



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121933/18

Held in Edinburgh on 4 and 5 March 2019 and 4 April 2019

Employment Judge Sally Cowen

Mr T McAlpine

**Claimant
Litigant in person**

Sodexo Justice Services (Sodexo Limited)

**Respondent
Represented by
Ms Stobart (counsel)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim of unfair dismissal is dismissed.

REASONS

Introduction

- 1 The claimant has brought a complaint of unfair dismissal. It was agreed that the hearing would consider both liability and remedy. The Tribunal heard evidence from the claimant himself, Mrs Fiona Anderson and Mr Ian Whitehead on behalf of the respondent. The Tribunal was also referred to a joint set of documents and both the claimant and the respondent's counsel made closing submissions.

- 2 The case was heard on 4 and 5 March 2019 and continued on 4 April 2019.

Issues to be determined

- 3 The Tribunal and parties identified this case as an unfair dismissal claim. The following issues were agreed as the legal issues to be considered;
 - I. What was the reason relied upon by the respondent for dismissal,
 - II. Was that reason within the list of potentially fair reasons s.98 ERA 1996
 - III. Did the respondent have a genuine belief in the claimant's misconduct,
 - IV. Was that belief based upon a reasonable investigation,
 - V. Was the procedure used reasonable in all the circumstances s.98(4) ERA 1996

Findings of Fact

- 4 The tribunal makes the following findings of fact:-
 - 4.1 The claimant was employed on 24 November 2008 as a Prisoner Custody Officer. He was subsequently promoted to Senior Prison Custody Officer at HMP Addiewell ('Prison'), until his dismissal on 11 July 2018. The respondent is a provider of custodial and rehabilitative services in five prisons in the UK including HMP Addiewell.

 - 4.2 The claimant was well regarded by his employers as a capable and professional prison officer who had no previous disciplinary history.

- 4.3 The respondent had a number of policies relevant to the use of social media by staff, including the Social Media Policy (18/8/17) which set out;

“6.1 You must avoid making any social media communications that could damage our business interests or reputation, even indirectly...

6.2 You must not use social media to defame or disparage us, our employees or any third party; to harass, bully or unlawfully discriminate against employees or third parties; to make false or misleading statements; or to impersonate colleagues or third parties”.

- 4.4 The respondent’s Rules of Conduct set out that *“A breach of any of these rules would be considered gross misconduct”*; under Miscellaneous, rules 5 and 7 indicated:

“Employees must be honest at all times, in connect with their employment and must not breach the trust and confidence that is provided to them by the Company or Client.

Employees must not engage in, condone or encourage any behavior that could be regarded as harassment, bullying, victimisation or discrimination”.

- 4.5 On 1 June 2018 an anonymous intelligence log was received which informed the respondent that alleged racist comments had been posted on Facebook by the claimant on 29 May 2018, whilst off duty. Mr Adam Banner, a Security Manager, was asked to access the conversation which the claimant had commented upon. He could not do so from his work PC, so went to his car in the car park, where he kept his mobile phone (in accordance with the respondent’s rules) and sent screenshots of the Facebook conversation involving the Claimant (‘the original version’), to Mr John Joyce, Head of Security and Operations.

Mr Banner did not know at the time he sent the screenshots why he was being asked to do so.

- 4.6 The claimant was called into a meeting by Mr Joyce, who asked him if we was aware of the policy on 'equality of other religions' and then read to him extracts of the conversation on Facebook from the original version and told him that he was being suspended pending an investigation. The claimant was then escorted out of the prison.
- 4.7 The claimant went to his car and proceeded to read and screenshot the entire Facebook conversation thread. These screenshots were produced to the Tribunal. All of the screenshots were chronologically sequential, being timed at 16.26 and 16.27, with the exception of two, which lay in the middle of the batch of screen shots, which were timed at 16.49. The significance of this will be referred to later.
- 4.8 The claimant received a letter confirming his suspension dated 4 June 2018 which indicated that "*it is alleged you have made comment/s on Facebook that could be damaging to the reputation of Sodexo*". The claimant was aware of the comments which were being referred to, as he had been read them by John Joyce at the suspension meeting. The claimant understood what was meant on the suspension checklist when it referred to "*comments made on Facebook that could cause offence*".
- 4.9 The same day, the claimant was contacted by a journalist from The Scottish Sun with regard to his suspension. An article was written and subsequently printed about the claimant's suspension.
- 4.10 As a result of the contact by the journalist, the claimant deleted his Facebook account, in order to avoid any photograph being obtained by the newspaper.

