourable comments were being said behind Mrs Haslam back, or so she suspected. Mrs Haslam felt she needed some hard evidence. She decided to secretly record telephone colleagues' conversations in the main Domestic suite where Mrs Goddard and colleagues would gather for breaks.

6. On Friday 9 October 2015, Mrs Haslam placed her mobile phone within one of the lockers in the suite and began recording from 9:00 am. She did not know what time her colleagues would be gathering for a rest break so she set the recording for all day. The recording continued until 3:00 pm. When replaying the recording, Mrs Haslam was shocked to hear what she heard. They consisted of racist comments which she concluded must be about her. She also heard some of her colleagues laughing at those comments. The offending part of the conversation occupied only a small part of the overall recording. On Monday 13 October, Mrs Haslam played the relevant part to Mrs Clark. Mrs Clark immediately contacted Mr Kelly so that he too could listen to the recording. Mrs Haslam was so upset at what she heard that she went off on sick leave and submitted a grievance. Mr Kelly, who had known Mrs Goddard for some years, was able to readily identify Mrs Goddard's voice as the one making the offending remarks. The recording had a lot of background noise but he could clearly make out the words "black bastard" being spoken.

7. Mr Kelly contacted Mr Cox, an HR Adviser to seek advice on whether the recording was something that could be relied upon as it was done secretly and on a personal device. He also wanted to meet Mrs Haslam to learn more of the circumstances. Because of Mrs Haslam's illness, the meeting could not take place until 28 October 2015. It was at that meeting that Mr Kelly was able to hear the relevant parts of the recording as Mrs Haslam was not keen on letting go of her mobile phone. Mr Kelly could discern that the words "fucking black bastard" were used. Some of the other words were unclear but they appeared to sound like "little" or "looking".

8. On 11 November 2015, in what was intended to be a meeting to deal with several matters but also treated as the grievance meeting on behalf of Mrs Haslam, it was agreed that copies of the recordings of the conversations would be provided to the Respondent in order to prepare a transcript. There were difficulties in accessing the files because the original format on the mobile phone did not easily lend itself to a transfer to any of the Council's systems. When the files were eventually accessible Mr Kelly decided that there was sufficient evidence for the Claimant to be

suspended and that he did on 14 December 2015. In the suspension letter Mr Kelly made it clear that the reason for suspension was because of the Claimant *“using unacceptable and racist language in the domestic suite... and that this was in reference to a colleague, Ms Janice Haslam”*. Mr Kelly did not make any reference at that stage to a recording.

9. Mr Kelly undertook his investigation into the matter between 14 December and 21 December 2015. In doing so he interviewed a number of staff at Border House.

10. In January 2016, Mr Kelly attempted to arrange an investigatory meeting with the Claimant’s and her trade union representative, Mr Andy Betts. The first of the two investigation meetings between the Claimant and Mr Kelly took place on 29 January 2016. Mrs Goddard denied making any racist statement but gave no explanation as to what she had said. The Claimant alleges that Mr Kelly called her “a liar and a racist” at the meeting.

11. At a further meeting on 29 January, the Claimant was provided with a written transcript of the audio recording. Mrs Goddard denied making the statement as to “that fucking black (either ‘little’ or ‘looking’) bastard”.

12. Shortly after the first investigation meeting, Mr Kelly had e-mailed the Claimant’s trade union representative with four audio files and the relevant transcript. In early February 2016, Mr Kelly wrote to Mrs Haslam to say that he had decided to uphold her grievance. In the letter Mr Kelly makes it clear that he upheld the grievance around the use of racist language in the Domestic suite of Border House.

13. On 5 February 2016, Mrs Goddard and Mrs Barnett lodged a grievance in respect of the covert recording. As a consequence of the grievance, the Respondent decided to put the disciplinary procedure on hold pending the outcome of the grievance.

