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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr T Bengler

Environment Agency

Held at Ashford

On 8 & 9 January 2019

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: Ms C Mawdesley-Thomas, FRU

For the Respondent: Ms V Webb, Counsel

JUDGMENT

The decision of the tribunal is:-

The claim for unfair dismissal is not well founded and it does not succeed.

REASONS

1. This is a claim for unfair dismissal brought by Mr Bengler the Claimant following his dismissal on 8 September 2017. I have heard evidence from Ms Julie Foley, Area Director for the Respondent (the manager who made the decision to dismiss) and also from Ms Sarah Chare, Director of Operations for the South and South East (who chaired the appeal panel). I also heard evidence from the Claimant.
2. The facts I found and the conclusions I have drawn from them are as follows.

3. The Claimant was one of two lock keepers at Allington Lock. He commenced this role in January 2007. He worked under a job share arrangement with a fellow lock keeper whom I shall refer to as SF, working a shift pattern of 2 days on and 2 days off. Both lock keepers lived on site in cottages adjacent to the lock. The photographs on page 94 and 95 of the bundle showed the layout of the site. There is a small kiosk café on an island in the middle of the lock. It is run by MSJ who operates the café on a seasonal basis. Her sister KSJ helps her at the café.
4. On 6 June 2017, KSJ wrote a letter to the Respondent complaining about the Claimant's behaviour on 27 May 2017. She said that the Claimant had told her that he hoped it would rain so that he would see her get wet, that he had been watching her work all day and that she had a 'cracking arse'. She also complained that towards the end of the day he had asked her when she would go out with him despite her rejecting his previous invitations. She said that the Claimant had been drunk on 27 May and had been drinking beer with a friend outside the kiosk towards the end of the afternoon.
5. I have noted that the Respondent has a code of conduct and that employees are expected to uphold high standards on behalf of the environment agency. Their disciplinary process states that bullying and harassment is potentially an offense of gross misconduct. The definition of harassment in the policy notes that it may include unwanted sexual advances or suggestive behaviour which the harasser may perceive as harmless.
6. On 22 June, SC, the Claimant's Line Manager, spoke to him about the allegations that had been made. This conversation was recorded in an email dated 22 June 2017. SC notes the allegation that on 27 May the Claimant was drunk whilst on duty and that he made inappropriate and lurid comments to the complainant which SC considered to be sexual harassment. It was noted that the Claimant denied the allegations and said that he had never been drunk on duty. It was also noted that he had said that he may have made flirtatious light-hearted comments to M and K in the past, and had asked them out in group situations. Julie Foley to whom the matter was referred, decided to initiate a

formal investigation. She asked J N to look into the allegations and prepare a report.

7. On 30 June 2017, J N contacted the Claimant to introduce herself. She suggested that he might think about who could give evidence in his support. In response to a question from the Claimant, she suggested that he did not approach boat owners. JN interviewed KSJ on 11 July 2017 and on 17 July she interviewed the Claimant. Prior to the commencement of the interview, the Claimant was given a copy of the complaint letter dated 6 June for the first time. He was told to take as long as he needed to consider it. The investigatory interview then followed.
8. At the investigation meeting, the Claimant denied all the allegations and said that he did not speak to KSJ that day. He said that he had not been drunk.
9. JN went on to carry out other interviews. She interviewed the Claimant's fellow lock keeper, SF. She interviewed the Claimant's current and previous line managers and some others. She interviewed a young employee who had been working at the kiosk on 27 May 2017, whom I will refer to as FL. She also interviewed KSJ's sister MSJ. In addition, JN interviewed RR, a boat owner who had gone through the lock late in the afternoon and whose name was provided to JN by the Claimant.
10. Following these initial interviews, JN carried out telephone interviews with two women who had previously worked with the Claimant. The first of these (CM) reported that the Claimant had asked her out on what she clearly understood to be a date, despite the fact that she was married. She expressed her surprise about this. Ms Nunn also interviewed R who said that the Claimant had referred to her as 'sexy bexy', although she stated that she had not been offended by this comment.
11. The investigation report was completed on 9 August 2017. Having reviewed all the evidence, JN decided that the allegation that the Claimant had been intoxicated on 27 May was not proven and should not be the subject of formal

disciplinary action. However, she found that there was a case to answer regarding the allegations of inappropriate comments of a sexual nature.

