EMPLOYMENT TRIBUNALS

Claimant: Bocarr Jamanka

Respondent: Deltaform Ltd

Heard at: **Bristol** **On:** **18-22 February 2019**

Before: Employment Judge Housego
Ms Y Ramsaran and
Ms S Maidment

Representation

Claimant: In person
Respondent: Ms T Hand of Counsel instructed by DLA Piper UK LLP

JUDGMENT

The claims are dismissed.

REASONS

Background

1. As this decision is placed on a public record we refer to individuals by a schedule of anonymity, as Colleagues 1-6, to accord with the numbers of their respective witness statements in the bundle of witness statements provided, and A-F in accordance with a schedule of anonymity.

2. The claimant was dismissed by the respondent. They say this was for gross misconduct, being the way that the claimant acted on 3 night shifts, 10-13 July 2017, inclusive. The claimant says that he was the victim of an orchestrated plan to get him dismissed, the prime mover being his former superviser, Colleague 6, who was the duty manager on those shifts. He says none of what was alleged was true, and his former superviser was

motivated to do so to try to subdue him into a sexual relationship, so that this was sexual harassment. He says his former superviser suborned others to provide statements that led to his dismissal.

Law

3. The claimant claims unfair dismissal and sexual harassment. (The claim was originally framed differently, but it was agreed in a case management hearing that this was the reality of the claim.)

4. Section 26 of the Equality Act 2010 (EqA), relevant parts emboldened:

> ***"26 Harassment***
>
> (1) A person (A) harasses another (B) if—
>
> (a) **A engages in unwanted conduct *related to a relevant protected characteristic***, and
>
> (b) **the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B**.
>
> (2) A also harasses B if—
>
> (a) **A engages in unwanted conduct of a sexual nature, and**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> (3) A also harasses B if—
>
> (a) A or another person **engages in unwanted conduct of a sexual nature** or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) **because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

5. There is no complaint of victimisation contrary to S27, but it is set out to show the difference between it and S26, and because the claimant referred to it in the hearing:

> ***"27 Victimisation***

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

6. In respect of a claim for unfair dismissal, the respondent has to show that the dismissal was for a potentially fair reason[1]. The respondent says this was misconduct which is one of the categories that can be fair[2]. It has to show that the dismissal was fair[3]. This means that it must show that it had genuine belief that the claimant was guilty of the misconduct alleged, that it had reasonable grounds for that belief, and formed that view after proper investigation[4]. It must follow a fair procedure throughout[5], and dismissal must fall within the range of responses of a reasonable employer[6]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

7. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[7]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[8], and lastly to consider whether the claimant's conduct caused or contributed to his dismissal[9]. While gross misconduct usually leads to dismissal, it is unfair to dismiss somebody without consideration of whether another sanction might be appropriate[10]. If a fair procedure is followed and the decision maker genuinely believes on reasonable grounds after proper investigation that there has been gross misconduct, then there is a fair dismissal even if another employee who did not have the responsibility for the dismissal or appeal engineered that outcome[11].

8. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination

[1] S98(2) of the Employment Rights Act 1996
[2] Also S98(2) of the Employment Rights Act 1996
[3] S98(4) of the Employment Rights Act 1996
[4] British Home Stores Limited v Burchell [1980] ICR 303 EAT;
[5] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[6] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[7] Section 98(4) of the Employment Rights Act 1996
[8] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[9] S122(6) and 123(2) of the Employment Rights Act 1996
[10] Brito-Bapabulle v Ealing NHS Trust UKEAT0358/12/1406
[11] Para 61 Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632

claim, it is for the claimant to show reason why there might be discrimination[12], and if he does so then it is for the employer to show that it was not.

