EMPLOYMENT TRIBUNALS

Claimant: **Mr N McCarthy**

First Respondent: **Lookers PLC**
Second Respondent: **Addison Motors t/a Benfield Motor Group**

HELD AT: **Leeds** **ON: 7-8 February 2019**

BEFORE: **Employment Judge J M Wade**
Mrs L J Anderson-Coe
Mr L Priestley

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms L Quigley (counsel)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 8 February 2019, the written record of which was sent to the parties on 15 February 2019. A written request for written reasons was received from the respondent on 18 February 2019. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 8 February 2019 are repeated below:

JUDGMENT

1 The complaints against the Second Respondent are dismissed: it was not the employer of the Claimant.
2 The claimant's complaint of unfair dismissal is well founded.
3 The Tribunal makes no Compensatory Award: the Claimant's conduct was wholly to blame for his dismissal.
4 The First Respondent shall pay to the Claimant the sum of £7620 by way of Basic Award.

5 The Claimant's complaint of sex discrimination is dismissed.

REASONS

Introduction

1. These were complaints of unfair dismissal and sex discrimination arising out of Mr McCarthy's dismissal, following an altercation with a colleague, to whom we refer as Ms M. It was established that Mr McCarthy at the time of his dismissal was employed by Lookers Plc, the first respondent. The complaint against the second respondent company is dismissed.

Evidence

2. We heard from Mr McCarthy himself, from Mr Hardy who completed an investigation for Mr Wilson, who took the decision to dismiss the claimant. We did not hear from the gentleman who undertook the appeal, Mr Banks, because he has since left the employment of the respondent.

Findings of fact

3. The undisputed chronology in this case is that on 20 June 2018 there was an altercation in the dealership in the office in the morning. The claimant was asked to go home around 11am and he returned the next day. Ms M, with whom he had had the altercation who worked as an accounts manager prepared her own statement that day as a formal grievance and she also collected statements from two witnesses who had been present for the altercation and she sent those through to HR.

4. Ms M was visited by the regional sales director Mr Hardy later that day and the next day and he arranged for her to work from the Leeds office so that the claimant could come back to work. It was a busy time for everybody of course and the claimant couldn't undertake his work other than in the showroom in Harrogate.

5. There was then an investigation conducted by Mr Hardy who liked the claimant, he knew him well, he knew he was a very good performer in terms of sales and that he had a more or less unblemished record with the respondent save for a minor disciplinary warning in 2017. He interviewed the claimant and then the three witnesses Ms C and Ms S but at that time in the week after the altercation, not Ms M because by then she had been certified unfit for work due to stress and we should also mention of course that she was pregnant at the time. Ms M was not interviewed until 4 July when an interview took place with a colleague of hers and that colleague also contributed in the interview. They both made a raft of disparaging comments about the claimant, his circumstances that he had had impersonated a police officer and that he was at work potentially influencing witnesses whereas Ms M was not and they described the conduct that the alleged against him as gross misconduct.

6. On 5 July Mr Hardy took the decision to formally suspend the claimant and in doing so he asked him about the allegation and how he was because of the matters that had been raised by Ms M and her colleague and because he was concerned about

him. When the claimant said he had not impersonated a police officer that was the end of the matter as far as Mr Hardy was concerned and so he removed from his later investigation report all the highly prejudicial material that had been mentioned by Ms M and her colleague and others during the investigation. He then invited the claimant to a disciplinary hearing to face allegations of serious misconduct which he said could result in a dismissal. He said that in a letter to him, and as I have indicated Mr Hardy's report comprised extracts of the various witness statements concerning only the altercation on 20 July and the events leading up to it.

7. The claimant wrote to Mr Hardy on 6 and 10 July raising a number of matters concerning his treatment including having access to the company's policies, having the need to have the full documentation in order to prepare for the hearing and that he'd previously and formally raised complaints about Ms M and that he felt that there was an inequality in the treatment of them. He was provided with a copy of the investigation report that Mr Hardy had completed on 10 July after asking for that paperwork and the hearing and he also asked for a postponement and that was granted and the hearing ultimately took place on 20 July before Mr Wilson.

8. The letter inviting him to that 20 July hearing described the allegations for the first time as gross misconduct and the allegations were being aggressive and invasive of Ms M's personal space and making offensive comments such as "you fat troll and I feel sorry for your unborn child". The claimant attended that hearing with Mr Wilson. Notes were taken by Mr Gordon who was the after sales manager in the branch and he was considered by Mr Wilson senior enough to undertake that note taking role. The claimant was accompanied by a colleague who took notes on his behalf. The claimant knew that Mr Gordon had been around on the day of the altercation in the branch but he didn't make any objection to Mr Gordon taking notes at that time.

