EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M S Doy	**v**	Clays Limited

Heard at: Bury St Edmunds **On:** 4 and 5 February 2019

Before: Employment Judge Postle

Appearances
For the Claimant: In person
For the Respondent: Mr Islam Choudhury, Counsel

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed and further his dismissal was not inconsistent treatment.

RESERVED REASONS

1. This case had originally been heard in the Bury St Edmund Employment Tribunal on 5 December 2018 before Employment Judge Laidler in which she found the claimant had not been dismissed unfairly and that his claim for holiday pay was not well founded.

2. The claimant appealed to the Employment Appeal Tribunal and his grounds for appeal was that he argued before the Employment Tribunal that his dismissal was unfair because another employer had been treated more leniently than he had even though that employee had on two other occasions hit other employees.

3. The Employment Appeal Tribunal held that the argument had been raised by the claimant in his ET1 and at the original Employment Tribunal hearing. The Employment Appeal Tribunal further held that it was not enough for the Employment Tribunal to summarise in its judgment the respondent's submissions about the disparity argument, but rather should have made factual findings on the claimant's case on disparity and then

explained how, if at all, those findings affected its analysis of the unfair dismissal claim. The Employment Appeal Tribunal remitted the case back to a different Employment Tribunal for a rehearing.

4. In this tribunal we have heard from the claimant through a prepared witness statement, the claimant called no further evidence. For the respondents we heard evidence from Mr Neil Dyke, formerly General Manager of Clays but now with Heatrae Sadia, through his original witness statement from the first employment tribunal hearing and a supplemental witness statement prepared for this hearing, Mr Mansfield, Bindery Manager with the respondent and Mr Smith who conducted the Appeal Hearing, again his original statement and a supplemental statement and a further statement dealing with remedy; all those witnesses giving their evidence through the prepared witness statements. The tribunal also had the benefit of a bundle of documents consisting of 167 pages.

The Facts

5. The claimant presented the claim to the tribunal on 12 August 2016 claiming he had been unfairly dismissed and was due arrears of pay. The claimant advanced an argument that the correct hourly rate for the job and shift that he worked on had been calculated by the respondent using an incorrect formula.

6. The respondents assert that the claimant was dismissed for serious and persistent verbal threats and harassments made against the claimant's line manager Paul Bullen and subsequently against Mr Bullen and his family, such conduct amounted to gross misconduct.

7. The money claims, the tribunal reminds itself is not a matter that was a subject of the appeal and is not a matter this tribunal needs to address.

8. The claimant commenced employment on 11 October 2004 as a Bindery Assistant, initially engaged on a casual basis.

9. The claimant had for some time argued that the method of calculating his wages on the night shift used by the respondent was incorrect. There was a meeting on 19 February 2016 with the General Manager Paul Bullen, the Bindery Manager Dean Knotley, the claimant and his Trade Union representative. There are minutes of that meeting in the bundle, (page 44). The conclusion of that meeting was that Paul Bullen and Danny Block, Father of the Chapel, believed that the claimant was being paid the correct sum for the shift.

10. The claimant remained unhappy with the decision and wrote to Ian Smith the Manufacturing Director requesting a meeting to discuss the issue of his pay. A meeting duly took place between the claimant and Mr Smith on 18 March, at which Paul Bullen and Danny Block the Trade Union representative attended.

11. On 14 April 2016, Mr Smith wrote to the claimant confirming he had reviewed the contracts, custom and practice of the respondents and confirmed, in his view, that the Bindery Management Team had calculated the method of payment correctly. The claimant was not being supported by the Union to the extent that the respondent was forced to change any of its local agreements. It is clear, the matter of the calculation of pay remained a burning issue with the claimant and he seems to have taken the view that Mr Bullen was responsible for, what the claimant believed was an incorrect calculation.

12. The claimant was on the night shift on 14 April 2016 following receiving the letter from Mr Smith, at which he started making threatening comments to colleagues about Paul Bullen. These comments were subsequently reported to Paul Bullen and as a result of the allegations the claimant was suspended from the workplace so the matter could be investigated. The claimant's suspension was confirmed by letter of 29 April, (page 51).