Issues

9. There have been two case management hearings in this case, on 16 March 2018 and on 14 August 2018. The issues were set out in the first case management order, and altered in the second. The order does not deal with the issues for the unfair dismissal claim, as these are standard and the law is set out above. It set out the allegations made in the sexual harassment claim. It should be borne in mind that this schedule was arrived at in the context of an application by the respondent to strike out the claim by reason of vagueness of allegations and inconsistency between the allegations set out in a Scott schedule subsequent to those identified in the previous case management hearing. The issues set out in the case management hearing are reproduced below. They are at paragraph 7.6 of that case management order. Paragraph 7.9 stated *"For the avoidance of doubt no other claims or complaints will now be considered by the Tribunal".*

10. The issues are:

    a. on 17 February 2015 Colleague 6 changed the materials the claimant was working on with the TFT machine;

    b. on 01 June 2015 Colleague 6 gave the claimant a machine that was not working properly and tried to hug him when he struggled to operate it;

    c. on 04 June 2015 Colleague 6 again altered the settings on the claimant's TFT machine;

    d. on 30 May 2016 Colleagues 6 failed to set the claimant's TFT machine properly;

    e. on 29 June 2016 at approximately 6:00 am during Ramadan and when the claimant was fasting Colleague 6 gave him work on a machine which was usually a two-man operation but he was required to undertake it alone;

    f. on 28 September 2016 6 days were improperly deducted from the claimant's holiday;

    g. on 16 February 2017 Colleague 6 altered the settings to the claimant's GN machine;

    h. on 06 April 2017 the claimant raised a complaint about the loss of 6 days holiday;

[12] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and most recently Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

i. on 24 April 2017 the claimant spoke to Colleague 6 again about his holiday entitlement and his manager's alleged sexual advances but was laughed at by his colleagues because Colleague 6 had made his complaints public;

j. on 28 May 2017 Colleague 6 again deliberately altered the settings of the claimant's GN machine.

11. In arriving at its conclusions the Tribunal has needed to stick to these issues, as they were arrived at arduously, after 2 case management hearings and a Scott schedule, and the version above differs from a grievance lodged on 20 February 2017[13], the claim form[14], the Scott schedule[15], and in the first case management hearing[16].

12. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading[17]. Nor must a Tribunal stick slavishly to them[18]. Nevertheless the respondent has to know the case it has to meet, and the Tribunal did not feel able to accept other allegations made by the claimant for the first time in cross examination, particularly bearing in mind the specific statement in the case management order.

13. This was the more difficult as the claimant did not provide a detailed witness statement, and nor did he give oral evidence or cross examine the witnesses about many of the issues in the list. The Tribunal did all that it could to try to ensure that there was a fair hearing, but this could not extend to cross examination of the respondent's witnesses.

Uncontentious facts

14. The claimant was a production operative. The respondent makes plastic trays for food products. There are 3 shifts, each with its own manager. The claimant started in 2014 in Colleague 6's shift. He moved in 2016 to another shift, the shift manager being Colleague 2. There he worked until 10-13 July 2017. This was at his request, as he was unhappy about working for Colleague 6.

15. On 20 February 2017 the claimant lodged a grievance. He wanted Colleague 6 to stop harassing him. He did not say in what way he was being harassed. He did not wish to engage in any form of conversation with him other than job-related matters. He was not a homosexual; he wrote that he *"do not stick it up the ass".* He said that 6 days had wrongly been taken out of his holiday entitlement.

16. Colleague 5 dealt with the grievance hearing. Later he also dealt with the claimant's appeal against dismissal. The claimant considers him to be a good man, and has no complaint against him personally. On 24 March

[13] Page 164
[14] Box 8.2, page 8
[15] Page 38
[16] Page 31
[17] Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN
[18] Saha v Capita UKEAT/0080/18/DM

2017 Colleague 5 dismissed the grievance[19]. He found that Colleague 6 operated normal working practices on machine settings and adjustment. Although he had asked for details of what was said to have happened, with dates, times there had been no specific evidence nor witnesses, even though the claimant said there were others in the car at the time. For these reasons he was not able to uphold the complaint. It had been said that he was homosexual (but there was no complaint of inappropriate conduct towards him). The holiday entitlement claim was not upheld. Copies of all the investigator's notes were sent to the claimant.