9. There was a full discussion of the allegations by Mr Wilson during the course of that hearing. He was a manager who was based in Sheffield. He didn't really have any knowledge of the claimant at all, nor of the circumstances or the personalities in branch. Mr Wilson identified that provocation and mitigation were likely to be things that he would want to explore in his notes that he made in preparation for that hearing because the claimant had accepted throughout that he had made the two comments to which I have referred. Albeit he'd said at the time he couldn't remember whether he'd used the word fat before the word troll.

10. The claimant raised provocation himself as an issue and Mr Wilson asked him about what had started the argument with Ms M and there was a full discussion of that. After an hour or so of that hearing Mr Wilson adjourned for half an hour. He decided that dismissal was the right decision in this case. He made some nights to explain that decision and he called the claimant back in to tell him. As to the mitigation that the claimant raised in the disciplinary hearing he'd mentioned autism as a reason for forgetting to complete some paperwork which had proceeded the altercation. He'd asked Mr Wilson to take that into consideration generally. He'd also mentioned marriage difficulties at home and that Ms M had called him a "cock" and a "wannabe policeman". Those to comments haven't been explored or mentioned in Mr Hardy's investigation with the claimant albeit one witness had said that both Ms M and the claimant had said horrible things to each other.

11. Mr Wilson didn't have any information about the claimant's disciplinary record or record with the business other than he knew he'd worked for them for some 10 years and the predecessor owners of the dealership.

12. Mr Wilson didn't consider any of the mitigating factors should influence his decision to dismiss because in short he didn't consider that they were an excuse for the particularly offensive comments that the claimant had made. A letter was then sent on 25 July terminating or confirming the decision that Mr Wilson had delivered to the claimant on 20 July terminating his employment with immediate effect and there was then an error made in a leaver's form on 25 July recording the dismissal had been on the 19th rather than 20th July. For the avoidance of doubt we do accept that that was a straightforward error and isn't evidence of some kind of conspiracy or anything else in this case.

13. The claimant then appealed that decision by letter dated 29 July. He set out that he had not had relevant documents in connection with the case. He set out that there had been unfair treatment as between him and Ms M. He set out that Ms M had been aggressive to him first and that he had formally complained about her behaviour in the past. He asserted that the comments he'd made did not amount to bullying and were the first aberration in over 20 years in the business as he put it.

14. A short appeal hearing was then undertaken by Mr Banks on 14 August. He didn't uphold the appeal and he communicated that in a letter on 16 August. The claimant had raised in the appeal at the outset that he had not had a copy of the notes of the disciplinary hearing which had been taken as we have indicated by the after sales manager and it was only as a result of a subject access request which the claimant made which had not been completed provided to him at the time of the appeal that he had received those notes. So having received those notes for the purposes of this case and as a result of the subject access request he was then able to see that they contained an error in the recording of one of the allegations, that is that it had been recorded that he had said "I hope your unborn child dies" rather than "I feel sorry for your unborn child".

15. Those are the broad findings of fact in the chronology that we have made out. We have to ask ourselves very well understood questions in relation to the unfair dismissal complaint. We have to say what was the reason for dismissal. Clearly it was the claimant's conduct on 20 June with Ms M and we entirely accept of course it wasn't really challenged that Mr Wilson had a genuine belief that the claimant had engaged in an unacceptable conduct in making those remarks. Did Mr Wilson have reasonable grounds for his belief. Of course he did. That was based on the investigation carried out by Mr Hardy and it was included in his brief for that disciplinary hearing. He also of course had what the claimant said to him in the course of the disciplinary hearing. The claimant accepted that he had made the reference to feeling sorry for Ms M's unborn child and referring to her as a troll albeit he couldn't remember whether he had used the word fat, but given the other witness evidence it is established or suggested that he had used that word. Mr Wilson clearly had reasonable grounds for believing it and he clearly did believe that that's what had been said.

16. Did the respondent carry out an investigation that was reasonable in all the circumstances and it is an established principle for Tribunals in unfair dismissal cases that we look at the investigation in the round, that is from the start of a process to the very end including an appeal and we have to ask ourselves that

question standing back and looking at all the matters in the round. We also direct ourselves that an investigation doesn't have to be perfect. It doesn't have to explore every possible angle. It has to be within the band of reasonable investigations in the circumstances. Was this investigation perfect? Clearly it wasn't. Firstly the claimant wasn't encourage by anyone on site on the day of the incident in question to write down his best recollection of what had happened when other witnesses had clearly been asked to do so by Ms M. When he saw Mr Hardy the following week it was apparent that that did put him at a disadvantage because he couldn't remember a number of things when they were asked of him about the altercation and it was suggested that there was no real challenge or exploration with Ms M of her conduct in the incident, for example what if anything she'd called the claimant or for example why she hadn't provided him with the files when he'd asked for them in a straightforward way. Mr Hardy on the other hand had explored in all his meetings the previous relationship between the two protagonists Ms M and the claimant and it was very clear not in dispute that they had had a falling out over a commission scheme some weeks before and everybody knew that their relationship generally was strained.