12. On 14 August, the Respondent wrote to the Claimant inviting him to a disciplinary hearing. The allegations against him were clearly set out in that letter. They are described as potential gross misconduct and he was warned that dismissal could be a possible outcome. Ms Foley who was to conduct the disciplinary hearing also said that the question of the Claimant's use of alcohol would be discussed at the disciplinary meeting.
13. I have considered the document on page 200 of the Bundle, where there is an email discussion about the witnesses that the Claimant might bring to the disciplinary hearing. Ms Foley states that the Claimant needed to advise her about the names of witnesses by 21 September. She adds: 'I would recommend that this is no more than 2 people'. In the event the Claimant brought one witness along to the hearing, TC who was a boat owner. I am satisfied having considered the email on page 200 that it was open to the Claimant to bring other witnesses if he wished to do so, including his wife. I note that he was represented at a disciplinary hearing by a trade union representative who would have been clear about the rules relating to witnesses at disciplinary hearings.
14. On 21 August 2017, Ms Foley met with KSJ herself. It is unusual but not unheard of for the person conducting a disciplinary hearing to interview a witness directly. On this occasion I conclude that Ms Foley was taking the allegations very seriously and wanted to have her own opportunity to interview the complainant and to assess the strength of her evidence before completing the disciplinary process.
15. The disciplinary hearing took place on 30 August 2017. At the hearing the Claimant produced a number of letters from boat owners and other persons associated with the lock. Ms Foley agreed to consider these.
16. I have noted the statement of AH at page 213a, who says that the Claimant and another man (TC) had coffee with him on his boat on the kiosk side of the

lock on 27 May. I have also noted the statement of AK, who said that he recalled visiting the kiosk café on two occasions that day and that he chatted to the Claimant there.

17. I turn to the disciplinary hearing. During the course of the hearing Ms Foley asked the Claimant if he went to the kiosk that day (page 221). He said that he did not, that he was on the other side of the lock and that TC could account for this. Ms Foley then quoted to the Claimant what FL had said during the course of the investigation. She said that she had seen the Claimant on the kiosk side of the river. She had not heard any conversation between KSJ and the Claimant. FL confirmed that KSJ had been upset and had said that 'he [the Claimant] made me feel uncomfortable'. The Claimant replied that FL had not started work until 11am on that day. He then said to Ms Foley 'since Simon Cox told me about this I did not even know who KSJ was' (page 222 of the Bundle).
18. Ms Foley referred to the witness statements from two other female members of staff. In relation to the statement of CM, the Claimant said that he had suggested that she go for a drink to avoid traffic. When he was asked if he had called R 'sexy bexy', he said that everybody did.
19. The Claimant's witness, TC was called. He said that he and the Claimant had gone onto the kiosk side of the lock to look at AH's boat. This contradicted the Claimant's statement that he had not gone onto the kiosk side that day. Both TC and AH said that the Claimant had left them on the boat so that he could return to work. It is clear from this that there was a period when he was on the kiosk side but not accompanied by either of them.
20. Ms Foley met with the Claimant to give him her decision on 8 September 2017 and it is confirmed in a letter dated the same day. Ms Foley states in the letter 'it is my belief that you did in fact have an exchange of comments with KSG on 27 May 2017 of an unacceptable sexual nature'. Ms Foley noted that the Claimant's evidence had been that he was not on the kiosk side, but this had been contradicted by AH and TC. She also noted that that he had an opportunity to speak to KSJ when he left them on the boat. She noted that the

Claimant's account was also at odds with evidence from FL, who recalled KSJ being upset. FL had also noted that the Claimant would come over and talk to KSJ and Ms Foley noted that this evidence was at odds with the Claimant's statement that he did not know who KSJ was.