17. On 24 April 2017 the claimant appealed this decision to Colleague F[20]. He referred to *"homosexual advances towards me"* and that holiday had been taken from him *"due to homosexual advances at me".* No details were provided.

18. On 09 May 2017 the decision was upheld[21] by Colleague F. As to the homosexuality concern the letter stated that this was removed from the appeal as the claimant had said *"forget about it as it is not an issue… any more".* The claimant accepts that this is what he said to Colleague F. There had been a review of the holiday entitlement and the days taken and that was no evidence that he lost any holiday entitlement, or not been paid for holiday taken.

19. The claimant worked under Colleague 2 without serious issue (although he was said to have been somewhat disruptive, and pushed the boundaries on tea breaks, as everyone did), until his manager, Colleague 2, was away and then Colleague 6 was duty manager for 3 successive nights, 10/11, 11/12 and 12/13 July 2017.

20. On the 3rd night Colleague 6 sent for the human resources manager, Colleague 3, at 05:30, and she attended swiftly. Her normal hours are 9-5. After a meeting with both the claimant and Colleague 6 she suspended the claimant. A letter was sent to him[22] stating that this was for breaching company rules and inappropriate behaviour towards a manager (Colleague 6).

21. There was a full investigation by a manager, Colleague A. He interviewed members of staff, Colleagues B-E. The claimant said that the allegations were fabricated. It was all choreographed by Colleague 6. Everything was twisted and distorted. Colleague A explored this with all the people he interviewed and they all denied that they said anything other than what they saw.

22. While there is no document setting out what the allegations were, this was made clear by Colleague A in his interview of the claimant on 20 July 2017[23]. It was taking breaks of up to 17 minutes when these should have been 10 minutes, ripping off his beard snood and refusing to put it back on for some time and only after argument, stopping his machine without good reason, and on other occasions leaving it running unattended, and gross

[19] Page 191-192
[20] Page 207
[21] Page 216
[22] Page 231, dated 13 July 2017
[23] Page 238-245

insubordination towards his manager (Colleague 6) detailed in the interview.

23. On 11 August 2017 a letter was sent by the human resources manager to the claimant[24]. He was required to attend a disciplinary hearing on 15 August 2017. All the notes of interviews were provided.

24. There was a disciplinary hearing on 21 August 2017 taken by Colleague 1[25]. The claimant has no issue with Colleague 1, whom he regards as he does Colleague 5 (disciplinary appeal and grievance hearings). In it the claimant accepted that he had left his machine running unattended on one occasion, but that was because it was running so slowly[26]. He denied everything else, saying that it was all fabricated. The outcome was summary dismissal. The letter of dismissal[27] did not mention the breaks but found the other matters proved, set out as 3 things, removal of the beard snood, leaving the machine running and failing to communicate with his manager to the extent of gross insubordination.

25. On 08 September 2017 the claimant appealed[28]. All the statements had been choreographed. Colleague 6 had changed his account. The allegations were false and baseless. Before he moved shift he had never had any disciplinary matter with Colleague 6. It was all planned and directed at him as systematic harassment and discrimination as happened when he had worked in Colleague 6's shift. He denied taking off his snood, or leaving the machine running and unattended. His version of events was not properly understood.

26. On 18 September 2017 there was an appeal hearing taken by Colleague 5[29]. The claimant said that Colleague 6 had persuaded Colleagues B-F to lie. He could not say why. His relationship with Colleague 6 was such that he would speak to him only about work matters.