17. Taking all of that in the round do we consider that the investigation carried out by Mr Hardy was outside the band of reasonable investigations. No we don't and we don't because the claimant it was clear had admitted one particularly nasty remark and Ms M was consistently known to Mr Hardy to be giving the same account more or less of an altercation involving the same offensive remarks and she was very upset on the day clearly and the claimant had continued to make offensive remarks to her. She'd also been absent for stress and hadn't been in the workplace the week before. She'd commented on the welfare of herself and her baby and that those ought to be the priority in the circumstances, and in the round in all of those circumstances not challenging her about the alleged remarks. At that stage it seems the Tribunal isn't outside the band of reasonable responses.

18. We want to deal with an aspect of the claimant's procedural case when we come on to decide whether it was reasonable in all the circumstances for Mr Wilson to treat the claimant's conduct as sufficient to dismiss him and indeed for it to be treated as such at the appeal stage and maintained on appeal. We just want to deal with one matter namely the claimant's suggestion that matters were ramped up by labelling this as gross misconduct in advance of the disciplinary hearing and that this was a foregone conclusion. A decision had already been taken in relation to the outcome.

19. In our judgment there was no decision already taken by Mr Wilson. It is clear in the reading of the full notes of the hearing that he engaged in a full discussion of all the relevant matters. It strikes us as highly unlikely that he had clearly made up his mind before meeting the claimant and the change to gross misconduct by Mr Hardy as his evidence reflected these letters were drafted for him by HR. He had flagged up that this was serious and could result in dismissal in an earlier letter and in our judgment that was simply HR applying the label in the policy to which these matters if established could attract.

20. By the time things came to Mr Wilson of course and applying the question that we have to apply that is contained in the Employment Rights Act section 98(4) whilst a different employer might have decided to interview Ms M themselves at that stage and to get a better sense perhaps of the provocation or what had gone out, given the admitted particularly nasty remarks by the claimant we can't say again that to

fail to take the step at that stage puts the investigation in the round outside the band of reasonable investigations.

21. It is fair to say of course thought that Mr Wilson didn't know about all the other prejudicial material that had been provided by Ms M and her colleague, the things that had been said about the colleague, but Mr Banks did know because the claimant alerted him in his appeal against dismissal that he considered it strange he'd been asked by Mr Hardy if he'd been impersonating a police officer. Similarly the claimant was still operating in the dark somewhat because he didn't know at the appeal what had been captured by the note taker during the course of the disciplinary hearing and in particular he didn't know that the note taker had upped the level of nastiness of the remark about the unborn child and that that in all likelihood indeed Mr Banks says it in his letter rejecting the appeal that that was what Mr Banks had read.

22. There was an opportunity clearly for the respondent at the claimant's appeal and indeed its procedures clearly provide for there to be an appeal against a dismissal decision and any reasonable disciplinary procedure would do so. It is a fundamental aspect of natural justice that you have to a fair appeal. Do we consider in the round that this was a fair appeal? It was a reasonable appeal within the band of reasonable responses. This was an opportunity for a reasonable employer to try and put the parties on the equal footing that they hadn't been on at the outset so Ms M perhaps for her own very sensible reasons wrote a contemporaneous account of what had happened. The claimant didn't have that opportunity and wasn't encouraged to have that opportunity. But in our judgment that renders all the more important that the appeal provide all the information that was seen by anybody including Mr Hardy, HR and anybody else in connection with these events, and provide the material that the claimant could properly say and have the opportunity to say might have influenced Mr Wilson's decision had he been able to press for exploration of why for example Ms M had said so may prejudicial things about him. That simply didn't happen on the appeal because he wasn't provided with any of that documentation at all.

23. In the round then we have come to the conclusion that for that reason, applying section 98(4) did the respondent act reasonably in treating the claimant's conduct as sufficient reason to dismiss in all the circumstances of this case and by all the circumstances we include his long service, the sense that there was nothing of this kind had ever happened before and that the claimant was entitled on appeal to have matters that had perhaps not been level at the outset of these events to be restored. Given that didn't happen on appeal we consider that this was outside the band of reasonable dismissal and it doesn't satisfy section 98(4). And so we uphold the complaint and have concluded that this was an unfair dismissal.

