



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr Paul Jones

**Respondent:** The Royal Bank of Scotland PLC

**HELD AT:** Manchester

**ON:** 19 October 2017

**BEFORE:** Employment Judge B Hodgson

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Miss J Dunlop, Solicitor

## RESERVED JUDGMENT

The Judgment of the Tribunal is that the claim of unfair dismissal is not well-founded and is dismissed.

## REASONS

### Background

1. This was claim of unfair dismissal, the claimant having been expressly dismissed by the respondent.

2. In his claim form, the claimant made reference to an additional claim stated as being "senior management jealous of my outside interest" but he accepted that this was not a discrete claim as such but rather formed part of his allegation that his dismissal was unfair.

### **Issues**

3. The reason given by the respondent for their decision to dismiss was gross misconduct.
4. The issues raised for the Tribunal to determine in summary were as follows:
  - 4.1. Did the respondent hold a genuine belief in the reason for dismissal at the time it took its decision?
  - 4.2. Was there a proper and reasonable investigation into the allegations of gross misconduct?
  - 4.3. Was the respondent's decision to dismiss one which was reasonably available to it to reach?
  - 4.4. Was summary dismissal a reasonable sanction in all the circumstances?

### **Facts**

5. The claimant gave evidence on his own behalf. The respondent called the dismissing officer David Thorniley (Operations Manager) and the appeal officer Carmen McAdam (Business Manager).
6. The parties had agreed a joint bundle of documents and references within this Judgment to documents are by reference to such bundle as paginated.
7. The Tribunal reached its conclusions on the following relevant facts having considered all evidence, both oral and documentary, based on the balance of probabilities.
8. It was common ground between the parties that the claimant commenced employment with the respondent on 27 May 2013 (although the date stated in his contract is 29 May – page 36), having previously been engaged by the respondent as an agency worker. He was employed as an Operational Specialist.
9. The respondent has a Disciplinary Policy [pages 97 – 102] together with what is described as a "Disciplinary Support Pack" [pages 103 – 135]. Examples of gross misconduct within the Disciplinary Policy [page 98] include "bullying or harassment".
10. There is also a "Resolving Issues at Work" policy [pages 50 – 55] together with a "Resolving Issues at Work Support pack" [pages 56 – 85]. This latter document contains [page 63] a definition of harassment as being "any form of behaviour that is unwanted and unreciprocated that creates a hostile, degrading, offensive

environment" and goes on to give examples of actions that may be considered harassment. These include

- Language of a suggestive or explicit nature
  - Unwanted propositions
  - Jokes of a sexual or explicit nature
11. In the afternoon of 25 November 2016, the claimant's team leader, Cath Clarke, called the claimant into a meeting with Michelle Adams, the Operations Manager. The claimant was told that the meeting was to discuss a conversation he had had the previous day with a work colleague, Laura Merrin.
  12. The essence of the content of the meeting was that there had been an allegation that the conversation the claimant had had with Laura Merrin had been inappropriate. The respondent produced notes of the meeting [pages 171 – 174]. The claimant denied that the conversation he had had could properly be categorised as inappropriate. There was discussion over the claimant's outside of work activity linked to modelling and make-up.
  13. The outside of work activity requires expansion as it features throughout the investigation and disciplinary process which followed. The claimant advertised on the internet an activity named "Fallen from Heaven" which describes itself as "Model Management & Make-up Artistry". It names the claimant as the contact and gives his mobile number [page 148]. This activity was linked directly or indirectly to two of the four allegations ultimately made. Notwithstanding that it operated from premises rented by the claimant and that he had had business cards printed, he was throughout insistent that it was not a business but rather simply a hobby. As part of the claimant running the activity, he participated in a Fashion Show on or about 16 July 2016 which had relevance to one of the subsequent allegations.
  14. The respondent's policy is that it has no objection to employees being engaged in outside of work business activities provided there is no conflict of interest. The respondent's position was that it engaged with the claimant on the subject in the various meetings as it was relevant to at least some of the allegations. There was no conclusion drawn by the respondent that the claimant should be disciplined for the activity itself but it did consider the impact on his credibility when assessing allegations that largely amounted to one person's word against another. In the investigation meeting held on 16 December 2016 [page 188], it was noted that the claimant, in describing the purpose of setting up the activity, stated that he had two nephews, one being a Graphic Designer and the other a Hairdresser and that he was "testing the waters" for them. It emerged at the disciplinary hearing on 19 January 2017 [page 250] that his nephews were in fact aged 11 and 14 and still at school but the claimant stated that what he had actually said in the earlier meeting was that they had wanted to follow those professions.