27. On 25 September 2017 Colleague 5 dismissed the appeal[30]. He upheld the dismissal for the same reasons.

The claimant's case

28. The dismissal was the culmination of Colleague 6's sexual harassment of him. The respondent fabricated documents. There was an induction note with yes/no boxes, none of which were ticked. This was a fabricated document. There was a letter from Universal Credit after his dismissal dated 02 November 2017 saying that he would not suffer a deduction as his employer had not responded to a questionnaire asking about reasons for dismissal, but in the bundle was a document dated 31st October 2017 saying that he had been dismissed for misconduct. He said that the company document was therefore a forgery because of the universal credit letter. This meant that nothing produced by the respondent could be

[24] Page 267-268
[25] Page 273-277
[26] Page 276
[27] 21 August 2017, page 278-279
[28] Page 280-282
[29] Notes pages 287-292
[30] Page 294

relied on. He had written many times, but conveniently they were no longer in his human resources file.

29. He had only withdrawn allegations of inappropriate behaviour outside work because a judge had told him to do that in a case management hearing.

30. He had been deprived of 6 days holiday when he wanted to go to the Gambia (and this was the focus of much of his cross-examination of witnesses), but Colleague E had 28 days holiday that year, and he only had 23½ days even though they had started work on the same day. This was all part of the harassment he had suffered from Colleague 6, who was responsible for approving his holiday.

31. There had been a sustained campaign of calling him homosexual. Everything about the dismissal was unfair, because Colleague 6 had orchestrated the whole thing when he had covered his new manager's absence.

32. When he first arrived he had been at work and bent over, and Colleague 6 had said *"I'll have a bit of that".* He had also asked about the claimant's sisters, saying they must be beautiful as he was so handsome.

33. There were various inconsistencies in witness statements.

Submissions

34. I made a detailed typed record of proceedings and the submissions, which were of 1½ hours for each party, and which can be read if required by a higher Court.

35. Counsel for the respondent pointed out that the claim was exclusively under S26 of the EqA. There was no harassment claim. Most of the matters in the list of issues, as described in the evidence and as challenged in cross examination had no sexual element at all. Of the 2 that did, (b) and (i) the claimant had given no oral evidence, had provided only a 2 page witness statement which contained nothing about these allegations, and he had not cross examined about them.

36. The allegations had not been the same – they had changed at every stage, even to making new allegations in oral evidence (as above).

37. For the claimant's case to be found to be proved there had to be a conspiracy of Colleague 6 and Colleagues B-F inclusive. This was not credible.

38. There was nothing in the holiday point – the claimant had simply failed to appreciate that the holiday year had changed, so that the 23½ days was his correct entitlement for the period March to December 2016. It had been explained to him in the grievance hearing. There had been no deduction from his entitlement. That of Colleague E might be because she had carried some forward from the last period, but in any event if she had more than she was entitled to that was unconnected with the claimant. Colleague 6 could not have reduced the holiday entitlement of the claimant as human resources were the only people who could input that.

39. As to unfair dismissal, the procedure could not be faulted and the claimant went out of his way to say that he regarded those who had conducted the grievance hearing and the dismissal and appeal hearings as fair. He had been provided with all the evidence, and had every opportunity to make his case.

40. There had been no presumption that the outcome had to be dismissal, but thought given to whether there was an alternative. It had weighed with the decision maker in the appeal that despite his denials the claimant had accepted in his disciplinary hearing that he had left his machine running.

41. The claimant spoke from the heart. He was particularly exercised about the holiday, as in 2016 he had been planning to go to the Gambia (where he was born: he came in 2001 and is now a British citizen) in order to marry his fiancée. This had its cultural complexities and he had not been able to go: the wedding had not happened. He objected to the way Colleague 6 had conducted himself. All he wanted was to go to work and earn to support himself and his family back in Gambia. He felt that he had not done himself justice in the hearing though inexperience in how to handle a case but he was telling the truth. It was all twisted as a device to get rid of him. He provided a schedule of what he felt were inconsistencies in the evidence of those interviewed. He felt that the whole process was a mocking exercise by his colleagues. All he had wanted was to get away from Colleague 6, and had done so, but when his new manager was away, and Colleague 6 stood in, pretexts were found to get him dismissed. His address can be read by a higher Court if required.