- 4.11 On 5 June Mr David McClure was asked to undertake an investigation on behalf of the respondent, into *“the allegations that Tommy McAlpine, employed as a Senior Prisoner Custody Officer, made inappropriate comments about Muslims and the Muslim religion on Facebook”*.
- 4.12 On 6 June 2018 the claimant attended an investigatory interview with Mr McClure. When shown the original version printout of the Facebook thread the claimant indicated that it was not the same as the one he had taken screenshots of ('Claimant's version'). The difference between the two being the use of grammar and punctuation. The claimant told Mr McClure that his posts included phrases in quotation marks which were quotes from Tommy Robinson and were not therefore his own views. The claimant's version included quotation marks which were not present on the original version.
- 4.13 The claimant could not explain to Mr McClure how the difference between the two sets of screenshots could have occurred. When questioned on where the quotes were obtained from, the claimant was unable to provide any clear explanation. He also refused to handover to Mr McClure the printout of the claimant's version, but offered to send them electronically.
- 4.14 The claimant confirmed to Mr McClure that his Facebook account had not had any reference to Sodexo and also showed him the text of an apology which he had posted on Facebook prior to deleting his account.
- 4.15 Mr McClure also interviewed another officer who had contributed to the conversation, but who was not accused of having made inappropriate comments. When shown the original version, the officer identified this as the format and conversation which had appeared on Facebook. Mr McClure was not able to show the witness the claimant's version, as it had not been provided to him.

- 4.16 The claimant did not submit an electronic version of the claimant's version. He informed Mr McClure that he had been advised by his trade union, the Prison Officers' Association, not to do so. When asked again on 13 June, he once again refused. The claimant asserted that the original version was in fact the doctored version and that his was the unedited version. He admitted to Mr McClure that his comments, in isolation, could be considered inappropriate, but asserted that they should be considered in the context of a discussion about extremism.
- 4.17 The claimant was invited to a disciplinary hearing on 3 July 2018. The allegation to be considered was "*you made inappropriate comments about Muslims and the Muslim religion*". The claimant was informed that the allegation was one of gross misconduct and that he was entitled to be accompanied at the meeting.
- 4.18 The meeting was conducted by Mrs Fiona Anderson, a Business Manager of the respondent. The claimant was accompanied by a Trade Union representative. It was agreed in advance of the meeting that it would be recorded and a transcript was provided to the claimant after the meeting. At the start of the meeting the claimant's version of the Facebook thread was provided in hard copy to the meeting. The claimant explained that he had made quotes and not his own views.
- 4.19 Mrs Anderson asked the claimant to explain how his version of the screenshots could differ from the original version and yet not have been edited in some way. The claimant could not explain but suggested that was a matter for the respondent to find out. He suggested that if he was quoting Tommy Robinson, then he was not making inappropriate comments, but was attempting to educate others who were part of the conversation. A point which he had not mentioned at the investigatory interview.

- 4.20 When asked how others would be aware that his comments were quotes from Tommy Robinson, the claimant asserted that the whole conversation was about Tommy Robinson and therefore it was clear. At no point did the claimant indicate in his Facebook comments who he was quoting. In his evidence to the Tribunal the claimant maintained his position but accepted that if his quotes were offensive then he apologised for them.
- 4.21 All parties agreed that only the person making the comment can edit the comment within the Facebook application.
- 4.22 Mrs Anderson adjourned the hearing, in order to interview Mr Adam Banner who captured the original version of the screenshots. He told her that a comment can be amended within a photo editing application, but that a change in colour would be present if such editing had occurred. No such colour change was apparent on the screenshots of the claimant's version.
- 4.23 Mrs Anderson reconvened the meeting on 11 July 2018 and took into account that a metadata test was carried out on the claimant's phone which showed a discrepancy between the phone and the serial number associated with the messages. She relied upon this as a seed of doubt that the claimant's version was doctored.
- 4.24 She also noted that the pages containing the claimant's version, where his comments were different, were timed at 16:49. However, she did not take this into account in her decision making. She found that the punctuation and grammar were not the relevant points, but held that the words used by the claimant were offensive with regard to Muslims and the Muslim religion. She took into account all the documentary evidence, all the evidence at the interviews and hearing and all the IT tests carried out and concluded that she did not believe the claimant that anyone reading his comments would be aware that the claimant was offering the views of someone else and not his own.