21. Ms Foley accepted that on the day in question the Claimant had not been intoxicated, but she did call into question his behaviour in relation to alcohol and suggested that it was not in keeping with the expectations of the environment agency.
22. Ms Foley went on to consider whether there was any mitigation. She considered the Claimant's long service, but also noted that this was a public facing role. Her conclusion was that the employment of the Claimant should be terminated on two months' notice, to give him the opportunity to vacate the property.
23. The Claimant appealed. His grounds of appeal are set out in the letter dated 19 September 2017. He argued that the investigation was flawed and the disciplinary hearing unfair. He said he had been limited to two witnesses at the disciplinary hearing. He suggested that Ms Foley had given undue weight to the allegations around drinking. He referred to the fact that MSJ had been interviewed even though she had not been there on the day, but not members of his family who had been there and might have been able to provide relevant evidence. He stated that there were a number of reasons to conclude that KSJ's evidence was not credible.
24. On 16 October 2017, the Claimant submitted additional written evidence for the purposes of the appeal, including statements that commented both on his character and the character of KSJ. He did not attend the appeal on 17 October 2017 due to ill health, but he was represented by his trade union representative. Ms Foley attended the meeting and was questioned by Ms Chare and the other appeal panel member.
25. The appeal outcome was issued in writing on 23 October 2017. The letter makes it clear that the additional written statements had been considered by

the panel. The appeal panel concluded that JN had carried out a fair and reasonable investigation. At page 277, they considered the conclusions reached by Ms Foley and stated that 'as a panel we were confident that Julie's decision to dismiss you was reasonable, taking account of the nature of the comments made which were highly derogatory and the fact that the café is approximate to the lock, which would make it very difficult for LSJ and KSJ to feel comfortable at work had you remained in post. As Julie explained, lock keepers have a very important role to play for the environment agency because it is public facing, we have to entirely trust staff that they will treat all customers, colleagues and business partners with dignity'.

26. The appeal panel also addressed the Claimant's complaint that the allegations of drinking had been taken into account as part of the decision to dismiss. Again on page 277 the appeal panel stated: "in the appeal hearing we asked Julie Foley to clarify whether the decision to dismiss you was based on a discussion you had about alcohol. Julie satisfied us that the severity of the disciplinary action to be decided on was based on sexual harassment. To be clear therefore you have not been found guilty of misconduct in relation to drinking alcohol. It was appropriate to discuss in the disciplinary hearing but the focus was in relation to alleged comments against KSJ. Even if we disregard the evidence related to drinking [we] are satisfied dismissing you based on the comments made was appropriate'.
27. Following the conclusion of the appeal, the Claimant brought proceedings for unfair dismissal to this Tribunal.

Decision

28. I am satisfied that the reason for the Claimant's dismissal was his conduct in relation to the comments made to KSJ. I have noted carefully the Claimant's concern that the allegations of drinking on duty played a significant part in the disciplinary hearing and the appeal hearing. It is clear that there was quite a lot of discussion about the drinking allegations at every stage of this case: during the investigation, at the disciplinary hearing where Ms Foley specifically raised it and at the appeal. I note that the appeal panel decided to deal with it

because it had been raised in the grounds of the appeal. Having heard evidence from Ms Foley, I am satisfied that she was very clear about the context in which alcohol had been discussed in the disciplinary hearing. She had noted that JN had decided that the allegation of intoxication on 27 May was not proven and should not proceed. She felt that in light of what had come out of the investigation the question of alcohol use was something that had to be addressed. Overall I am satisfied that her decision was based on the allegations of sexual harassment. Likewise it is very clear from the passage I have just quoted from page 277 that the appeal panel understood the Claimant's concern about how the allegations of drinking had been dealt with. They specifically addressed this with Ms Foley but were satisfied that it was not the reason for dismissal. The panel also made the comment that even if the evidence related to drinking was ignored, they were satisfied that dismissal was appropriate.

