



EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Miss N Hussain

Respondent
Waterloo
Solutions Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham ON 6 & 7 March 2019

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: Mr E Komeng (Lay Representative) – 6 March 2019
In Person – 7 March 2019

For Respondent: Mr R Morton (Solicitor)

JUDGMENT

(Sent to the parties on 21 March 2019)

The judgment of the tribunal is that:

- 1 The claimant was fairly dismissed by the respondent: her claim for unfair dismissal is not well-founded and is dismissed.
- 2 The claimant was lawfully dismissed under her contract of employment: her claim for wrongful dismissal is dismissed.

REASONS

(Issued pursuant to a request in writing from the claimant dated 11 March 2019)

Introduction

1 The claimant in this case is Ms Nazma Hussain who was employed by the respondent, Waterloo Solutions Limited, from 6 May 2014 until 8 June 2018 when she was dismissed. There is a dispute between the parties as to whether prior, to the commencement of her employment with the respondent, the claimant had a period of qualifying service with another employer which transferred to the respondent either through the provisions of TUPE or from an associated employer. Both parties have agreed to provide further evidence on this point, but it is unnecessary to resolve the point before determining the claims for unfair and wrongful dismissal. The point is relevant only to the calculation of remedy.

2 The reason given by the respondent both at the time and subsequently for the claimant's dismissal is misconduct.

3 The claim form was presented on 4 September 2018: it is the claimant's case that she was both unfairly and wrongfully dismissed. She claims compensation for unfair dismissal and unpaid notice pay.

4 The claims are resisted: the respondent maintains that the dismissal was fair and that it was within the terms of the claimant's contract for her to be dismissed without notice.

The Evidence

5 The tribunal heard evidence from three witnesses: firstly, for the respondent, from Miss Claire Whistance-Smith HR Manager and then from Mrs Karen Chilton - Operational Head. Mrs Chilton dealt with the claimant's appeal against dismissal: the dismissing officer was Mrs Jane Bull. Mrs Bull has not given evidence, but Ms Whistance-Smith provided HR support to Mrs Bull throughout the process and was able to give first-hand evidence as to how the disciplinary procedure was applied. The claimant gave evidence on her own account.

6 In addition I was provided with a joint trial bundle running to 193 pages; and a supplementary trial bundle running to 81 pages. I have considered the documents in the bundle to which I was referred by the parties during the hearing.

7 I find that all the witnesses were truthful: it is unnecessary for me to determine conflicting accounts; the relevant facts are agreed.

The Facts

8 The claimant was employed by the respondent as a Sales Adviser: she was a high performing employee with no blemishes to her disciplinary record. The appellant describes herself as an "exemplary employee" and there is no basis to depart from that description. Testament to how highly the claimant was regarded by the respondent, comes with the fact that on 11 April 2018 the claimant tendered her notice which was to expire on 4 May 2018; the claimant was choosing to move on for her own career progression; however, her performance and contribution was such that the respondent moved quickly to offer the claimant an alternative role in the hope of retaining her services. At the time of the events leading to the claimant's dismissal, negotiations regarding the alternative role were ongoing, but it is common ground between the parties that the resignation never took effect.

9 On 9 May 2018, the respondent's managers received a complaint from one of the claimant's colleagues JC: she complained that, on 21 April 2018, the

claimant had sent her a series of insulting; hurtful; racist; and threatening *Whatsapp* messages. The messages were available to be seen and were self-explanatory. JC's account was taken in an informal grievance meeting with Miss Whistance-Smith on 9 May 2018. At that meeting, JC provided an explanation for not having reported the claimant's conduct earlier. At the time of the incident it was known that the claimant was shortly to leave the respondent's employment; JC therefore took the view that it might be too stressful to pursue a grievance in respect of a colleague who was shortly to leave in any event. From 30 April 2018, onwards the claimant was off sick; accordingly, after the incident, JC only worked alongside the claimant for a matter of a few days; JC explained that during those few days she had been afraid to go to work; she had felt uncomfortable; and had, in fact, been physically sick. However, in early May 2018, JC became aware that it now appeared that the claimant would not be leaving after all – hence, the decision to raise her grievance on 9 May 2018.

