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# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondents***

Mr A Boukra

**AND**

Veolia ES UK Ltd

**Heard at:** London Central

**On:** 5 March 2018

**Before:** Employment Judge Davidson (Sitting alone)

**Representation**

**For the Claimant:** Mr E Lixandru, of Counsel

**For the Respondent:** Mr D Kew, Human Resources

## RESERVED DECISION - JUDGMENT

It is the decision of the tribunal that the Claimant's claim for unfair dismissal succeeds. A Remedy Hearing will take place on 9 April 2019 to deal with the claimant's request for reinstatement and other remedy issues.

## REASONS

Issues

1. The issues for the hearing were whether:
  - 1.1. the claimant was unfairly dismissed and
  - 1.2. whether the claimant was wrongfully dismissed.

Evidence

2. The tribunal heard evidence from the claimant and Ben Halla (both via an Arabic Algerian interpreter) on behalf of the claimant and from Gary DeGrout (Operations Manager) and Steve Morris (Contract Manager) on behalf of the respondent. In addition, there was an agreed bundle of documents running to some 250 pages. This included a number of character witness statements from various individuals supporting the claimant although none of them were involved in the matters under issue and none of them attended the hearing. The tribunal gave little weight to these statements.

Facts

3. The tribunal found the following facts on the balance of probabilities:
  - 3.1. The respondent provides waste, water and energy management services throughout the United Kingdom. The claimant was employed by the respondent as a Foreman in Haringey from 3 July 2006. He stated that he had worked for the respondent prior to that date under a different name but this was not substantiated. I therefore find he had 11 years' service at the date of dismissal.
  - 3.2. The respondent's disciplinary policy applied to the claimant. This included provisions for dealing with disciplinary hearings where the employee is on sick leave. The policy provides for disciplinary proceedings to carry on despite the employee's sickness in certain situations and includes 'special measures' in such cases which can be applied such as change of venue, sending the employee all the relevant documentation in advance of the hearing and allowing written representations or a representative to attend in place of the employee.
  - 3.3. The claimant had no disciplinary issues during his employment until November 2017. During October 2017, the claimant became concerned that one of his team, Mr Atef Moursi was working 5.5 or 6 hours a day, instead of the usual 8 hours, but still seemed to be paid his full wages. He raised this with his superiors in October 2017. This affected the relationship between the claimant and Mr Moursi.
  - 3.4. On 28 November 2017, the claimant asked Mr Moursi to perform a task and an altercation between the two of them developed. There had already been a disagreement between them earlier in the day. They spoke to each other in Arabic and the conversation was heated. The claimant alleges that Mr Moursi was insulting to him and his mother and called him a racist. His account was that Mr Moursi

was the aggressor. Mr Moursi's account was that the claimant was the aggressor and head-butted him.

- 3.5. The claimant's manager, Hughie Hughes, Environmental Manager, was sitting in a lorry when this took place. After the incident, the claimant confirmed that Mr Hughes told him that he should not behave like that in front of him again to which the claimant accepted that he had 'lost it'. His explanation to the tribunal was that he told Mr Moursi to shut his mouth when Mr Moursi made insulting comments about the claimant's mother. He accepted that their voices sounded raised but this is the way North Africans normally communicate, together with hand gestures. The claimant stated in evidence that his managers shout at him if he does something wrong.
- 3.6. After the incident, Mr Moursi complained that the claimant had physically and verbally abused him. The matter was passed to Billy Brooker, Contract Manager, to investigate.
- 3.7. Mr Brooker met with Mr Moursi on 6 December 2017, with a translator and note-taker present. Mr Moursi gave his account of events including information that Mr Hughes had sat with him for an hour after the incident. In response to hearing Mr Moursi's account, Mr Brooker told Mr Moursi that he 'cannot and will not condone that behaviour' and 'appropriate action will be taken'.
- 3.8. He then met with Mr Hughes who had witnessed the event. Mr Brooker gave Mr Hughes details of the account he had received from Mr Moursi and then asked Mr Hughes for his account. Mr Hughes confirmed he witnessed the claimant and Mr Moursi speaking with raised voices in Arabic, which he did not understand, but did not see a head-butt although they were close to each other physically. He had then spoken to the claimant who apologised and said he had 'totally lost it'. Mr Brooker suggested to Mr Hughes that the claimant had 'shown intent' to head-butt Mr Moursi, which Mr Hughes accepted but restated that he could not confirm that there had been any contact. Mr Hughes stated that he had stayed with Mr Moursi for 2-3 minutes after the incident.
- 3.9. Mr Brooker met with the claimant on 13 December 2017. The claimant gave his account of events and explained that he had asked Mr Moursi to do a job but Mr Moursi objected because he was on his break. Mr Moursi then called the claimant a liar in an aggressive and loud fashion and said abusive words about the claimant and his mother. This upset the claimant and he spoke back to Mr Moursi although he denied hitting him with his head or his body. After that,

