Case Number: 2205529/2018

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondent***
Mr M Azad	Sainsbury's Supermarkets Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 24 and 25 January 2019

EMPLOYMENT JUDGE: Mr J Tayler

Appearances
For the Claimant: **Mr K James, Solicitor**
For the Respondents: **Mr B Uduje, Counsel**

REASONS

1. By a Judgment sent to the parties on 4 February 2019 I held that the claim of unfair dismissal failed and was dismissed. By email dated 14 February 2019 the Claimant asked for written reasons. These results are produced in response to that request.

2. By a Claim Form received by the Employment Tribunal on 3 August 2018, the Claimant brought a complaint of unfair dismissal. In considering a claim of unfair dismissal the tribunal must first consider the reason for the dismissal. The Respondent must establish that it is one of a number of potentially fair reasons. The Respondent relied on conduct in that the Claimant had used the term “banana tree” when referring to a colleague. The Respondent considered the term to be racist. They contended that this was conduct that warranted consideration of dismissal. The Claimant accepted that the dismissal was for the potentially fair reason of conduct. It was then the tribunal to consider under the wording of section 98(4) ERA whether the employer had acted fairly or unfairly in treating that as a sufficient reason for dismissing the Claimant, having regard to the size and administrative resources of the Respondent and considering equity and the substantial merits of the case. In misconduct cases the tribunal considers whether the Respondent had a genuine belief in the guilt of the Claimant, whether that belief was formed after a reasonable investigation had been under undertaken and on reasonable grounds. The tribunal will then determine whether the dismissal fell within the band of reasonable responses.

3. I have not in this Judgement gone on to consider the questions of whether the Claimant contributed to the dismissal or whether a Polkey reduction might have been appropriate had the dismissal been found to be unfair, on the basis that

the Claimant would, or might, have been dismissed had a fair procedure been operated.

Evidence

4. The Claimant gave evidence on his own behalf.

5. The Respondents called:

   5.1. Paul Gold, Store Manager

   5.2. Simon Huggard, Area Manager

6. The witnesses gave evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

7. We were provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

Findings of Fact

8. The Claimant commenced employment with the Respondent in 2003. The Claimant was provided with a contract of employment which incorrectly gives a start date in 2004. The contract refers to disciplinary rules in the Employee Handbook. The Claimant accepted that he was aware of the provisions of the disciplinary procedures. By the time of his dismissal the procedure was available on the Respondent's intranet.

9. On 24 July 2017, a complaint was made against the Claimant by a 12-year-old boy who alleged that while shopping the Claimant had commented on his weight. He said that the Claimant asked if he was okay and said that he was asking “because your tummy is big”. He alleged that the Claimant suggested he ate too much junk food. The matter was dealt with by Mohammed Razu the Deputy Manager of the Claimant's branch. He gave the Claimant a written warning on the basis that he displayed inappropriate behaviour towards a customer.

10. On or about 13 December 2017 a further complaint was made by a customer who alleged that she had been accused of not having paid for items of shopping. She alleged that the Claimant had said that she had failed to pay for shopping on a previous occasion and said that he recognised her “because she was wearing a headscarf”. On 21 January 2018, the Store Manager, Abdul Ojud, gave the Claimant coaching and guidance about the incident. He recorded that the customer complaint was based on the Claimant’s behaviour towards a Muslim customer who felt he victimised her because she was wearing a headscarf. He also noted that the Claimant accused the customer of stealing without any proof. He stated that the customer, who was a schoolteacher, was a regular customer and that many colleagues knew her. He

noted that the Claimant admitted that he made the comment and that it "came across wrongly". Mr Ojud wrote:

> "you need to understand that this is not the first time your comments has impact on others.
>
> Your behaviour is unacceptable and this has to stop, and in numerous occasion supervisor/Deputy Managers had spoken to you in part around your comment making towards colleagues and customers. Also to remind your previous conduct recently issued with a written warning for calling a young customer his tummy is big and should not be eating junk food ….
>
> I am extremely concerned regarding your behaviour towards others and hence I am holding this informal meeting with you to remind you and coach you once again, so this does not happen in the future."

11. I do not accept the Claimant's evidence that he was unaware of this incident. I consider that the contemporaneous documentation makes it clear that the Claimant was given coaching and was warned that he needed to take care about the way in which he communicated with colleagues and customers.

12. On 12 or 13 March 2018 a fellow customer services assistant, Jayson Simpson, made a complaint about the Claimant alleging that the Claimant had call him a "banana tree". While I accept that Mr Simpson had not complained to the Claimant about the incident on the day itself, his signed statement made it clear that he considered the matter overnight. I do not accept that the natural reading of the complaint is that it was only because Mr McCartney suggested the comment might be treated as racist that Mr Simpson took that view. I think the natural reading of the complaint is that adopted by the Respondent; that Mr Simpson himself felt that when the Claimant referred to him as "banana tree" it was a racist comment.