10 When the claimant returned to work after her sick leave on 23 May 2018, she was invited to a meeting with Mrs Bull; Miss Whistance-Smith; and an HR notetaker. The claimant was told of the allegations against her and shown copies of the messages. The claimant's immediate response was that as the incident had happened outside work it was not relevant for the respondent to investigate. She suggested that JC had been encouraged to make the allegations and she minimised the incident. By now, it was more than a month since the incident occurred.

11 The following day, Mrs Bull wrote to the claimant inviting her to a formal grievance hearing (the matter under investigation was JC's grievance rather than the claimant's conduct); the claimant was accompanied by a work colleague; and Miss Whistance-Smith and an HR notetaker were present. At the meeting the claimant openly admitted that she had sent the messages and she agreed that her conduct was unacceptable.

12 In the light of the claimant's admissions that she sent the messages and that her conduct was unacceptable, Mrs Bull concluded that the matter should proceed to a disciplinary hearing and no further investigation was necessary. The disciplinary hearing was convened for 4 June 2018: at the outset the claimant read aloud a pre-prepared personal statement running to some nine pages; she admitted sending the messages; she admitted that they were unacceptable; she explained that she felt provoked by JC's conduct; in one respect, she suggested that JC had doctored the messages to make the position look slightly worse than it otherwise was. She disputed that during the following week JC had been in any way afraid or disturbed at work; she repeated that this was a private matter which had occurred outside work.

13 Following the meeting, Mrs Bull took some time to consider the position: the meeting was then reconvened on 8 June 2018; and the claimant was

dismissed with immediate effect. The dismissal was confirmed by letter dated 11 June 2018; the claimant was notified of her right to appeal.

14 The claimant submitted an appeal which was dealt with by Mrs Chilton. In addition to the matters raised with Mrs Bull, the claimant also suggested that the decision for summarily dismissal was inconsistent with decisions taken by the respondent on other comparable occasions - but she has never provided any details of these. The appeal meeting took place on 3 July 2018: the claimant was again accompanied by a colleague; and after the meeting Mrs Chilton undertook extensive investigations into the following: -

- (a) The claimant alleged that she had not seen relevant documentation before the dismissal hearing: Mrs Clinton established that the appellant had had access to the text messages.
- (b) Mrs Clinton looked into the claimant's allegations that she had been provoked by JC.
- (c) Mrs Chilton looked into the suggestion that there was evidence that JC was not in fact afraid or intimidated. This was both by reference to her behaviour during the few days that the claimant and JC worked together after the incident and due to claims made as to JC's behaviour at a work social event which happened to take place on the day of the claimant's dismissal. This further investigation generated notes of 12 additional meetings and one written statement.

15 Mrs Chilton's conclusion was that, to the extent that JC could be said to have provoked the claimant, JC's conduct did not remotely justify the claimant's abusive and threatening messages.

16 The evidence said to show that JC was not afraid or intimidated had to be balanced against other evidence which clearly demonstrated that she was. And, in any event, the messages were unacceptable and spoke for themselves.

17 Having considered these matters, on 30 August 2018, Mrs Chilton wrote to the claimant advising that the decision to dismiss her was upheld,

The Law

Unfair Dismissal

18 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

- (1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

- (1) 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 a reason falling within subsection (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.
- (2) A reason falls within this subsection if it—
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (4)where the employer has fulfilled the requirements of subsection (1), the determination of the question 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 of the employer's 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.

19 **Cases on Unfair dismissal**

British Homes Stores v Burchell [1978] IRLR 379 (EAT)

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that

belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)
Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

20 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

Wrongful Dismissal

21 The wrongful dismissal claim is a simple claim under the law of contract: under the terms of her employment contract the claimant was entitled to a period of notice of termination of her employment. If she was to be dismissed without notice she is entitled to claim damages for the losses arising from the breach of contract. Frequently such a claim can be quantified by a payment equivalent to the wages which the employee would have earned during the notice period.

22 The only effective defence to the wrongful dismissal claim (and the only potential defence advanced in this case) is that, by her conduct, the claimant was herself in repudiatory breach of her employment contract; and that, by dismissing her, the respondent merely accepted the breach and chose not to waive it.

23 The principal burden of proof is on the claimant to establish that she was entitled to a period of notice - in this case this is not in dispute. It is the respondent who asserts that the claimant was in repudiatory breach; and the burden of proof is on the respondent to establish this on the balance of probabilities.