13. On 19 April, the claimant was signed off sick with 'stress related problems and stress at work' until 6 May 2016.

14. Mr Smith asked Mr Dyke to conduct an investigation into the allegation of what the claimant may, or may not, have said about Paul Bullen on the night shift of 14 April. Mr Dyke then identified whom had been on shift on the night of 14 April and arranged to meet with them on 28 April. There was some delay due to Mr Dyke's holiday and other employees being away at the relevant time.

15. The tribunal were directed to the notes of the outcome of those discussions in the bundle which started at page 52.

16. In the course of the investigation, Mr Dyke spoke to Mr Steve Francis, Mr Wayne Chapman, Ms Mandy Henderson, Graham Bell and Nigel Marchant. Mr Francis was unable to give any evidence about the comments other than the claimant was unhappy about his hours and money.

17. Wayne Chapman was aware that the claimant had received a letter from Mr Smith regarding money and apparently said,

    "…Mark said, I hope they all die, I might have to kill them. Hope Paul Bullen and Ian Smith's children get cancer and die. Mark then said he would get into his car the next morning and drive straight into the first car that came off the roundabout towards him."

    Wayne stated that the crew on the Mini Corona left Mark alone. Wayne believes that people on the line were quite scared and are still worried, naming Mandy as a case in point. Wayne commented that Mark was a nice person, but that he flips and mentioned that Mark had threatened people before. Wayne stated that what Mark had said on that night was not reported to management. Wayne noted that Mark was on the

guillotine on the Friday night. Wayne also believed that Mark had taken his letter into the office to show M Hoffman. Wayne also remembered that Gary Podd and Matthew Rudder were present when Mark made the comments regarding Paul Bullen and Ian Smith.

18. The other employees interviewed were not able to give further information about the comments made.

19. Following on from those meetings Mr Dyke then interviewed Greg Gibson, Andrew Shimmon, Dean Boast and Gary Podd as they had been identified as further colleagues who may have heard comments made by the claimant.

20. When Greg Gibson was interviewed by Mr Dyke with Mr Earll present and Mr Hollis he commented

    "I felt Mark was out of control' and [the claimant said], 'They are all a bunch of cunts, Bully and Ian Smith, I wish they all die and their kids get cancer'", (page 53).

21. Mr Shimmon said, when interviewed by Mr Dyke, that he had not heard anything directly, only rumours about what had been said regarding Paul Bullen, Ian Smith and their children. He was able to comment that the claimant had said,

    "I hope no one gets in my way on my way home as I am going to drive at 100 mph", (page 54).

22. Mr Boast, when interviewed, commented that he had been told by Greg Gibson that the claimant had told him that he wished Paul Bullen was dead and that he hoped his kids got cancer and that he would like to kill them, (page 55).

23. When Mr Podd was interviewed he was unable to give any evidence as to what either he had heard or been told other than the fact that the claimant was upset about the decision over pay, (page 56).

24. The claimant was interviewed on 9 May, there present was the claimant, Mr Hollis, Mr Dyke and a note taker. The claimant was supported by his Union representative Mr Minns.

25. The allegations were clearly put to the claimant at this meeting and at that meeting, although the claimant admitted offending conduct, though not the actual words used and it is to be noted he never put forward a version of the words he actually used, he nevertheless accepts inappropriate comments were made for which he was sorry.

26. Following the investigatory meeting Mr Dyke concluded that there was sufficiently serious issues to be addressed with the claimant which could only be properly dealt with by way of a disciplinary hearing.

27. The disciplinary meeting was to be held on 20 May, the letter having been dated 17 May, (page 67), the letter clearly advises the allegations of threatening behaviour, the right to be accompanied either by an employee or Union representative and a warning that the allegations, if founded to be true could be subject to further disciplinary sanctions, and the letter enclosed a copy of the company's disciplinary rules and procedure.

28. However, on 13 May, the claimant attended the respondent's reception to hand in his sick certificate and in talking to the receptionist, Miss Nobbs, informed her that he did not care what happened as,

    "I will expose the company to the media and social media, I will show them how corrupt this company is, all these flexis agree this company is taking money from them, how would you like it"

    The claimant then went on to say,

    "I am going to find out where Bullen lives and I will go and tell his Mrs what kind of bloke he really is".

29. Miss Nobbs was sufficiently concerned about this, recorded what the claimant had said (page 64) and although Miss Nobbs did not feel threatened by the claimant, she was concerned for Mr Bullen's safety given what was said as the claimant was clearly angry. Miss Nobbs reported this to Mr Dyke on 16 May having worried about the matter all weekend and provided her statement.