13. Two other complaints were made at about the same time against the Claimant, which subsequently did not form part of the reason for the dismissal, so I shall not consider them in any detail.

14. On 15 March 2018, Mr McCartney wrote to the Claimant suspending him because of the alleged comment to Mr Simpson. The suspension letter stated this could be a breach of the Fair Treatment and the Equality, Diversity and Inclusion policies. Mr McCartney stated "on 12 March 2018 you made a racial comment towards your colleague Jayson Simpson calling him a banana tree."

15. I accept that the approach that the Respondent adopted at this stage was to focus on the word "banana" and the fact that it has been used to make racist attacks on people of African or Afro Caribbean descent. In particular, there have been occasions in football matches when the word has been used in a racist manner and/or bananas have been thrown onto football pitches as a form of racist abuse. I accept that it was reasonable for the Respondent to adopt this approach. The Respondent reasonably considered that there was a case that required investigation and that it was a case of potentially very

serious misconduct that warranted investigation under the disciplinary procedure, rather than being treated as a grievance under the Respondent's Fair Treatment procedure. Mr Simpson states twice that he is making a formal complaint.

16. A note was taken of the suspension meeting. The Claimant requested a copy of the Disciplinary Policy and the Fair Treatment and the Equality, Diversity and Inclusion policies. He was referred to the Respondent's intranet where they could be found.

17. In correspondences between the Claimant and his representatives, Mr James, an issue was raised about the possibility of witnesses being called to the disciplinary hearing. The Respondent's approach, which did not accord with their own policies, was that they would not themselves call any witnesses to give evidence. Mr James raised his contention that there was a requirement in the ACAS code of conduct for witnesses to be available for cross examination. The Respondent did not accept that there was such a requirement. In fact, there was no significant relevant area of factual dispute that witness evidence went to. The Claimant accepted that he had made the comment.

18. At the disciplinary hearing it was made clear by Mr Gold, who chaired the meeting, that he would only be considering the alleged racist comment. The Claimant set out a great deal of information about why he felt that Mr McCartney was biased against him. However, that was not relevant to the fundamental issue in dispute which was what the Claimant had meant when he had used the term “banana tree”. I do not accept the contention put forward by the Claimant that the Respondent analysed the matter by only considering what Mr Simpson thought the term meant. I accept that they formed their own opinion as to what the words meant. The Claimant contended that he meant that Mr Simpson was useless. He did not give his current explanation as to why the term banana tree may be used to mean useless because the banana tree does not produce wood that is of any practical use. The Claimant did not take the opportunity to provide any evidence to support the contention that this was a term used by people in Bangladesh either by producing any documentation (i.e. from the Internet) or witness statements from people of Bangladesh heritage who could confirm this.

19. The Claimant argued that CCTV footage should be provided. The Respondent reasonably concluded that this would show little about Mr Simpson's reaction to the comment. In any event, Mr Simpson's contention was that it was when he had thought about the matter overnight that he had realised how offensive he found the term. Question put to Mr McCartney and Mr Simpson and their answers were provided to the Claimant and is representative. The disciplinary hearing was reconvened. Mr Gold confirmed that the only complaint he was considering was the alleged racist comment. The Claimant was questioned in detail about the words he had used to Mr Simpson. He did not put forward his current explanation that a banana tree is considered useless as it does not have wood that can be used to make useful objects.

20. Mr Gold produced a decision-making summary. He concluded that the comment was inappropriate. He did not accept the contention that it meant no more than a useless person. He was particularly concerned that the Claimant did not accept responsibility for his actions. Although there was some suggestion within the meeting that the Claimant was sorry if Mr Simpson had misunderstood what he said, the Claimant could easily have made it clear that he now understood why someone of African origin would consider that the term was racist. The Claimant could have made it clear that he was extremely sorry for any upset that he had caused. He could also have taken the opportunity to put forward some evidence that would support his contention as to the meaning of the term, particularly as it was not one that seem immediately plausible.

21. On 23 May 2018, the Respondent wrote to the Claimant dismissing him in a rather brief letter and holding that the Claimant had breached the companies Fair Treatment and Equality, Diversity and Inclusion policies, in that he had made a racial comment towards his colleague Jason Simpson by calling him a "banana tree". The letter makes it clear that the Respondent reached its own conclusion that the term did have a racial connotation and was meant in that way by the Claimant.

22. I accept that Mr Gold took into account the previous warning, not on the basis that the Respondent was entitled to dismiss by totting up, but because the Claimant had previously been warned that he needed to take great care about the way in which he addressed customers and colleagues and that, despite this, he had failed to do so.

23. The Claimant appealed on 29 May 2018. The appeal was detailed. It was produced with the assistance of the Claimant's adviser. The Claimant contested that he did not make a racial comment but he did not set out the detailed explanation that he now gives as to why the term banana tree may be used of someone who is considered to be useless. He did not take the opportunity to provide any written and or witness evidence to support his contention that the term has the meaning he now contends for; i.e. that it related to that fact that a banana tree does not provide any workable wood.