15. The claimant was told that he was being suspended pending investigation and was given a letter confirming that position [pages 175 – 176]. The letter confirmed that the claimant had been "suspended from duties" which was described as "a precautionary measure while we carry out an investigation into alleged sexual harassment". The claimant was asked to hand over his desk key and security pass and escorted out of the premises.
16. Cath Clark subsequently (on 28 November 2016) held two meetings, minuted by Paula Kinsella. The first was with Laura Merrin [page 178]. In that meeting Laura Merrin outlined what she recalled of the conversation she had had with the claimant on 24 November. The second meeting was with Sarah Mir [page 179] who had been in the vicinity but advised that she had not in fact heard the conversation in question.
17. A subsequent meeting was held by Michelle Adams with Jen Lowe on 13 December, minuted by Cath Clare [page 180].
18. There had been a Team Leader meeting on 2 December at which Paula Kinsella had informed her senior colleagues that the claimant had been suspended and the outline reasons for this. Jen Lowe had been present and had thereupon raised a further allegation of a prior incident involving the claimant, the allegation being that the claimant had made inappropriate comments and handed to her an inappropriate drawing.
19. Michelle Adams then met with Paula Kinsella on that same day, she being the person to whom Laura Merrin had made her initial complaint [pages 181 – 182]
20. Following these meetings Michelle Adams met again with the claimant on 16 December 2016. The new allegation was put to him for comment, his reply being that he did not remember the circumstances of the alleged incident. There was further discussion of the claimant's outside activity. The claimant's website included the photograph of a work colleague of the claimant, Nicole McGeown. The meeting was held in two parts [pages 185 – 190 and 191 – 194].
21. In the meantime, Michelle Adams held what was described as a "fact finding meeting" with Nicole McGeown [pages 195 – 200] who alleged that, following a number of approaches by the claimant, had agreed to model at the Fashion Show but that she had been made to feel uncomfortable by being asked to model swimwear and being videoed by the claimant. It is not clear how and in what circumstances this additional allegation came to light. The claimant denied any inappropriate behaviour towards Nicole McGeown.
22. The continued suspension of the claimant pending further investigation was confirmed.
23. There was a further investigatory meeting with Andrew Tattersall, with whom Laura Merrin had spoken about the conversation on 24 November, held by Michelle Adams on 20 December 2016 [pages 201 – 202].

24. Michelle Adams met with Sarah Mir, who had worked with the claimant in connection with his outside activity, including with Nicole McGeown, also on 20 December [pages 203 – 205].
25. The following day, 21 December, a meeting was held with Shevaughn Hurndall by Gillian McKinley at which Shevaughn Hurndall made a number of additional allegations of inappropriate behaviour towards her by the claimant [pages 206 – 207]. Again, it is unclear how and in what circumstances these additional allegations came to light.
26. The claimant remained on suspension. Following the Christmas and New Year break Michelle Adams held a further meeting with the claimant, on 9 January to explain where they had got to with their internal investigations and the additional allegations that had now arisen [pages 208 – 210].
27. As a consequence of observations made by the claimant, Michelle Adams followed up that discussion with a further clarification meeting with Shevaughn Hurndall on the same day 9 January 2017 [page 212].
28. By letter dated 11 January 2017 [pages 213 – 216] the claimant was called to a disciplinary meeting to be held on Thursday 19 January. This letter was sent by Mr David Thorniley.
29. It set out 4 allegations as follows:
  - 29.1. Allegation 1 – It is alleged that you made an inappropriate and unwanted proposition to Laura Merrin on 24 November 2016 in very close physical proximity that made her feel uncomfortable and violated.
  - 29.2. Allegation 2 – It is alleged that you made persistent inappropriate approaches to Nicole McGeown throughout April to June 2016 that have resulted in making her feel extremely uncomfortable in your presence.
  - 29.3. Allegation 3 – It is alleged that you made a joke of a sexual/explicit nature to Jen Lowe around 18 months ago that made her feel very uncomfortable.
  - 29.4. Allegation 4 – It is alleged that you made a joke of a sexual/explicit nature to Shevaughn Hurndall early part of 2016 that made her feel very uncomfortable and embarrassed.
30. The letter made reference to the respondent's Resolving Issues at Work Support Pack and extracted from it, including a definition and examples of sexual harassment.
31. The letter went on to set out "Background" giving more detail surrounding each of the allegations.
32. Under the heading "possible outcome" the letter states that "I am making you aware because of the serious nature of this allegation, a possible outcome of this