30. As a result of the above information Mr Dyke received from Miss Nobbs, he reported the matter to Mr Smith and the matter was then reported to the police, Mr Bullen and his family were moved out of their property temporarily for their own safety.

31. The disciplinary hearing duly took place on 20 May; that was conducted by Mr Dyke. The claimant attended and was accompanied by two Trade Union representatives, Sam Riseborough and Steve Minns, Gemma Burke was also in attendance who took the minutes of the meeting. Those minutes are at page 68 – 69, they are a summary.

32. The claimant was asked if he would like to add anything following the recent investigation and the claimant responded that he did not have anything further to add, he had apologised and cannot take back what he had said.

33. Mr Dyke then referred to a further incident since the investigation took place regarding what appeared to be further threatening behaviour and the claimant was asked for an explanation. Whereupon, the claimant responded,

"I just think that Paul Bullen's wife should know what he is doing to us flexi workers and me",

the claimant further added,

"*I apologise, I am still very upset regarding the matter and I have already resigned myself to the fact that I have lost my job".*

34. The statement provided by Miss Nobbs was given to the Union representatives so they were aware of what had been said, (page 64). It is not entirely clear whether the Union representatives showed it to the claimant.

35. The meeting was then adjourned so Mr Dyke could consider what sanction to impose. He concluded that the claimant had admitted what had been said was inappropriate and had apologised for it. Although the claimant had never actually stated, either at the investigation meeting or at the disciplinary, his version of what he did say. Mr Dyke could not see any evidence that the claimant fully appreciated that his behaviour was unacceptable. Furthermore, Mr Bullen had to be moved with his wife and children out of his home following the second incident of threatening behaviour on 13 May. This occurred during a period when the claimant was already suspended and had been informed that a disciplinary investigation was being undertaken, that suggested that the claimant simply did not understand the seriousness of his behaviour by making further direct threats against Mr Bullen and his family on 13 May.

36. Mr Dyke considered the claimant's length of service, his previous clean disciplinary record, but concluded that the claimant repeating his behaviour amounted to a break down in trust and confidence and had offered no acceptable mitigation for his behaviour and was concerned that the claimant might behave in the same way in the future towards Mr Bullen or other employees.

37. Mr Dyke accepted that the claimant had reported that he was stressed at the time, but that was not an excuse for such extreme behaviour. The decision relating to the claimant's pay had been communicated to him in an appropriate manner and whether the decision was right or wrong, that did not warrant the reaction the claimant portrayed by threatening managers. The decision Mr Dyke reached was that dismissal was the only option.

38. The claimant now asserts before this tribunal, that other members of staff were treated differently for similar behaviour. It is to be noted that neither at the investigation or at the disciplinary did the claimant or his Union produce chapter and verse of incidents reported to management of a similar nature which warranted lesser sanctions.

39. The claimant in his witness statement now asserts that a female worker, Sarah Becks punched Ady Pole in the face and a few weeks later struck

another Clays' worker Colin Burrows, in 2015 and they kept their job. He further asserts that the shift Manager on duty that night, in relation to the first allegation turned around and looked the other way and failed to do anything.

40. In or around February 2016, the claimant asserts Simpson Hale-Smith told the claimant to get a piece of string and go and put it around his neck, however, there is no evidence that this was reported to management, in the words of the claimant shop floor matters in dispute get diffused before they get reported or get to management.

41. The claimant also asserts in his ET1 that several years ago an engineer got caught playing with himself downloading porn on the Clays' Wi-Fi and retained his job. What is clear is that Mr Dyke was unaware of that incident and the incident involving Simpson Hayle-Smith in February 2016, clearly Mr Dyke cannot take matters into account if he is unaware of the incidents at the time and if they have not been reported to management.

42. The only other incident that was reported and resulted in disciplinary action was one involving bets placed on a Harry Potter story line in 2005. All of those who were involved were subject to disciplinary action resulting in a final written warning and one week suspension without pay. Mr Smith did not take this into account in considering the claimant's appeal as the misconduct, whilst serious, was not comparable and did not involve intimidating and threatening behaviour towards another employee and in the case of the claimant this was repeated.