- 4.25 Mrs Anderson took into account that the claimant had admitted to John Joyce that “if it’s there, I said it”. Her view was that anyone looking at the comments would take them to be the claimant’s own views. She held that the claimant’s actions breached four of the respondent’s policies and amounted to gross misconduct and concluded that dismissal was the appropriate sanction.
- 4.26 The claimant filed an appeal letter on 8 August 2018. The hearing occurred on 3 December 2018 and was conducted by Mr Ian Whitehead, Director of HMP Addiewell, by which time the claimant had also filed two letters of grievance. It was agreed that the appeal and the later grievance letter would be considered at the meeting. Mr Whitehead agreed to the claimant’s request for written notes to be made.
- 4.27 Mr Whitehead conducted a review of the decision to dismiss, based on the issues raised by the claimant in both his appeal letter and grievance. The claimant did not provide him with any explanation as to how the original version of the notes were different to his own. Nor could he recall where the quotes had been found. The claimant was given the opportunity to ask questions of Scott Ogden who had carried out the IT tests on the phone and Mrs Anderson. Mr Whitehead concluded that Mr Ogden’s evidence was more credible than that of the claimant.
- 4.28 Mr Whitehead took account of the disparity in timing of some of the screenshots, which are timed at 16.49 whereas the rest are 16.25 and 16.26. The claimant gave no explanation for the difference in these times, or the storage on iCloud times.
- 4.29 Mr Whitehead found the technical information complex, but concluded that this was not the essential question to be considered, as the allegation related to the words used. He considered whether to engage in further technical IT testing, but did not do so, as this would not resolve the issue

of whether the comments were offensive. He concluded that it was more likely than not that the claimant had written his own views and he disbelieved the claimant's explanation. He indicated to the Tribunal, that even if the comments were quotes of Tommy Robinson, he would have dismissed the appeal as the claimant had failed to follow the social media policy and had not been clear as to the quotations.

Observations on evidence

4.30 The claimant continued to assert to the Tribunal that he had been the victim of a vendetta, however, he produced no substantive evidence to support this. The claimant also continued to assert that his comments had been quoting Tommy Robinson, but was still unable to identify where the quotes had been found.

4.31 The claimant's attempts to criticise incidental procedural matters such as the recording or note taking of the respondent were considered by the Tribunal to be attempts to divert attention away from the substantive wrongdoing which occurred.

4.32 In contrast, the Tribunal found both Mrs Anderson and Mr Whitehead to be straightforward, clear witnesses who showed appropriate concern for the career of an otherwise useful and respected member of staff, when making their decisions.

Relevant Law

- 5 In order to claim unfair dismissal, an employee must first establish that he/she has been 'dismissed'. Having done so, it is for the Tribunal to decide in accordance with s.98 Employment Rights Act 1996 ('ERA'), whether that dismissal is fair or unfair.
- 6 The Tribunal must be satisfied that the reason given by the respondent was a fair reason within s.98, which includes conduct s.98(2)(b)ERA.
- 7 The Tribunal must also consider the fairness of that dismissal, for which the burden of proof is neutral. That fairness is considered under s.98(4) ERA, together with the test in *BHS v Burchell* [1978] IRLR 379 and the ACAS Code of Practice on Disciplinary & Grievance Procedures ('ACAS Code').
- 8 *BHS v Burchell*, outlines that the Tribunal should consider whether the employer had a genuine belief that the misconduct occurred; whether it had reasonable grounds on which to base that belief; and whether it was based on an investigation which was reasonable in all the circumstances. Finally, the Tribunal should also consider s.98(4), as to whether the respondent acted reasonably in treating this as a sufficient reason for dismissing the claimant.
- 9 The Tribunal must consider whether the decision to dismiss fell within the band of reasonable responses as set out in *Iceland Frozen Foods v Jones* [1982] IRLR 439.
- 10 The Tribunal must not substitute its own view of the facts, but test to see whether in all the circumstances including the size and resources of the employer, the employer acted reasonably in treating the reason as sufficient to dismiss the claimant.
- 11 The Tribunal is aware that whilst a breach of the ACAS Code does not warrant an automatic finding of unfair dismissal, the Tribunal will take into account any failure to follow the guidelines contained within it.