Findings of fact

Discrimination claim

42. The claimant presents as someone with a genuine sense of grievance, but there is not the evidence for his claims to succeed.

43. The claim is predicated on there being a large scale conspiracy to get him dismissed for sexual harassment reasons. There are several difficulties with that assertion and the claim.

    a. First it requires Colleagues B-E and 3 to be complicit in it. Colleague 6 was not their manager, and there is no reason for them to do so.

    b. The claimant did not say that he was friendless, but could find no one to support what he said, either on the 3 shifts, or as to adverse treatment before. He said they were afraid to do so, and we take account of that possibility.

    c. There is the moving nature of the allegations, which differed every time he set them out, with further allegations raised for the first time at the hearing.

    d. The assertions are not particularised save (b) which referred to a *"hug"* on 01 June 2015.

e. There was no oral evidence or cross examination about the matters in the list of issues.

f. Most of them cannot have any sexual element and that is an essential component of a S26(b) claim. There is no S27 harassment claim.

g. The claimant asserts that there were sexual advances by Colleague 6, but save for 2 matters that were in the list for the first case management hearing (and which were left out of the second) there is only the one specific, over 2 years earlier. We did not find credible that the Judge at the case management hearing directed that anything outside work could not be relied on.

h. The claimant accepted in his disciplinary hearing that he had left his machine running, and this was regarded as one of the most serious matters (the respondent produces food trays and there is no production process between the product leaving the factory and being used for food for supermarket customers so oversight is crucial – the beard snood is important for the same reason). It is not consistent with a sexual harassment reason. The claimant's assertion that everything was made up is, in this important particular it was not, by his own admission. In the disciplinary hearing the claimant accepted that it was so, and offered the mitigation that it was slow, and that a colleague was coming to attend it. The colleague (B) said that she went to the machine only because the claimant left it running unattended.

44. The claimant's assertion that the form sent to the universal credit department was a forgery is not credible. The letter requesting the form asked for a reply in 7 days: the form was sent in 10, and the UC letter was dated a few days after that. The UC letter was very probably prepared before the form reached the department and the file. This was to the advantage of the claimant as he was not sanctioned by the UC department. That a form had not got the yes/no sections circled was undoubtedly human error. Since the form was to sign him off for a pay increment and he was sent a letter congratulating him passing the training there is nothing in this point.

45. The claimant spent a long time seeking to show that there were inconsistencies in the evidence put before the disciplinary hearing. There was certainly one, which was that there were two different accounts as to who it was that eventually persuaded the claimant to leave the shop floor and discuss matters in the training room. That misses the point, for the claimant accepts that he was highly agitated then, and refused to speak to, or even look at, his manager that evening. The detail of who persuaded him to go up to the training room is inconsequential and does not bear on the facts considered by those dealing with disciplinary and appeal hearings. Other differences are in reality not: Colleague 6 came on duty at 2am and used the date applicable from midnight. Those starting work at 10pm (Colleagues A-E) used the date they started work – one earlier. We resolved this by going through all the documents and annotating them as shift 1, 2 or 3. The table provided by the claimant does not give any cause

to doubt the essential credibility of the evidence provided to the person dismissing the claimant. Even if they made mistakes about exactly what happened when, it is clear that they were telling of things that happened, and whether it was shift 1, 2 or 3 is not particularly important. Colleague 6 was able to give a clear account of what happened on each shift, and we accept that evidence as factually correct.

46. The allegations do not fit within S26(1)(b), save for one which was not established. We considered that it could be argued that the other allegations could be argued to fall within S26(1)(a) as related to a protected characteristic. The difficulty with that argument is that a shift manager routinely adjusts the machines of those he manages. It is part of his job. There is nothing to indicate that anything done to the machines operated by the claimant was out of the ordinary.