14. Although the initial recording of the discussions which Mr Kelly had listened to was tolerably clear, the sound quality was not the best and there was a great deal of background noise. In preparation for the disciplinary hearing he made enquiries as to how the quality could be improved and the background noise or hiss reduced. He got in touch with the Council’s Corporate Investigation Team who told him that unfortunately the Council did not have the technical equipment which would help to improve quality. In April 2016, Mr Kelly made a formal request to the Council’s ICT department and later that month one of the infrastructure engineers was able to improve slightly the quality of the relevant track. The result was to remove background noise without interfering with the actual recording in any way.

15. A second investigatory meeting was arranged for 26 May 2016. At this meeting the “clean” recording was played to the Claimant. By this stage a second and more accurate transcript was available, the material part of which was as follows:

[The initials of those speaking are as follows: DG = Deborah Goddard, LO = Lorna Oswin, GB = Glenda Barnett]

DG: “Some things weren’t put back in the chill out toilet, you never know who fucking knows do ya” LO:

“Who’s that then”

DG: “That fucking black little bastard... She looked at me like that, in the kitchen so I went like that, I couldn’t help it.”

GB or LO: “What?”

DG: “She looked at me like that with her eyes, like that” [Gives out a loud laugh].

GB: Gives out a loud laugh.

LO: "Oh ya fucker".

16. At this point Mrs Goddard now gave an explanation of what her remarks were about. She said she now recalled that the incident was about a spider. Mrs Goddard said that she remembered that there was a spider which had jumped out at her. She referred to it as 'she' because it was female she believed female spiders are large. Mrs Goddard did not challenge the accuracy of the transcript itself.

17. Mr Kelly arranged to meet Mrs Barnett and Mrs Oswin for their views on the Claimant's explanation and attempted to obtain statements from them. Both of them supported the Claimant's version of events.

18. In July the Claimant was invited to a disciplinary hearing and was told that her grievance appeal would be considered on the same day as the disciplinary hearing. Both processes would be conducted by Mr Mike Evans on 6 October 2016, the first stage of the grievance having been dismissed on 23 August 2016 by Mr Mahoney.

19. Following the hearing on 6 October 2016, Mr Evans decided that the Claimant would be dismissed for gross misconduct. That is agreed as the effective date of termination. Mr Evans also dismissed the grievance appeal.

20. On 12 January 2017 the Claimant presented her claim to the Employment Tribunal.

21. The Respondent also dismissed Mrs Barnett on 27 October 2016 for failing to challenge Mrs Goddard when she had heard the Claimant make offensive and racist comments and was instead heard to be laughing. The reason for dismissal also included two other matters but the main allegation of gross misconduct in Mrs Barnett's case related to her conduct on 9 October 2015.

THE LAW

22. Section 98(1)(2) and (4) of the Employment Rights Act ("ERA1996") states:

"(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,

(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."

23. Section 122(2) of ERA 1996 states:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

24. Section 123(1) and (6) ERA 1996 states:

“(1) Subject to the provisions of this section and sections 124, 124A 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.

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

25. Both the basic and compensatory awards may therefore be reduced (under sections 122(2) and 123(6) ERA 1996) by reason of contributory conduct on the part of an employee, though on slightly different principles. In **University of Sunderland v Drossou** (UKEAT/0341/16) the Employment Appeal Tribunal has made it clear that whilst the statutory provisions are slightly different, any percentage reduction should generally be the same for both the basic and compensatory awards.

26. A Tribunal may also reduce the amount of compensation by the appropriate percentage to reflect the possibility that the employee could or would have been dismissed fairly in any event if the dismissal was ‘procedurally’ unfair. This is the so-called ‘**Polkey**’ principle (**Polkey v AE Dayton Services Ltd** [1987] IRLR 503). A **Polkey** reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for both **Polkey** and for contributory conduct (**Robert Whiting Designs Limited v Lamb** [1978] ICR 89). The tribunal must limit the Claimant’s compensatory award if there is reliable evidence on which it can conclude that dismissal would have happened in any event (**Software 2000 Ltd v Andrews** [2007] ICR 825). Where the tribunal can say with certainty that dismissal would have happened in any event by a particular date (the “safe date”), compensation should be limited to that safe date (**O’Donoghue v Redcar & Cleveland Borough Council** [2001] IRLR 615). In **Polkey** cases it is necessary to ask:-