meeting is that you may be dismissed from our employment without notice or pay in lieu of notice".

33. The letter further enclosed minutes of the various meetings that had taken place, each one being set out within the body of the letter. It also enclosed the respondent's Disciplinary Policy and Support Pack together with the Resolving Issues at Work Policy and Support Pack.. The claimant was advised of his right to be accompanied at the forthcoming disciplinary hearing.
34. The hearing proceeded on 19 January conducted by Mr Thorniley. At the outset of the meeting, the claimant was reminded of the right to be accompanied and confirmed that he did not wish to be. He confirmed that he had considered all the documentation enclosed within the invitation letter.
35. The meeting was minuted [pages 248 – 278].
36. As a result of a number of issues raised by the claimant in response to the allegations – all of which were denied by the claimant - Mr Thorniley considered that further investigation was required.
37. On 23 January 2017 he interviewed Nicole McGeown [pages 291 – 299]. On 24 January he interviewed Jen Lowe [pages 316 – 318], Laura Merrin [pages 326 – 329] and Paula Kinsella [pages 333 – 334]. He held further meetings on 26 January with Sarah Mir [pages 342 – 346] and also with Shevaughn Hurndall [pages 351 – 354].
38. Following his follow up investigation meetings Mr Thorniley wrote again to the claimant by letter dated 27 January [pages 355 – 358] reconvening the disciplinary hearing for 2 February 2017 (incorrectly stated in the letter to be 2 March) referring to a discussion with the claimant on that day to agree that date. Additional to the documents previously enclosed were the notes of the follow up meetings conducted by Mr Thorniley and copies of additional documentation, namely two press cuttings.
39. The reconvened disciplinary hearing with the claimant proceeded on 2 February 2017 [pages 363 - 400]. The claimant maintained his denial of all allegations.
40. Mr Thorniley held a further, subsequent, meeting with Andrew Tattersall on 3 February 2017 [407 – 409]. This included a somewhat surprising question from Mr Thorniley as to whether or not Andrew Tattersall "knew if [the claimant] only socialised with young girls" to which the reply was that Mr Tattersall only had a professional relationship with the claimant.
41. The outcome of the disciplinary hearing was confirmed by a lengthy letter dated 14 February 2017 from Mr Thorniley [pages 436 – 448] in which he set out his detailed analysis, findings and conclusions in respect of each of the four allegations.
42. His summary conclusion is that "... taking all of this information into consideration I believe that you have displayed behaviours that are considered to be sexual harassment in respect of the 4 allegations made against you". He goes on to say

"For this reason I have decided that it is appropriate to dismiss you from our employment".

43. The claimant was notified in the dismissal letter of his right to appeal which he exercised by letter dated 21 February [pages 449 – 451].
44. The appeal was conducted by Carmen McAdam who wrote to the claimant by letter dated 28 February [page 453] calling the claimant to an appeal hearing on 8 March.
45. The hearing proceeded on that date [pages 454 – 467].
46. As a consequence of the matters raised by the claimant at the appeal hearing, Carmen McAdam decided that it was appropriate to conduct further interviews with Jen Lowe, Paula Kinsella, Lee Housley, Sarah Mir and Nicole McGeown [pages 470 – 477].
47. Carmen McAdams' decision was confirmed by letter dated 12 April 2017 [pages 481 – 487]. The conclusion was that the appeal was rejected and the summary dismissal of the claimant confirmed.