47. The claimant feels (such was his evidence) that Colleague 6 wants a sexual relationship with him. There is no evidence that could lead to such a finding. An issue not before us was of an asserted touching on the leg in a car. However we refer to it. The claimant spoke in his submissions of his distress (even now) – at the very least great discomfort – at attending a cremation for the first time instead of a burial. While Colleague 6 denied it occurred, if it did it is equally consistent with reassurance. There were others in the car, but no allegation was made at the time. The claimant asserted that years later Colleague 6 was suborning him by ill treatment at work to induce him into a sexual relationship: but while complaining of ill treatment he makes no allegation of any such approach in parallel with the asserted ill treatment. The human resources experience was of frequent visits complaining of many things. These are just more complaints from the claimant unconnected with sexuality.

48. On the evidence before us the claimant has not met the burden of proof upon him. We have borne in mind the shifting burden of proof in discrimination claims. We conclude that that on the evidence before us the burden of proof does not shift to the respondent. If it had the respondent has discharged it

49. For all these reasons the claim for sexual harassment does not succeed.

50. We observe that even if there was a heading of harassment contrary to S27 it would not, on our findings of fact, succeed. It is plain that the claimant has an antipathy towards Colleague 6. He would not even look at him on the night: that was the evidence of the human resources manager, Colleague 3. She was new to the company and there is no reason why she might be part of a conspiracy. It was her clear evidence that when she was called to the place of work at about 5am (and she works normal office hours so it was plainly regarded as important) the claimant would not speak to anyone but her – not Colleague 6 or Colleagues A-E who were all present. That could be because he was so angry at being *"framed"*, but as he accepted that he had left his machine running unattended that cannot be the entirety of the case. We accept that the evidence of Colleague 3 and of A-E was what they saw. It was of a man who was very agitated every time his manager approached his machine and refusing to engage with him, walking off when he approached, usually switching off

the machine he was working on, and on the 3rd shift storming off throwing down his beard snood.

51. The claimant said in his oral evidence that everything happened on that 3rd shift and the other 2 were uneventful. However Colleague 6 had emailed Colleague 3 on the first shift as Colleague 6 had emailed her about it that night[31]. It is unlikely that a plot would be laid so deep as to email and then wait 2 days.

52. It is highly unlikely that the asserted conspiracy extended to the human resources department filleting the file to excise the written complaints he said he had made. Either Colleague 3 would have had to have done it, her predecessor or Colleague 6 get access to the file to do so. There is no reason to think a departing human resources person would have any reason to do so. Colleague 3 was new and was not said to be hostile to the claimant, and it is not likely that Colleague 6 got access to the file, or got Colleague 3 to remove papers from it.

53. The evidence of the claimant varied in this regard, being first of letters then of verbal complaints. The evidence of the human resources person (Colleague 3) was that the claimant would often attend their office often to complain about one thing or another. The claimant has an excellent command of the English language, but he tends to speak quickly and quietly about things he finds important and has an accent at times hard to understand. With these factors in addition to the way the matters he complained about varied, and the lack of any particularity (the allegations made in these proceedings being an exemplar) it is entirely understandable that matters really of concern to the claimant were not understood.

54. The claimant seems to assert both that he was mocked by Colleague 6 for being homosexual (and Colleague 6 knowing that he is not) and that he was being ill treated to attempt to get him to submit to a same sex sexual relationship. This is an inherently unlikely combination. With all the other difficulties with the claimant's case we find that neither is the case.

55. On the balance of probabilities we find that the position is that at some point early on in the claimant's employment there was, from unidentified colleagues, some *"banter"* – in an Employment Tribunal always something the speaker finds amusing and the hearer finds insulting – to the effect that the claimant is gay. He finds that very insulting. Coupled with his upset over not being allowed holiday to go to the Gambia, this infected his perception of the working environment to the extent that the claimant sought to be moved from Colleague 6's team, and he was. He was left with a deep antipathy towards, and suspicion of, Colleague 6 that has no evidential basis, and which manifested itself in his actions towards Colleague 6 on the three shifts in July 2017.