26.1 If a fair process had occurred, would it have affected *when* the Claimant would have been dismissed?

26.2 What were the percentage chances that a fair process would still have resulted in the Claimant’s dismissal?

27. In applying section 98(4) ERA 1996, it is necessary to bear in mind the guidance repeated in **HSBC Bank plc v Madden** [2000] ICR 1283, namely that:

“(1) In applying the above section the Tribunal must consider the reasonableness of the employer’s conduct, not simply whether the Tribunal would have done the same thing.

(2) The Tribunal must not substitute its decision as to what was the right course to adopt.

(3) There is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(4) The function of the Employment Tribunal is to determine whether the dismissal of the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair.”

CONCLUSIONS

Procedural unfairness

28. Prior to the hearing the Respondent conceded that the dismissal was

procedurally unfair. The basis of the concession was that:-

28.1 Mr Kelly upheld Mrs Haslam's complaint of race discrimination prior to completing his investigation into the disciplinary charges against the Claimant. It is accepted that Mrs Haslam's grievance should have been adjudicated upon at the same time as the disciplinary charges against the Claimant;

28.2 the Claimant had questioned the integrity of Mrs Haslam's recording. Prior to the disciplinary hearing on 6 October 2016, the Respondent should have formally put to Mrs Haslam the allegation that she (or someone on her behalf) had tampered with the recording;

28.3 the Respondent should have adjudicated upon the allegations levelled against the Claimant and Mrs Barnett at the same time rather than consecutively;

28.4 the Claimant should have been provided with the documentation that particularised Mrs Barnett's defence for use at the disciplinary hearing.

28.5 the Claimant should have been provided with the documentation recording the recollections of Mrs Oswin for use at the disciplinary hearing. Mrs Oswin was interviewed by Mr Kelly on 1 June 2016 and whilst a note was taken of that discussion, Mrs Oswin subsequently refused to sign it on union advice. Unlike Mrs Barnett Ms Oswin was not disciplined.

29. Notwithstanding these procedural irregularities, which were rightly conceded in my view, it is the Respondent's case that the Claimant would have been fairly dismissed in any event under **Polkey**. Alternatively, Ms Masters submits that both the basic and compensatory award should be reduced to nil on the grounds that the Claimant contributed *wholly* to her dismissal. It was therefore still necessary to consider the issue of 'substantive' fairness under section 98(4) ERA 1996.

The investigation

30. The Claimant's criticisms of the dismissal centre almost entirely upon the conduct of the investigation rather than the rationale of the decision, the honesty and genuineness of the belief in misconduct or the reasonableness of that belief. At the start of the hearing the Claimant was asked, with assistance from Miss Baker, to reduce those criticisms into written form.

31. The criticisms are as follows:-

31.1 That the Claimant was initially not told of a tape recording;

31.2 That the Claimant was questioned not just on a transcript from Mrs Haslam's mobile phone but also from Mrs Haslam's witness statement and the grievance, both of which were not made until June 2016 and November 2015;