29. As the reason for dismissal related to the Claimant's conduct, the **Burchell v British Home Stores** test applies, I must consider whether the Respondent had a genuine belief, on reasonable grounds after a reasonable investigation, as to whether the conduct took place. I must then decide whether dismissal was an appropriate sanction.
30. The essential issue in this case is whether there was sufficient evidence for Ms Foley to reach a conclusion that KSJ's allegations were likely to be true and that the Claimant had engaged her in an inappropriate discussion of a sexual nature. I should make it clear that in making that decision Ms Foley is not bound by the same standard of proof as would apply in a criminal trial for example. She did not have to be satisfied beyond reasonable doubt that the allegations were true but she did have to make a decision about whether it was more likely than not that the alleged conversations had taken place.
31. I find that Ms Foley's dismissal letter at page 233 makes it clear that she had reached a genuine belief that the allegations were essentially true. It is clear that she accepts KSJ's accounts of events to a large degree and that she was not convinced by the Claimant's account of what had happened that day.

32. Did she have reasonable grounds for reaching that belief and was the investigation that had been carried out reasonable?
33. I note that Ms Foley gave weight to FL's account which confirmed that KSJ was upset and had said that the Claimant made her feel uncomfortable. This supported KSJ's allegation that there were exchanges between her and the Claimant that day and contradicts the Claimant's account that there were none.
34. She decided that the Claimant was not truthful when he said that he had not been on the kiosk side. She noted that his statement had been contradicted by his own witnesses. She also decided that the Claimant's account that he hardly knew KSJ was not true and was contradicted by his statements to SC and JN. (At the investigation interview for example, he had agreed that he had asked her out for a drink in the past).
35. Ms Mawdesley-Thomas makes a number of points about the conclusions reached and about the way in which the investigation was carried out.
36. First of all, she complains that a person mentioned by KSJ as a witness to the last event that took place on 27 May (whom I will refer to as Z) had not been interviewed.
37. I considered the record of JN's interview with KSJ at page 102. She notes that 'your friend Z was there at about 5pm to help, would she have heard anything?' KSJ replies 'she was there when he asked to have a beer with him but when I went to get glasses from the other side she wasn't so didn't hear what was said, we left the glasses and shut the kiosk'. I note also that the Claimant received copies of an investigation report including those interview notes prior to the disciplinary hearing, but he did not ask at any stage for Z to be interviewed until it was brought up at this Employment Tribunal hearing.
38. I accept that it is possible that Z could have commented on certain aspects of whether the latest incident complained about by KSJ had taken place. This was an allegation that late in the afternoon the Claimant had asked KSJ for a drink, and that he then sat outside the café with an unidentified friend and

complained to the friend that KSJ would not go out with him. The Claimant says that this incident never happened. He argues that Z could have shed some light on the matter, and could have confirmed whether the Claimant and his friend had been sitting outside the kiosk or not, even if she could not comment on what had been said to KSJ.

39. It seems clear from JN's notes that she considered the possibility of interviewing Z. However I find that ultimately any evidence that Z could provide would have been of limited value. It was made quite clear that she did not hear any exchange between KSJ and the Claimant and his friend as they were (allegedly) sitting there and having a drink.
40. In relation to the evidence of FL, Ms Mawdesley-Thomas argues that this should not be relied upon because FL contradicts what KSJ and stated that she had not heard any exchange between KSJ and the Claimant. The account provided by FL does corroborate in part the account of events provided by KSJ. It is relevant that she noted that KSJ was upset on the day and her evidence also supports the fact that an exchange with the Claimant had taken place.
41. The Claimant has also argued that none of the boat owners were interviewed as part of the investigation. I have noted that JN did say to him that he should not approach them. There may have concern about broadcasting the allegations to the local community given their nature. I also note that when asked by JN about the allegation that he had been drinking, the Claimant gave the name and phone number of a boat owner called RR because he had been through the lock late on that afternoon. JN did interview him and he said that he had seen nothing untoward. He also said that he went through the lock about 4.50pm, whereas in fact I note that KSJ says that the last incident (involving the Claimant and his friend) took place around 6pm so it was about an hour and 10 minutes later.
42. I have also noted that at the disciplinary hearing, the Claimant was permitted to provide witness statements from a number of boat owners and that these were all considered by Ms Foley prior to making her decision. All of them said they

saw nothing untoward, but it is of note that the statements of AH and K contradicted certain aspects of the evidence given by the Claimant.