56. It must be a matter of regret that the claimant never told anyone in the respondent WHY his *"lost"* 6 days were so important to him. Perhaps he could then have taken an advance on his accrued leave. That did not emerge (we think) until this hearing. The effect on him of not being able to

[31] Page 221

go to Gambia then has, we consider from the way he presented his case. It was the starting point for his cross examinations and he spent a lot of time on the point. It has impacted hugely on his approach to the respondent and those with whom he worked. In particular he blames Colleague 6 for denying him that holiday (entirely erroneously) and so he blames Colleague 6 for the consequences (for which it seems to us Colleague 6 is not responsible in any way, and of which he was probably unaware). This has been a causative factor in the events of 10-13 July 2017 leading to the dismissal of the claimant.

57. **Put shortly, the claimant had a genuine but misplaced resentment against Colleague 6 that boiled over in the 3 night shifts when Colleague 6 was deputising as manager of the claimant's new shift, and which led him to unwise actions, which came to a culmination towards the end of the 3rd such shift, leading to his suspension and dismissal.**

58. We raised the possibility of there being a jurisdictional problem with time limits. This is set out in section 8 of the second case management order. This was not a matter addressed in Counsel's submissions before we raised it at the end of the hearing. Because the claims fail on the merits it is not necessary to consider striking out the claims for a jurisdictional reason. As the claimant asserts that his dismissal was the culmination of a campaign of harassment it is arguable that this is a series of asserted events, and so in time. If it were not then given that the unfair dismissal claim is agreed to be in time and was said to be motivated by a background of asserted sexual harassment we would probably have considered it just and equitable to allow it to continue, if it were out of time. However this is academic given that the discrimination claim fails on the merits.

Unfair dismissal claim

59. The Claim for unfair dismissal also fails. We consider that the guidance of the Court of Appeal in *Jhuti* means that it could not possibly succeed. That claim was about an asserted public interest disclosure, but it was a S103A unfair dismissal claim and applies equally here. (There are different burden of proof criteria for a S103A claim, but that is not relevant to this point.) The claimant accepted that the person dismissing him and the person taking the appeal were both entirely genuine. He accepted that if he had done the things that he was accused of doing this was gross misconduct. He accepted that dismissal for such gross misconduct would not be unfair. The investigator expressly asked Colleagues B-E about the possibility of fabricated statements. It is apparent that the ACAS Code was followed.

60. Given the evidence in front of them both the witnesses who dismissed the claimant and rejected his appeal have established that they had genuine belief on reasonable grounds after proper investigation in gross misconduct. The dismissing officer did consider whether anything else was appropriate and concluded not. He gave sound reasons. Given that the matters were of attitude towards management, and health and safety matters in a factory where these are critical for product delivery it could not

be said that dismissal for this gross misconduct was outside the range of responses of the reasonable employer.

61. That means that even if the claimant was right, and it was all orchestrated by Colleague 6 it would still be a fair dismissal. The claimant would think that a harsh and unfair outcome if that were the reason we dismissed his claim. While that means the claim cannot succeed we also find, as a fact, that it was not so orchestrated. We have no doubt that the claimant genuinely believes that it was, but after looking carefully at all the evidence, assertions and submissions (and making full allowance for the difficulties faced by a litigant in person) we find that he is mistaken. It would have needed to be a large conspiracy, and Colleague 6 was not the usual manager of Colleagues B-E, and nor would it account for Colleague 3 being complicit. There was no evidence on which we could so find.

62. Colleague 6 did not harass the claimant sexually or otherwise. He did not tamper with the claimant's holiday entitlement or prevent him going to the Gambia in 2016. The claimant just did not have enough holiday entitlement at the time. Colleague 6 did not invent allegations. He did not get the others to lie.

63. Accordingly the unfair dismissal claim is also dismissed.

64. We record that we considered all the evidence put before us before arriving at any conclusions, and did not deal with the discrimination claim in isolation. To some extent the factual matrix is applicable to both claims, but we have set them out separately as legally they are distinct claims.

Employment Judge Housego

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Date 22 February 2019