43. Mr Smith was aware of one other incident which occurred at the same time of the claimant's appeal where there had been an altercation between two employees in which one had used offensive language. That individual was immediately suspended pending further investigation. It was made clear to the employee concerned that behaviour of that type would not be tolerated by the respondent and that such incidents would be treated seriously, the outcome of which was a final written warning which was to remain on that person's file for twelve months.

44. The only other matter of relevance was a dispute between Simpson Hale-Smith and Darren Mansy on the shop floor, that was brought to Mr Mansfield's attention when it occurred, it was defused, the parties apologised to each other and that was the end of the matter.

45. The claimant submitted an appeal to Mr Smith in a handwritten letter appearing at page 71. That letter was written before the letter of dismissal sent out on 20 May (page 70).

46. The claimant submitted a further undated letter to Mr Smith confirming that he had received the dismissal letter and wanted to appeal on the following grounds:

a. *"it is my belief that the extent of the stress contributing to my action was not properly considered at the disciplinary hearing";*

b. *"it is my belief that my previous 13.5 years clean record had not been properly considered";*

c. he was seeking reinstatement.

47. A date was set for 9 June for the appeal hearing. Mr Dyke had prepared short notes in order to present the management case. The claimant was again accompanied by Mr Minns and Mr Hollis from the Union. The claimant once again apologised for what he had said and indicated he had not meant anything by his comments. His length of service was emphasised and the fact that he was a good worker. The claimant confirmed he had not reported any grievance or issues as to how other colleagues were treating him, had he done so Mr Smith would have investigated them.

48. In reaching his decision, Mr Smith took into account the claimant's long service, that he had a previously clean disciplinary record and that Mr Dyke had explained to him the rationale for reaching the decision of dismissal. Mr Smith concluded that the claimant's actions on 14 April were serious and then to repeat them on 13 May and the very nature of those threats were such that made the claimant's continuing employment untenable. The comments made by the claimant on 13 May taking in the context of his previous comments against Mr Bullen and his family on 14 April were very serious intimidating and threatening. He was concerned that the behaviour might be repeated and could not allow that to continue. He therefore, likewise concluded that dismissal was an appropriate sanction and upheld Mr Dyke's decision to dismiss. The letter confirming the outcome of the appeal dated 13 June is at pages 85 – 86.

The Law

Section 98 Employment Rights Act 1996

Sub-section 1

49. 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 reason falling within sub-section 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.

Sub-section 2

50. A reason falls within this sub-section if it -

    (a) …

    (b) relates to the conduct of the employee,

    (c) …

    (d) …

Sub-section 4

51. Where the employer has fulfilled the requirements of sub-section 1, the determination of the question of 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 for the employers 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.

52. In this case the reason advanced for the dismissal is conduct in deciding the issue of whether the dismissal is fair, the tribunal will have in mind the familiar case of British Home Stores v Birchall [1978] IRLR 379 and that says that an employer must show the following:

    52.1 it believed the employee was guilty of misconduct;

    52.2 it had in mind reasonable grounds upon which to sustain that belief; and

    52.3 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.

53. This means that the employer need not have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief reasonably tested.

54. The tribunal also reminds itself that any investigation into the alleged conduct has to be reasonable, it does not have to be a counsel of perfection.

55. The tribunal also reminds itself under section 98(4) –

Employers will have at their disposal a range of reasonable responses to matters such as the misconduct of an employee which may span summary dismissal down to an informal warning. It is inevitable that different employers will choose different options. In recognition of this fact, and in order to provide a standard of reasonableness that tribunals can apply, the band of reasonable responses approach was formulated. This requires tribunals to ask: 'did the employer's actions fall within the band (or range) of reasonable responses open to an employer?' In other words, was it reasonable for the employer to dismiss. If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all of these cases there is a band of reasonableness, within which one employer might reasonably take one view and another quite reasonably take a different view. The tribunal also reminds itself, in reaching its decision, one must not substitute its own opinion for the objective test of the band of reasonable responses.

Inconsistent treatment

56. The first point to note is, a previous similar situation must be truly similar. In the Court of Appeal in Paul v East Surrey District Health Authority [1995] IRLR 305, cautioned against finding two regularly unfairness due to inconsistent treatment:

56.1 *"an employer is entitled to take into account, not only the nature of the conduct and the surrounding facts, but also mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding a repetition is likely. Thus, an employee whom admits that conduct proved is unacceptable and accepts advice and help to avoid repetition, may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely";*

56.2 The second point to note is that those taking the decision to dismiss, that person must not be taken to know facts which are known to another employee but are withheld from, or simply not known of by the decision maker.