Submissions

- 12 The claimant provided an updated written statement, which the Tribunal has read and taken into account. This included a summary of the evidence of the respondent's witnesses.
- 13 The claimant submitted that the respondent failed to investigate the possibility that Mr Banner had doctored the original version of the screenshots prior to sending them to John Joyce. He suggested that the respondent did not therefore have sufficient evidence on which to base their reasonable belief.
- 14 The claimant submitted that he had no idea that he was not allowed to quote people and that his comments had been misinterpreted. He described the respondent's decision to dismiss him as the "nuclear decision".
- 15 Miss Stobart on behalf of the respondent provided a written submission which the Tribunal has read and taken into account. She submitted that the decision to dismiss was based on as much investigation as was reasonable in the circumstances and that Mrs Anderson's view was genuine.
- 16 Miss Stobart submitted that the respondent was reasonable to form the view that the comments were inappropriate and represented the views of the claimant himself.
- 17 She also submitted that Mrs Anderson had to make a decision as to whom she considered was more likely to have provided an undoctored version. Her conclusion that she relied upon the version provided by Mr Banner was reasonable.
- 18 Miss Stobart asserted that Mr Whitehead had also looked into the technical issue of altering the comments, but decided not to obtain further analysis as it would not be proportionate or a relevant. He instead considered whether Mr Banner had a motive or intent to provide doctored evidence.

- 19 She also asserted that dismissal was a reasonable response to the finding of gross misconduct.

Decision

Reason for dismissal

- 20 The Tribunal considered the evidence carefully and the relevant issues it had to determine and concluded that the claimant was dismissed for reason of misconduct, which is a fair reason under s.98 ERA 1996.

Investigation

- 21 The respondent carried out an investigation by an independent person, into the creation of the comments which included interviewing the claimant and others who participated in the Facebook conversation. Mrs Anderson considered the two different versions of the screenshots, the analysis of the metadata behind the claimant's version of the comments and a colouration test of the screenshots.
- 22 Mr Whitehead considered whether to engage in further investigation of the technical alteration of the screenshots. It was reasonable of him to conclude that the outcome of that investigation would not alter the culpability of the claimant for writing the words.

Genuine Belief

- 23 Mrs Anderson genuinely concluded that Mr Banner had no knowledge or reason to doctor the screenshots he sent to John Joyce. She believed that the claimant's failure to provide copies of the screenshots at two investigatory interviews and his inability to explain how the differences could have arisen, meant that on balance, it was more likely that the claimant had altered the posts before showing them to Mr McClure and her.

24 She also did not believe that the claimant was trying to educate those in the conversation, as he asserted, as his comments did not clearly indicate which parts were quotes from Tommy Robinson. Even with the punctuation shown by the claimant, it was not clear that the quotations were those of Tommy Robinson. This led her to the conclusion that the posts showed the views of the claimant. He accepted at the first investigatory interview that his comments could be seen to be inappropriate in the way they referred to Muslims and that Muslim religion, if not seen as quoting Tommy Robinson.

A Fair Procedure

25 The respondent's disciplinary procedure was followed and the claimant was given the opportunity to be accompanied and to respond to the allegation. The claimant was able to put forward his version of events and his mitigation points.

26 The Tribunal finds that a fair procedure was followed in this case.

Band of Reasonable Responses

27 The Tribunal reminds itself that it is not to substitute its own view for that of the respondent, but to consider whether the decision to dismiss lay within the band of reasonable responses. The question is not whether a lesser sanction might have been appropriate.

28 In deciding whether the band of reasonable responses included dismissal, the Tribunal considers that the respondent's policy on discipline for discrimination and/or breach of the social media policy is clear gross misconduct . What constitutes gross misconduct in the respondent's employment needs to be considered within the context of the work. The job of a Prison Officer involves engagement with people of a variety of religions and ethnic backgrounds. The respondent has policies to ensure that Prison Officers do not discriminate against any prisoner or other staff member with regard to their race or religion. The

respondent takes a strict view on breach of the equality and social media policy. It was reasonable for the respondent to have such policies and to enforce them. In all the circumstances, the claimant's dismissal for breach of the respondent's social media policy and rules of conduct was within the band of reasonable responses.

29 The claimant raised the issue of disparity in penalty between himself and another Prison Officer. The handling of the claimant's case can be distinguished from that of the other Prison Officer. The claimant's use of language was clearly offensive and his attempt to cover up his actions led to the respondent disbelieving the claimant, who failed to admit his wrongdoing throughout the disciplinary procedure and indeed the Tribunal procedure. The respondent stated that the other officer was dealt with for a more minor offence. The two cases are therefore sufficiently different so as to warrant different response.

30 The Tribunal therefore concludes that the dismissal lay within the band of reasonable responses and was fair. The complaint is dismissed.

I confirm that this is my judgment or order in the case of *McAlpine v Sodexo Justice Services (Sodexo Limited)* (case 4121933/2018) and that I have signed the judgment by electronic signature.

Employment Judge: Sally Cowen
Date of Judgment: 14 June 2019
Entered into the Register: 18 June 2019
And Copied to Parties