## Law

48. Section 98(1) of the Employment Rights Act 1996 states:

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.

49. The "conduct of the employee" is one of the reasons set out in subsection (2)

50. Section 98(4) of the Employment Rights Act 1996 states:

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.

51. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof.
52. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct.
53. The case of *British Home Stores Limited v Burchell (1980) ICR 303* proposes a three-fold test. The Tribunal must decide whether:
  - 53.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;
  - 53.2. it had in mind reasonable grounds upon which to sustain that belief; and
  - 53.3. at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances (which include the gravity of the charges and the potential impact upon the employee – *A v B 2003 IRLR 405*).
54. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances
55. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (*Iceland Frozen Foods v Jones 1983 ICR 17*). This applies to procedural as well as substantive matters (*Sainsburys v Hitt 2003 ICR 111*).

### Submissions

56. At the culmination of the hearing, there was insufficient time for the Tribunal to hear the parties' submissions and the parties were therefore directed to submit written submissions. This was directed to be sequential, starting with the respondent, to give the claimant the opportunity to consider those submissions first before submitting his own.
57. The written submissions of both parties, together with the case law referred to, were fully considered by and extremely helpful to the Tribunal in reaching its decision.

### Conclusions

*The reason given by the respondent for their decision to dismiss was gross misconduct. Did the respondent hold a genuine belief in such reason for dismissal at the time it took its decision?*

58. The claimant argued that the allegations of misconduct were not the reason for his dismissal. This is where the allegation of "jealousy" as referred to in the ET1 Claim Form is said to come into play. There was no evidence to support this contention, beyond a perception on the part of the claimant.



59. When asked about other possible motivation for the decision, the claimant suggested that his high level of performance may also have been the reason in that it embarrassed his superiors (and in particular his line manager) to be so reliant upon him. It was not in dispute between the parties that the claimant was a strong performer but the Tribunal had difficulty in accepting this as a realistic proposition.
60. The respondent's case was that the allegations of conduct as found formed the reason for its decision.
61. The claimant cited in support of his contentions evidence he believed showed that the outcome was predetermined at any early stage. He referred to the fact that a "disciplinary hearer" was appointed as early as 28 November 2016 [page 88] which only came to light at the stage of disclosure. Mr Thorniley accepted that he had been asked to be a disciplinary hearer prior to Christmas even though the investigation at least in part ran into the new year. The claimant also relied on Mr Thorniley's question to Mr Tattersall regarding "young girls". The respondent's position was that it was simply procedural to identify a potential disciplinary hearer in the event that the matter were to move to a disciplinary hearing.
62. The Tribunal understands the claimant's interpretation of this evidence but it effectively amounts to a contention that the entire investigative and disciplinary process was a sham. The Tribunal would have to accept a conspiracy theory on a grand scale to uphold this contention on the part of the claimant. There were four individual allegations raised against him which were investigated by a number of senior individuals and then there were the roles of the dismissing officer and the appeal officer. The crux of the matter is whether it was reasonable to accept those allegations as credible in the face of the claimant's denial.
63. On the evidence presented, the Tribunal was satisfied that the allegations of misconduct as found were the reason, and certainly the principal reason, for dismissal and both the dismissing officer and the appeal officer genuinely believed those allegations at the time they made their respective decisions.

*Was there a proper and reasonable investigation into the allegation of gross misconduct?*

64. The Tribunal considered the evidence and contentions made in the round, including the clear fact that the respondent is a large organisation with substantial administrative resources, and in the context of the ACAS Code.
65. On the face of matters, there was a full and extensive investigative process involving complainants and witnesses being interviewed on more than one occasion.
66. The claimant criticised the investigative process in a number of ways:
- 66.1. the emergence of the additional allegations subsequent to the initial allegation amounted to a fishing expedition on the part of the respondent