Mr Hughes told him that he should not have shouted at Mr Moursi and not to do that again in front of him.

- 3.10. Following the investigation interviews, Mr Brooker compiled an Investigation Summary Report dated 19 December 2017 in which he recommended that a disciplinary hearing should take place for the claimant to answer the allegation that he had used violent and threatening behaviour towards a work colleague.
- 3.11. On 22 December 2017, the claimant went off work sick. He was not suspended at any time.
- 3.12. The claimant was invited to attend a disciplinary hearing to answer the allegation that he had used violent and threatening behaviour towards a Veolia colleague on 24 November 2017. The claimant was unable to attend on the date stipulated, 28 December 2017, due to sickness. He was then asked by the respondent to attend an Occupational Health assessment on 20 February 2018. The report from the Occupational Health professional, Dr Sam Manickarajah, confirmed that the claimant was not fit to attend work but concluded that he was fit to attend a disciplinary hearing.
- 3.13. The respondent then invited the claimant by letter dated 8 March 2018 to attend a disciplinary hearing on 15 March to be conducted by Mr DeGrout. He was informed that failure to confirm his attendance or to give reasons for his non-attendance would be regarded as a disciplinary matter and that the meeting could go ahead in his absence.
- 3.14. On 13 March the claimant sent an email to HR with a copy to Mr DeGrout explaining that he was not fit enough to attend the disciplinary hearing. Mr DeGrout replied advising the claimant to provide medical evidence to justify his absence, failing which the hearing would go ahead without him.
- 3.15. In the meantime, the claimant had contacted Dr Manickarajah who wrote a letter to HR dated 13 March 2018 concluding that there was new evidence and he concluded that the claimant was not currently fit to attend a meeting with management, suggesting a follow-up appointment 4 weeks later. Dr Manickarajah sent the report to the claimant before sending it to the respondent. On 21 March, the OH company confirmed to the claimant that they had released the updated report to the respondent at 16.56 on 13 March 2018.
- 3.16. Although the report had been sent to the respondent on 13 March, Mr DeGrout was not aware of the updated OH advice on 15 March

and decided to proceed with the disciplinary hearing in the claimant's absence. He told the tribunal that he would have considered re-booking the appointment if he had been aware of the updated OH report. Mr Brooker was present in addition to HR and a minute taker. Before starting the meeting, HR attempted to contact the claimant but was unable to do so. After waiting 90 minutes for him to turn up, the meeting went ahead.