24 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or

otherwise of the respondent's decision; but must make its own findings as to whether or not the claimant had acted in repudiatory breach of contract.

The Claimant's Case

25 The claimant's case is that dismissal was unfair for a number of reasons which can be summarised as follows: -

- (a) Insufficient consideration was given to her exemplary employment record.
- (b) There was an inadequate investigation into or insufficient consideration given to JC's provocation.
- (c) There was inadequate investigation into or insufficient consideration given to the fact that JC appeared not to have been intimidated by the claimant's conduct.
- (d) Mrs Bull was both the investigating officer and the disciplining officer: this is contrary to the ACAS guidelines.
- (e) The claimant was not provided with the notes of the respondents meetings with JC or with a small number of other employees who provided evidence as to JC's fear upon her return to work in the week after the incident.

26 I have considered each of those and my conclusions are: -

- (a) I am satisfied on the evidence provided by the respondent's witnesses that full account was taken of the claimant's exemplary employment record. The respondent did not wish to lose the benefit of the claimant services: this is amply demonstrated by the efforts they were making to retain the claimant after her resignation.
- (b) I am satisfied that the respondent took full account of what the claimant says about JC's provocation: but it did not justify the claimant's conduct.
- (c) There was evidence to suggest that JC had exaggerated the degree of intimidation she felt. But, there was also evidence to confirm that JC felt intimidated. The respondent had to balance the two. In my judgement, it did so correctly.
- (d) Mrs Bull was initially engaged to investigate JC's grievance: in the context of this investigation, the claimant fully admitted the misconduct alleged against her; there was no separate investigation into the misconduct. In my judgement, no unfairness arises in Mrs Bull then also dealing with the disciplinary hearing.
- (e) The statements to which the claimant refers were provided by JC and witnesses in the context of the grievance investigation in which they had a reasonable expectation of confidentiality. The claimant then admitted the misconduct: and, in those circumstances, my judgement is, that it was not essential to the fairness of the disciplinary process for those confidential statements to be disclosed.

Discussion & Conclusions

Unfair Dismissal

The Reason for the Dismissal

27 The reason for the dismissal, and the sole reason, was misconduct which is a potentially fair reason under Section 98(2) ERA.

General Fairness

28 Applying the case of ***Burchell***, there is no doubt that Mrs Bull genuinely believed that the claimant had committed the misconduct alleged - namely the sending of racist and abusive messages. The claimant had admitted it.

29 In my judgement, there was ample evidence for this conclusion not least because the claimant had admitted it and the messages were available to be read.

30 In my judgement the investigation was perfectly adequate. Mrs Bull did not conduct additional investigations into JC's behaviour: what she effectively did was to accept what the claimant told her about this. She took the claimant's case at its height: and she concluded that, even if all the claimant said was correct, then the claimant's conduct was still such that the sanction of dismissal was appropriate; accordingly, further investigation was unnecessary. In the event, Mrs Chilton then carried out further investigations and drew the same conclusions.

Procedural Fairness

31 The respondent acted with conspicuous fairness. Although the claimant was not provided with copies of statements obtained under the Grievance Procedure, the claimant was left in no doubt as to what the allegations against her were; and, of course, she admitted the conduct alleged. My judgement is that the ACAS code has been complied with.

Sanction

32 The final question on unfair dismissal is whether or not the decision to summarily dismiss the claimant was within the range of reasonable responses. Of course, the claimant had an exemplary record; but this was serious misconduct. Some may judge the respondent's decision to dismiss as a harsh decision; but that is not the test which I must apply; and, my judgement is that the decision clearly came within the range of reasonable responses.

33 For these reasons, I find that the dismissal was fair.

Wrongful Dismissal

34 Regarding the claim for wrongful dismissal, the test here is different. There is no doubt that under her contract the claimant was entitled to receive or to be paid notice; essentially the only defence arises if the respondent can prove that the claimant had acted in fundamental breach of employment contract such that she can no longer rely on the benefits of it. My judgement is that, in sending these messages to a work colleague, the claimant clearly fundamentally undermined the implied term of trust and confidence; she breached the employment contract; the respondent was entitled to dismiss her without notice.

35 The claim for wrongful dismissal is also dismissed.

Employment Judge
21 May 2019