- 66.2. there was inappropriate merger between note taking, investigating and giving evidence which tainted the process in that witnesses were aware of evidence given by others as a result of being present at other investigatory or fact-finding interviews
  - 66.3. there had been inadequate investigation by not talking to other colleagues who may have witnessed the immediate aftermath of the initial conversation with Laura Merrin as repeatedly urged by the claimant
  - 66.4. there was a failure to request the mobile telephone records of Nicole McGeown as repeatedly urged by the claimant
  - 66.5. the fact that two of the complainants had left the respondent's employment prior to the end of the disciplinary process prevented their allegations being fully explored and tested
67. The respondent's reply to these matters was as follows:
- 67.1. the respondent's witnesses accepted that they could not explain how the latter two allegations had emerged
  - 67.2. there were issues over availability of staff in terms of conducting the investigation but nothing that could be reasonably described as materially prejudicial occurred as a consequence
  - 67.3. the allegation was made to Paula Kinsella who had been spoken to as part of the investigation as had Sarah Mir and there were no other relevant witnesses identified
  - 67.4. this was agreed but the decision had been taken on the basis that it was not in dispute that Nicole McGeown remained in contact with the claimant but indicated that she did so more cautiously following the incidents alleged
  - 67.5. this was also agreed but the individuals concerned had been directly interviewed on more than one occasion prior to their leaving the employment of the respondent
68. The Tribunal's conclusions were
- 68.1. the important aspect of the allegations were the content and whether the respondent reasonably found them to be credible rather than how they had emerged
  - 68.2. the Tribunal did not see these issues as having any clear material impact on the process followed and the conclusions reached
  - 68.3. the Tribunal did not, on the evidence available to it, see how a failure to make such further investigation was unreasonable. It was not being alleged that Laura Merrin had displayed any overt distress immediately following the conversation in question which may have been challenged with further

evidence. At the appeal stage, Lee Housley, to whom she had spoken soon after the incident, had been interviewed but he added nothing, and certainly nothing that may be said to support the claimant's position, material to the overall position

68.4. the Tribunal does not see how the failure alleged could have materially impacted on the decision – the records would only have shown ongoing contact between the two individuals which was not in any event in dispute

68.5. it was only at the latter stages of the process that the individuals concerned left the employment of the respondent by which time they had been interviewed on more than one occasion

69. The Tribunal accordingly concluded that the respondent had carried out an investigation that was reasonable in all the circumstances. Further, the Tribunal's view was that, if it were wrong in this conclusion and were it to be the case that any procedural defect was such as to render the decision unfair, there would be a high probability that such defect would have made no material difference to the ultimate outcome

*Was the respondent's decision one which was reasonably available to it to reach?*

70. It is not for the Tribunal to substitute its own view.

71. The individuals making the allegations were interviewed on more than one occasion and maintained their allegations. No evidence emerged that indicated they were fabricating the allegations made – there were no material contradictions or inconsistencies in the content of their various interviews. The respondent was entitled to prefer the individuals' version of events over the denial of the claimant

72. The claimant's own position that he was and, to varying degrees remained, on good terms with the individuals concerned, rather than casting doubt on the veracity of the allegations, supported that they were in fact true – there was no indication or suggestion of personal animosity towards the claimant from any of the complainants.

73. In all the circumstances, the Tribunal was satisfied that the conclusions reached were conclusions reasonably available to the respondent to reach.

*Was summary dismissal a reasonable sanction in all the circumstances?*

74. The allegations amounted to four separate allegations of sexual harassment. The seriousness of such allegations was confirmed in the claimant's invitation to hearing letters and also is made clear within the respondent's policies.

75. The Tribunal considers that it cannot be said that the decision to summarily dismiss in the circumstances was outside the sanctions reasonably available to the respondent to impose.

76. The Tribunal has carefully considered the claimant's arguments which he has skilfully put both orally before the Tribunal and in his written submissions. It is not the Tribunal's role to determine whether or not the allegations are true. There are undoubted questions over a number of aspects of the process undertaken by the respondent but, for the reasons given above, the Tribunal does not find – given the tests the Tribunal must apply to a claim of this nature – that the respondent's process and conclusions fall outside the band of reasonableness. In those circumstances, the Tribunal conclude that the claim must fail and is dismissed accordingly.

Employment Judge B Hodgson

Date 7 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 December 2017

FOR THE TRIBUNAL OFFICE