24. The appeal hearing was held before Mr Huggard on 7 June 2018. Again there was a detailed discussion with a focus on the term "banana tree". Mr Huggard produced a decision-making summary. He noted that he felt that the Claimant did not have anything new to add. He noted that the Claimant stated that the comment was not racially motivated. He noted "why use the term banana tree to black colleague to call them useless if not linked to race". This strongly supports the contention that the Claimant did not explain to Mr Huggard what it was about a banana tree that was said to be useless. Mr Huggard, concluded, as Mr Gould had, that the use of the word banana tree to someone of African descent was a comment of an extremely offensive racist nature. On 7 June 2018 Mr Huggard wrote dismissing the appeal.

The Law

Unfair Dismissal

25. Pursuant to s.94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the conduct of the employee.

26. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This 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. This is to be determined in accordance with equity and the substantial merits of the case.

27. In considering dismissal for misconduct the Tribunal is guided by the principles set out in **British Home Stores v Burchell** [1978] IRLR 379, taking into account the neutral burden of proof that now applies in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the Respondent had a genuine belief in the misconduct alleged, whether the Respondent had reasonable grounds for believing the Claimant was guilty of that misconduct and, at the time it held the belief, whether the Respondent had carried out as much investigation as was reasonable in all the circumstances.

28. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

29. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.

30. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place: **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

31. The Tribunal must consider whether the investigation was reasonable, not whether it itself would have chosen some alternative reasonable process to that adopted by the Respondent.

32. The more serious the allegations and more far reaching the effect on the employee of dismissal, the more rigour will be expected of the employer: **A v B** [2003] IRLR 405. It is particularly important that employers take their responsibility seriously where dismissal is likely to have a serious effect on the

employee's reputation or ability to work in his or her chosen field: **Crawford & another v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402.

33. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

Analysis

34. It is accepted that the Claimant was dismissed for a reason that related to his conduct. I accept that the Respondent genuinely formed the view that the Claimant had used the term "banana tree" of Mr Simpson in a racist manner. They reached that decision after carrying out a reasonable investigation and giving the Claimant a fair opportunity to explain herself. In considering the investigation, I have to consider what was reasonable in the sense of falling within the band of reasonable responses. The Respondent might have pushed the Claimant a little more to explain why he claimed the term banana tree meant useless. However, the Claimant had every opportunity to explain what he contended the term meant and to provide some evidence of the term being used in that way in the Bangladeshi media or online, or through statements from people from the Bangladeshi community. He did not do so. The fact that the Respondent did not push him further in respect of an explanation that seemed implausible does not, in my judgment, take the matter outside the band of reasonable responses.

35. I do not consider that this was a matter that the Respondent should have dealt with as a grievance under the Fair Treatment procedure. Mr Simpson had made it clear in his letter that he was raising a formal complaint. Where the words "banana tree" were being used of a person of African descent there was an allegation of an offensive racist comment that necessitated consideration under the disciplinary procedure.

36. I do not accept the Claimant's contention that it was necessary for Mr McCartney to be called to give evidence because of his alleged animus against the Claimant. I do not see that the Claimant's allegation against Mr McCartney were relevant to the fundamental issue in this case, which is what the Claimant meant the term banana tree to mean. Whatever the view taken by Mr Simpson the Respondent was entitled to conclude that if it was a racist term, it was unacceptable. I do not consider that a fair procedure required that Mr Simpson be called to attend the disciplinary hearing to be challenged on whether he considered the term to be racist as he had said in his statement.

37. Overall, I conclude that, on the information before it, the Respondent formed a genuine view that the Claimant was guilty of the conduct alleged against him. They genuinely believed that the Claimant had used the term banana tree in a racist manner. They formed that view after conducting a reasonable investigation and on reasonable grounds. In the circumstances I consider that the decision to dismiss fell well within the range at band of reasonable responses.

38. I accept it is possible that the Claimant has failed to take the opportunities that have been available to him to put forward information that might have persuaded the Respondent that the term banana tree does not bear the most natural meaning and really does refer to a useless person. To do so the Claimant needed to provide evidence. He did not do that during the investigation, disciplinary hearing or appeal. He has not done so in his claim to the tribunal or in his witness statement. The Respondent had to judge the matter upon the evidence before them, and on the evidence before them. I consider that they came to a conclusion that they were fully entitled to reach. The dismissal of the Claimant was fair.

39. Even if the term does have the meaning, in certain circumstances, that the Claimant contended for at this hearing, that would still have left the question of why he used it when speaking to a colleague of African descent, and why he seemed incapable of understanding why Mr Simpson found it so offensive. However, I have to consider the fairness of the dismissal on the basis of information that, after a reasonable investigation, was before the Respondent. On the basis of that information I conclude that the decision to dismiss was fair.

EMPLOYMENT JUDGE TAYLER

16 April 2019

JUDGMENT SENT TO THE PARTIES ON

18 Apr. 19