24. We then come on to remind ourselves that the primary remedy for unfair dismissal is reinstatement or re-engagement. In this case the respondent has clearly set out its case and indeed put its case to Mr McCarthy that he engaged in very blameworthy conduct. We don't know from Mr McCarthy whether he would seek reinstatement or re-engagement but it seemed to us appropriate that we deal with this head on and straightaway because even if he did seek it we have had to make findings about the nature of his conduct on that day. It is absolutely at the heart of the respondent's case and for our own part this Tribunal having seen a lot more material than Mr Wilson saw of course has concluded that even the single remark "I feel sorry for your unborn child" which was admitted, whatever the provocation

and whatever the circumstances in which it was made is so hurtful and so targeted and so bullying of somebody in those circumstances even under the red mist that the claimant was 100% to blame for his dismissal and his conduct was of that magnitude of blameworthiness and we don't shy away from that at all. In that sense we entirely share the respondent's reaction to it.

25. We then come on to consider the complaints of sex discrimination. Of course there are four points in the chain of events, the suspension by Mr Hardy, the disciplinary decision or a level disciplinary charges by Mr Hardy, dismissal by Mr Wilson, the appeal by Mr Banks.

26. The theme of the claimant's case throughout and indeed at the case management hearing was that Ms M was the comparator that she too had engaged in blameworthy conduct and she was not subject to anything like the four steps to which he was subject.

27. In our judgment first of all the claimant has to prove less favourable treatment. So he has to prove a difference of gender. Well clearly Ms M and he were of different genders, and then he has to prove different treatment. On the face of it potentially different treatment. But there is a provision in the Equality Act that the person with whom he compares his treatment has to have circumstances which are materially the same. This is subtle in this case because the remarks even if we accept that, and it wasn't proven, but even for the sake of ?????? if we accept that Ms M was belligerent, unwilling to simply deal with this by handing over the papers, called the claimant a cock, waved a cheque book at him. In our judgment what she did not do and the reason that she is not a valid comparator is that she did not engage in particularly vicious and targeted remarks towards the claimant and we share to some extent Mr Wilson's characterisation of what is as it were ordinary banter in this sort of workplace and particularly target and vicious remarks. We can imagine some of the remarks that she might have levelled at the claimant had she wanted to really target him in that vicious way but she didn't and in our judgment they are not proper comparators in that sense in the claimant can't establish that gender had anything to do with his treatment by either Mr Hardy or Mr Wilson or Mr Banks. If we are wrong about that we simply go on and ask ourselves the reason why the claimant was subject to suspension disciplinary dismissal and rejection of his case on appeal and the straightforward reason why of course is his making of particularly vicious remarks and we know he perhaps struggles with accepting responsibility for those remarks but nevertheless that is our judgment also and so we dismiss the sex discrimination complaint.

28. We have to deal with remedy of course in this case because we have upheld a complaint of unfair dismissal for the essentially failings on appeal and the lack of natural justice afforded to the claimant in that respect. We have made a finding that he was 100% to blame for his dismissal because of the remarks that he made. We have to apply the provisions of the Employment Rights Act therefore discount entirely any award of compensation to him known as the compensatory award because of his blameworthy conduct as we found it to be. We have a discretion as to whether to discount and award no basic award. His is a litigant person. He is not represented by a lawyer before this Tribunal. He hasn't included in his schedule of loss a claim as such for a basic award but it seems to us part of our duty to put the parties on an equal footing is certainly to tell everybody that that is an award that we would usually make to establish what that is and then to come

on to decide whether or not to apply the 100% discount to it that we have applied to the compensatory award.

29. Now given the hour and the Tribunal wanting to not waste the parties' time we have undertaken that calculation. The basic award it seems to us for the claimant in this case is £7,620. He was over the age of 41 for all the years that he was working for the respondent. It is not in dispute that he worked for 10 years. The calculation is the same as it would be for a statutory redundancy payment at the maximum weekly pay of £508 because clearly with his commission he was earning more than that gross every month. We have decided to exercise our discretion not to apply the 100% discount that we applied his compensatory award to the basic award and we do so for this reason. It seems to us that there has been a clear lack of transparency in providing to the claimant all the things that were said about him during this episode. There has been a lack of ability on his part to challenge some of that through the disciplinary and appeal process because he simply didn't know about it and he has told us about the effect that the mistake in the disciplinary notes that having got out into the community has had on him in a broad sense.

30. Exercising our discretion is a matter of weighing up all things in the case if you like and deciding whether or not it is in the interests of justice that the claimant has no compensation or that he has his basic award. And for all those reasons we have decided that it is in the interests of justice in this case that he have that basic award and so the respondent shall pay that to him within the usual 28 days of the Judgment being sent to the parties.

Employment Judge JM Wade

Date: 25 April 2019