- 3.17. Mr Brooker presented the conclusions of his investigation. Mr DeGrout checked the claimant's length of service and whether he had received the disciplinary procedure but asked no questions regarding the investigation. Mr DeGrout appears to have adopted Mr Brooker's conclusions without scrutiny and decided to terminate the claimant's employment with immediate effect having found that the claimant was the aggressor. He had not noticed the discrepancy between Mr Moursi's evidence and Mr Hughes regarding the length of time they had been together after the incident. He did not check with Mr Brooker whether the claimant's account had been put to Mr Moursi for his comments. Although he asked for the claimant's start date, there is no evidence that he took the claimant's length of service into account as a mitigating factor or that he considered the explanation given by the claimant in his investigation interview. There is also no evidence that Mr DeGrout considered any sanction other than dismissal. The dismissal was confirmed by letter dated 16 March although the letter did not set out any reasoning undertaken by Mr DeGrout.
- 3.18. On 19 March, the claimant wrote to Estelle Brachilianoff of the respondent setting out his complaints regarding the way the disciplinary process was handled.
- 3.19. On 21 March 2018, the claimant exercised his right to appeal, basing his appeal on the fact the disciplinary had gone ahead in his absence when he was not well enough to attend. He also requested that Mr Morris did not hear the appeal as he had been involved in the background to the incident and the claimant thought he would act against the claimant's interests. The claimant's evidence was that HR told him to 'take it or leave it' regarding the appeal.
- 3.20. A date was set for the appeal hearing of 3 May 2018. Through his solicitors, the claimant asked for a postponement due to his own sickness and his wife's hospitalisation during pregnancy. He explained the reasons why he did not want Mr Morris to conduct the appeal including the fact that the claimant had made previous written complaints against Mr Morris.

- 3.21. The appeal meeting was re-scheduled for 14 May and was conducted by Mr Morris with the claimant being represented by Pat Calvin of the GMB and Mr Morris being supported by HR with a note taker present. The claimant did not object to Mr Morris conducting the appeal at that stage on the advice of his union representative. At the hearing Ms Carver put forward further grounds of appeal including questioning why the claimant was not suspended, why the disciplinary procedure was not sent to him and why the process was not followed, querying the manager's knowledge of the claimant's sickness position, whether the claimant had received any support and challenging the sanction of dismissal.
- 3.22. Mr Morris dealt with these grounds of appeal but did not conduct a re-hearing. At the conclusion of the appeal hearing, he reserved his decision and wrote to the claimant on 20 May 2018 informing him that he had rejected his appeal. He gave brief responses under each of the headings and concluded that he regarded dismissal as an appropriate sanction. He did not explain what factors he had taken into account or whether he had considered any other sanctions. The claimant was informed that there was no further right of appeal.

#### Law

4. The relevant law is set out in section 98 of the Employment Rights Act 1996. As this is a dismissal on the grounds of alleged misconduct, the test in *BHS v Burchell [1978] IRLR 379 EAT* applies, namely, in order for the dismissal to be fair:
- 4.1. the Respondent must have a genuine belief that the Claimant committed the misconduct;
- 4.2. there must be reasonable grounds for that belief;
- 4.3. the Respondent must have conducted a reasonable investigation into the allegation.
- 4.4. In addition, the Respondent must act reasonably in all the circumstances by following a fair procedure and the sanction must be within the range of reasonable responses.
- 4.5. It is not for the tribunal to form its own view whether the Claimant committed the alleged misconduct, only to assess whether the Respondent reached its decision fairly.

Determination of the Issues

5. I determine the issues as follows:

5.1. I find that the respondent had a genuine belief that the claimant had committed an act of misconduct although I find that the grounds for such a belief were not reasonable and the investigation and disciplinary process were inadequate.

5.2. I find that Mr Brooker's investigation was flawed for the following reasons:

5.2.1. After interviewing the claimant, who had an opposing account of events to that of Mr Moursi, he did not put that account either to Mr Moursi or to Mr Hughes to find out their comments on the claimant's version of events;

5.2.2. The record of the interviews between Mr Brooker and Mr Hughes shows that Mr Brooker was suggesting the answers Mr Hughes should give rather than asking him open questions, for example he suggests to Mr Hughes that the claimant was the aggressor and that the claimant had 'intent' to strike Mr Moursi;

5.2.3. Mr Brooker appears to accept Mr Moursi's account in his interview with him before having carried out any further investigation by assuring him that he did not condone the claimant's conduct and that he will take the necessary action.