56.3 Thirdly, if there are two distinguishing cases and the dismissal in one there is no rational basis for the distinction being made, then it can be challenged.

Conclusions

57. As to the investigation process, it is clear there was a reasonable investigation. The claimant committed the first acts on 14 April. The

claimant was suspended on 29 April (page 51). Mr Dyke conducted a reasonable investigation on 28 April when a number of witnesses were interviewed (pages 52 – 56). The claimant admitted his behaviour was inappropriate, although he never offered the exact words he used responding to what was said by the witnesses, heard or repeated.

58. The claimant was invited to an investigatory meeting and attended with his Union representatives and was given an opportunity to respond to the allegations. Again, he admitted inappropriate conduct but again, not the words actually used. Although alleging a history of harassment, he did not raise issues of inconsistent treatment at that stage.

59. The claimant then made further threats on 13 May concerning Mr Bullen and his family to a receptionist Miss G Nobbs. She provided a statement of those comments.

60. The claimant was invited to a disciplinary hearing that set out the reason for the disciplinary hearing, the allegations, the right to be accompanied and the fact that serious consequences could flow if the allegations were found against him.

61. The disciplinary hearing took place on 20 May. The claimant was given a full opportunity to respond, he was represented by his two Trade Union representatives, there was no suggestion that there was any procedural defects nor failure to understand the allegations. Miss Nobbs' statement regarding the further threats made on 13 May was certainly made available to the claimant's trade union representatives. The claimant, at the disciplinary hearing, whether himself or through his Trade Union, did not raise the issue of inconsistent treatment.

62. It is therefore clear that Mr Dyke had a genuine and reasonable belief in the claimant's guilt in respect of the allegation, the fact the claimant had admitted the conduct on 14 April and Mr Dyke had no reason to doubt Miss Nobbs' evidence of the second incident on 13 May, those threats were very serious and indeed the second threat led to a report to the police and Mr Bullen having to be moved out of his family home for a short period.

63. It is therefore not difficult to conclude that it was reasonable for Mr Dyke to believe that the conduct fell within the band of a reasonable response and that amounted to gross misconduct.

64. It is clear, that had there been no repeat on 13 May, the claimant would almost certainly have been dealt with by a final written warning. The reason being the second incident was serious and clearly although apologising previously for the first incident, the claimant simply had not realised the nature of his behaviour was serious. Furthermore, the second offence was committed whilst the claimant was on suspension and it was therefore not difficult for Mr Dyke to conclude that the claimant had simply not learnt his lesson from the first incident. Furthermore, at the disciplinary

hearing, the Trade Union representatives did not advance arguments of inconsistent treatment which would have led to further investigation or the dismissal being questioned from a fairness point of view.

65. It is clear that the inconsistencies that the claimant now raises in the case of Simpson Hale-Smith in February 2016, where he told the claimant to get a piece of string and put it around his neck, were not ever raised with management.

66. The dispute between Simpson Hale-Smith and Darren Mansy on the shop floor was no more than a storm in a tea cup which led to them being spoken to by management, apologising and that was the end of the matter. This is an entirely different situation to that which the claimant had behaved towards Mr Bullen and comments made.

67. In relation to the Sarah Beck and Ady Pole matter, it is clear that management had no recollection of that event or of it ever being reported to anyone. Therefore, there was no inconsistent treatment.

68. If the claimant is still relying on the Harry Potter matter, that was dealt with in 2015 and was an entirely different set of fact and all parties found to be involved were put on a final written warning, there was no threats or intimidation involving employees.

69. The claimant was also afforded an appeal, he was represented at that appeal by his Union and again, nothing was advanced about inconsistent treatment or any procedural defect, the claimant was given a full opportunity to respond. That hearing was fair and on the facts, particularly with the second incident Mr Smith felt that the decision to dismiss was an appropriate sanction that fell well within the band of a reasonable response of a reasonable employer. The claimant could no longer be trusted to behave appropriately towards other employees.

70. The decision to dismiss was neither unfair or inconsistent with the treatment of other employees.

Employment Judge Postle
29/03/2019
Date: …………………………………..
29/03/2018
Sent to the parties on: ....

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For the Tribunal Office