31.3 That the Claimant did not have sight of the transcripts and was "questioned blind";

31.4 That the investigation meeting was cursory on the first occasion lasting only 15 minutes;

31.5 That no notes were taken or a tape recording made of the second investigation meeting;

31.6 That the second investigatory meeting was convened on a pretext and was not a 'new' investigation at all;

- 31.7 That the Claimant had been in possession of a recording for months and was able to put her interpretation forward;
- 31.8 That the Claimant was called “a racist and a liar” by Mr Kelly (and thus presumably the investigation was conducted unfairly);
- 31.9 That Mr Kelly should have interviewed other witnesses;
- 31.10 That the investigation failed to disclose that witness statements that had been taken from Border House staff that supported the Claimant.
- 31.11 That relevant witnesses were not interviewed immediately (by which is presumably meant that it was not within a reasonable period);
- 31.12 That Mr Kelly had no justifiable reason to suspend the Claimant;
- 31.13 That Mr Kelly did not inform the Claimant of her data protection rights;
- 31.14 That Mr Kelly failed to investigate a breach of confidentiality in relation to the audio recording before the Claimant had been provided with a copy;
- 31.15 That the transcripts of the recording differed from the first investigation meeting to those sent to the Claimant later;
- 31.16 When the transcripts were sent to the Claimant in July they differed from those sent in February 2016;
- 31.17 That the Claimant was not sent an invite letter for the second investigation meeting;
32. Dealing with all of those criticisms in the round, I do not find that any of them rendered the investigation defective or such that the investigation fell outside the band of reasonable responses. For the sake of completeness I will deal with each of them separately:-
- 32.1 The Claimant was clearly told of a tape recording at the first investigatory meeting on 29 January 2016 as is apparent from the notes;
- 32.2 This practice falls within the ‘reasonable range’ in matters of investigation;
- 32.3 The Claimant was provided with a copy of the transcript before and after the investigation process was concluded;
- 32.4 Although the investigation meeting was relatively brief, it lasted from 9:45 am to 10:20 am with a 15 minute break, which is all that was necessary at that stage. The investigation process had not concluded at that stage;
- 32.5 This is factually incorrect.
- 32.6 There is nothing to suggest that it was a convened as a pretext for any other purpose;
- 32.7 This allegation is not understood nor was it explained further in submissions. If it is meant to suggest that the Claimant was not able to put forward her explanation then that is factually incorrect.

- 32.8 I am satisfied that the Claimant was not called 'a racist and a liar' by Mr Kelly nor by anyone else. Mr Kelly's evidence is supported by Mr Cox-Stone who was present. I find the evidence of both those witnesses to be reliable.
- 32.9 All relevant witnesses were interviewed and their evidence disclosed. There was no purpose in interviewing the Duty Manager who was not present at the time of the events. The list of witnesses interviewed is extensive.
- 32.10 Any other witness statements did not assist the Claimant's case;
- 32.11 There was no prejudice caused by any delay;
- 32.12 Suspension was entirely appropriate in the circumstances;
- 32.13 Mr Kelly had no obligation to inform the Claimant of her data protection rights (whatever they might be) nor does the absence of it affect the fairness of the investigation;
- 32.14 The issue of breach of confidentiality was investigated and in any event it does not go to the issue of fairness;
- 32.15 The Claimant has at all material times accepted that the key part of the transcripts were accurate. There is a minor difference between two transcripts. The first transcript was as follows:

"DG: "that fucking black little (or looking) bastard, she looked at me like that, so I went like that, couldn't help it."

The material part from the second transcript is:

"DG: "that fucking black little bastard... she looked at me like that, in the kitchen so I went like that, I couldn't help it."

The material words remain the same. The differences are minor and inconsequential.

- 32.16 This is dealt with above
- 32.17 The allegation is factually incorrect. The Claimant was sent an invitation letter to the second investigatory meeting on 13 May 2016 as is apparent from page 163 of the hearing bundle.

"Substantive" unfairness

33. The principal issue in relation to substantive unfairness is whether the dismissal fell within a band of reasonable responses open to a reasonable employer. In that respect, I am satisfied that it did for the following reasons:-

33.1 There is no doubt that this was a serious act of misconduct. Racist language at the workplace is rightly seen as unacceptable. The Claimant's conduct clearly led to a complete breakdown in trust and confidence.

33.2 Neither the genuineness of the belief in misconduct nor the reasonableness is challenged. I am satisfied that the belief in misconduct was an honestly and reasonably held view.

33.3 I am satisfied the Respondent had reasonable grounds on which to base their beliefs. The final version of the transcript is accurate to the extent it is necessary to rely on it. Although no request was made to play the audio recording at the tribunal hearing the Claimant has not challenged the accuracy of the words used. The minor discrepancies are immaterial. At the disciplinary hearing the Claimant accepted that she had said at least the words: "that fucking.....black bastard".