5.3. I find that Mr DeGrout's disciplinary hearing was defective for the following reasons:

5.3.1. As the claimant was not in attendance at the disciplinary hearing, Mr DeGrout should have been more rigorous in reviewing the investigation report since the claimant was not present to challenge it. I find that Mr DeGrout accepted the investigation report without any review and simply adopted the findings. If anything, he regarded the absence of the claimant as a free pass rather than imposing a greater obligation on him to ensure a fair outcome. In the light of the claimant's length of service and good employment record, I find Mr DeGrout should have been more rigorous.

5.3.2. Mr DeGrout did not adopt the 'special measures' provided for in the respondent's Disciplinary Policy and Procedure in the event of the employee not attending the hearing. Although these are discretionary, I find that Mr DeGrout should have considered these measures and given a reasoned explanation if he decided not to adopt them.

5.3.3. Mr DeGrout does not appear to have undertaken any follow-up investigation of his own, in particular to investigate what had happened. The event leading to the disciplinary allegation was an altercation between two employees, both of whom gave contradictory accounts. There was a witness who was not able to give evidence on the words used (as they were in Arabic) or the alleged headbutt (as he could not see it). I find that Mr DeGrout did not give sufficient reasons for rejecting the claimant's account of events.

5.3.4. Mr DeGrout failed to take into account the claimant's length of service in reaching his decision to dismiss. He also failed to consider any other sanctions short of dismissal.

5.4. I find that Mr Morris's appeal hearing was defective for the following reasons:

5.4.1. The defects of the disciplinary hearing were not remedied by the appeal hearing as it was not a re-hearing but a review.

5.4.2. I find that the appeal should have been by way of a re-hearing in the light of the evidence before the appeal hearing that the claimant's absence from the disciplinary hearing was on the advice of OH and not, as had been thought at the time, contrary to the advice of OH. Mr DeGrout's evidence was that he took his understanding of the OH advice into account in deciding to proceed in the claimant's absence and that, had he been aware of the updated advice, he would have postponed the hearing. Apart from making no enquiry as to why the updated OH advice sent to the respondent on 13 March was not received by 15 March, Mr Morris did not take into account that the outcome of the disciplinary might have been different if the claimant had attended. I find that a fair process would have been to treat the appeal hearing as a re-hearing of the disciplinary hearing with the opportunity for the claimant to make representations on the disciplinary allegation and investigation report. If the appeal had been by way of re-hearing, the claimant would have had an opportunity to appeal against any adverse finding.

5.4.3. I find that there are explanations which the claimant has put forward to the tribunal regarding the incident which he did not have an opportunity to put to a disciplinary hearing, including the offensive language he says was used by Mr Moursi and the cultural context of the way North Africans speak to each other with raised voices and hand gestures. These explanations were not taken into



account by Mr DeGrout or Mr Morris in reaching their findings or, if they were, there is no evidence of this in the decision letters.

5.4.4. The claimant objected on two occasions to the appeal being conducted by Mr Morris and gave reasons. He does not appear to have been given a reasoned response to this representation. Given the size and resources of the respondent, it would have been relatively easy to ask another manager to hear the appeal in the light of the claimant's objections. If the respondent regarded the request as without merit, this should have been explained to the claimant.

5.4.5. Mr Morris repeated Mr DeGrout's failure to take into account the claimant's length of service or to consider any other sanctions short of dismissal.

5.5. I therefore find that the claimant's dismissal was unfair.

Remedy

6. The claimant has requested reinstatement. A Remedy Hearing will take place on 9 April to address issues relating to remedy including reinstatement.

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Employment Judge Davidson

Dated: .....12 March 2019.....

Judgment and Reasons sent to the parties on:

18 March 2019

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For the Tribunal Office