43. The Claimant also complains that his wife was not interviewed. At the investigation meeting the Claimant did mention his wife, but said simply that she had offered KSJ a drink during the course of the day and that KSJ said that she had a hangover. There is no suggestion made at the investigatory meeting that the Claimant's wife would be able to give evidence that would contradict KSJ's statement.
44. In any event I find that the Claimant could have called his wife as a witness at the disciplinary hearing or submitted a written statement during that hearing. He said that he had been advised that this would not be sensible because she is a member of his family, but I note that he did produce a statement for his cousin. This statement suggested that an exchange had indeed taken place between the Claimant and KSJ.
45. Overall, I find that the Respondent did not prevent the Claimant from calling evidence from members of his family.
46. I have noted the Claimant's concern that during the course of the investigation interview with FL, a leading question was put to her. I have to agree that there was a leading question about what FL had heard but in fact it was of no effect because FL replied that she had heard any exchanges between KSJ and the Claimant during the day. Therefore I do not find this to be material.
47. The Claimant is also concerned that although his family members were not interviewed, KSJ's sister was interviewed, I find that it was reasonable in all the circumstances to interview MSJ because she was able to give evidence about the previous relationship with the Claimant and exchanges that had taken place both with her and between him and her sister.
48. We heard quite a lot of evidence about the timing of tides on the day in question. KSJ has said that she had witnessed the Claimant being unable to open the lock around 11am that morning and suggested that he was drunk, she

said at the time the lock was full of boats. The Claimant said that high tide was at 15.19pm that day. Boats can only access the lock for 3 hours either side of high tide, so the lock could not have been busy with boats at 11am. He said this cast doubt on the credibility of KSJ.

49. JN addressed this point during her investigation. She emailed SC and asked him about the time of the tide on 27 May. He replied that it was at 14.20pm. That would suggest that boats could not access the lock until around 11.30. time when she saw the Claimant opening the lock.
50. It is clear when I read the statement of KSJ that the timings she provides are not particularly precise. It was a busy day. I do not consider this affects KSJ's overall credibility to a material extent. JN did look into the matter but she was entitled to rely on the evidence provided by the Waterways Operations Manager. I note that the Claimant thinks that the evidence provided was incorrect, but that was the evidence available as part of the investigation. I have not seen specific evidence to contradict that during the hearing today. No tide tables were produced, for example. In any event, the allegation that the Claimant was drunk on the day was found not proven. It is not relevant to the question of whether he made inappropriate comments.
51. Summing up the investigation overall, I have been referred to the case of *J Sainsbury plc v Hitt* and I note that I need to consider whether the scope of the investigation was within the range of reasonable responses to the allegations made. I find that it was. JN had a clear rationale for the extent of her investigation. She interviewed relevant witnesses and followed lines of enquiry that emerged. That led her to interview CM, R and RR. I have not seen any example of her refusing to interview witnesses suggested by the Claimant and he was not denied an opportunity to provide evidence from his wife or other family members. JN could have extended her investigation to interview Z and I have considered that carefully. I find that the failure to interview that person was not fatal as it seemed clear from KSJ's interview notes that this evidence would only be of limited value.

52. I find that the investigation provided a reasonable basis for Ms Foley to decide that the allegations against the Claimant in relation to alleged sexual harassment were proven. It is also clear that Ms Foley considered what the appropriate sanction should be. There is a section in her dismissal letter which makes it clear that having found that there was gross misconduct, she looked at the question of the sanction carefully. She considered what mitigation was available, but ultimately decided that termination was the correct option. I find that dismissal was within the range of reasonable responses.
53. Essentially, this case came down to the question of who was going to be believed, either the Claimant or KSJ. A manager in that situation has to weigh up the accounts of both sides and decide which is the more credible. JN and Ms Foley both decided that they preferred the account of KSJ to the account of the Claimant. I find that was a conclusion that both of them were entitled to come to in all the circumstances of this case. The claim for unfair dismissal does not succeed.

Employment Judge Siddall
Date: 27 March 2019