33.4 The Claimant accepted during the course of the disciplinary hearing that the recording sounded "dreadful" and "awful".

33.5 I have already rejected the criticisms of the investigation. In my view this was a fair and reasonable investigation undertaken carefully with care and attention.

33.6 The Claimant's suggestion that she was referring to a spider rather than a person is plainly ridiculous. Her words must be seen in their context. The context was that the Claimant had just been involved in a confrontation with Mrs Haslam and she was recounting the episode to her colleagues. Mrs Goddard was cross with Mrs Haslam and was demonstrating to her colleagues how she had dealt with the situation. The suggestion that Mrs Goddard was able to see the eyes of a spider and that the spider looked back at her is clearly unbelievable. The Claimant's account lacks any credibility whatsoever.

33.7 Mrs Goddard made no reference to a spider when she was first shown a transcript.

33.8 The Respondents reasonably believed that the Claimant had colluded with Mrs Oswin and Mrs Barnett to invent a wholly implausible version of events to protect their friend.

33.9 There is no evidence that the audio recording had been tampered with or doctored by Mr Kelly, Mrs Haslam or anyone else on her behalf. The Claimant instructed her own expert (although she now denies that he was really an expert) who in fact agreed with the Respondent that this was not a doctored or tampered recording. The highest point of the Claimant's case on this argument is that Mrs Haslam has a brother in Birmingham who owns an electrical shop. She suggests that it is possible he may have doctored the recording when Mrs Haslam had the phone. No further information or evidence has been offered as to this. I am satisfied that at no point have any officers of the Respondent tampered or doctored the audio evidence.

34. In those circumstances I am satisfied that the decision to dismiss the Claimant was not substantively unfair.

35. I do not find any procedural irregularity other than that which is conceded. In particular I do not find any breach of the ACAS Code of Practice which would trigger or require an uplift of the compensatory award.

36. I was however initially concerned as to the delay in the appeal process and whether that also affected fairness. Ms Pinnock the appeal officer accepted that there were delays in the appeal and that these delays were 'not ideal'. However, I also note that having lodged an appeal the Claimant chose not to attend the appeal hearing. Her stipulation was that her husband should be permitted to attend. When that was eventually agreed, and there was no reason for the Claimant not to attend the appeal hearing, she still failed to attend. In the circumstances any delay in dealing with the appeal is ultimately immaterial.

Polkey

37. I am satisfied that there is reliable evidence upon which it can be concluded that the Claimant would have been dismissed in any event regardless of the conceded procedural irregularities. I consider that the 'safe date' is in fact the actual date of dismissal in this case. The procedural

irregularities would not have extended the date of dismissal. In those circumstances I consider it appropriate, on **Polkey** principles, to make no compensatory award.

Contributory conduct

38. Ms Masters submits that there should be a 100% reduction for contributory conduct in respect of both the basic and compensatory awards.

39. Whilst 100% reductions for contributory conduct are comparatively rare, this is a case where the Claimant was indeed wholly to blame for her dismissal. She made racist and offensive comments at work. She then attempted to cover up her comments by colluding with colleagues to manufacture a false story.

Breach of contract

40. The Claimant's conduct was clearly a repudiatory breach which the Respondent was entitled to accept and to dismiss summarily without notice. The Claimant had, through her conduct, demonstrated that she wholly disregarded the essential terms of her contract of employment in not complying with anti-discrimination legislation and dignity at work rules. Dismissal was justified. Notice pay was therefore correctly withheld. The complaint for breach of contract is therefore dismissed.

Reinstatement and re-engagement

42. An order for re-instatement or re-engagement is clearly not appropriate. It would not be practicable in the circumstances particularly where there has justifiably been a complete breakdown of trust and confidence caused by the Claimant's conduct.

Employment Judge Ahmed

Date: 12 February 2018

SENT TO THE PARTIES ON

12/2/18

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FOR EMPLOYMENT TRIBUNALS