



EMPLOYMENT TRIBUNALS

Claimant

Mrs L Alexander-Bartlett

v

Respondent

Pauline Scott Property
Management Limited

Heard at: Cambridge

On: 19 June 2019

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: In person.

For the Respondent: Ms F Barker, Solicitor.

JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.
2. The respondent's application for an order in its favour for the payment of costs fails, the bringing of and continuing with the claim being neither frivolous, nor vexatious, nor otherwise unreasonable.

REASONS

Background

1. The claimant was employed by the respondent from 9 June 2014 until 25 October 2018. The respondent is a small business. It has some eight employees, including Mr and Mrs Scott, the effective co-owners of the business. The claimant was employed as a sales and letting negotiator. The business is carried on from a single set of premises where its various employees have desks grouped closely together. There is also a front office, separated from the rear by a glass screen, where clients may be seen. Outside (accessed by a door the opening of which triggers a bell) is a small car park.

2. I heard evidence from the claimant herself and from two other witnesses. Mr Leslie Emerson, who accompanied her to the disciplinary hearing and is himself a business man with his own business and Miss Tierny Brett who described herself (without objection from the claimant) as more of a character witness. On behalf of the respondent I heard from Mr Duncan Scott (one of the two co-owners) and also from three other members of staff: Ms Anne-Marie Davies, Ms Kirstie Smith and Mr David Black. I was also referred to various documents contained within an agreed bundle.

Findings of fact

3. The claimant described the working environment of the respondent's business as being "modern", with the various employees working closely together, both physically and in a business sense. Occasional expletives were used by staff "for emphasis" (the expression used by witnesses) in conversations between them. Having heard from her and from the other witnesses, I am satisfied that the claimant's self-description as someone who was not a "shrinking violet", but someone who was robust and capable of "giving as good as she got" is accurate. However, it is equally clear to me that during the majority of her employment those characteristics and the ways in which she manifested them (generally in an appropriate way) were seen as an asset to the business.
4. From about late Spring 2018 onwards the claimant's private life became somewhat more complicated. Her mother was ill; she had to spend a certain amount of time caring for her mother and she herself was being treated by her GP with anti-depressants. In August 2018 her mother was taken into hospital and in September 2018 it was thought that she did not have much longer to live. Indeed, the claimant was seeking to persuade the relevant clinicians that she should be put onto a regime of palliative care. The situation at home was clearly causing her some distress, but a letter from the practice nurse at her GP practice shows that in early September 2018 (being when she last visited the practice prior to her dismissal) she was reporting that her mood was much improved.
5. The respondent was sympathetic to the claimant's situation. She habitually worked a four-day week, but this was reduced by agreement, on 1 October to a three-day week. She was offered the opportunity to take time off as and when required. However, I find that the nature of the respondent's business was that it was difficult to maintain strict working hours and if the claimant did take time off, she regularly would make up that time.
6. In early October 2018 Mr and Mrs Scott decided that there was a need to promote one of the members of staff to become lettings office manager. The person chosen was Ms Kirstie Smith. She was a great friend of the claimant. When she was told of her intended promotion (and later when it was announced to other staff) she and they were requested not to inform the claimant. This was because Mr Scott wished to inform the claimant

himself and she was absent from the meeting at which the announcement was made. There was nothing sinister in her absence. Like the claimant, other members of staff came into the office only on a number of days during the week and members of staff were frequently out visiting clients or properties.

7. In fact, Ms Smith did inform the claimant almost as soon as she herself had been informed. The claimant's reaction, as revealed by an exchange of text messages with Ms Smith, shows that she was extremely unhappy with the situation. Although she sought to distinguish between any unhappiness at Ms Smith being promoted, instead of herself, which she denied, from her unhappiness at the way in which this was communicated, I do not accept that there was any such distinction. In particular, I note that her reaction, which was angry, involved an expletive and declared an intention to (in effect) "work to rule". That was a reaction to the information being given to her by Ms Smith, some days before the information was revealed to staff generally. Having heard her evidence, I am satisfied that whilst she was unhappy that the announcement had been made at a meeting which she was unable to attend, she was at least equally angry about the fact that it was Ms Smith who had been promoted and not her.
8. On 4 October 2018 Mr Scott approached her when she came into the office in order to inform her of Ms Smith's promotion. He, of course, was unaware that she already knew.
9. When he approached her desk, and asked to have a chat with her, she shouted at him "fuck you". She stood up in an angry and aggressive way, agreed that they needed to have a chat, and headed towards the car park. She was shouting at Mr Scott, complaining that he had not consulted her before making the appointment and had not informed her of it. Her tirade continued once they were in the car park and there, on at least two occasions, she described Mr Scott as a "fucking cunt". Mr Scott's wife had followed the two of them into the car park and heard the claimant refer to her husband as a "fucking cunt" and describe them both as "fuckers".
10. The claimant has always maintained that she did not use the expression "fucking cunt" during the tirade in the car park. She admits that she was angry and that she swore, but that her swearing was in order to emphasise points, rather than representing a personal attack on Mr Scott (or his wife). She accepts that when she returned to the office she told others that Mr Scott was "a cunt". However, having heard the evidence of those with whom she conversed immediately after the episode in the car park, I am satisfied that what she told them was that she had called Mr Scott "a cunt" and I find this strongly supportive of his assertion that the words "fucking cunt" were directed at him on a number of occasions by the claimant. I also accept Mr Scott's evidence that his wife heard the words spoken, his attention being drawn to the fact that she had come out by his hearing the door buzzer sound.

11. Mr Scott (and his wife) were extremely shaken by what had happened. Whilst the various members of staff swore in the office from time to time, it is common ground between the parties that that swearing was for emphasis and did not involve anything of the character of what took place in the car park. The remainder of the day passed rather uneasily, but I note that the claimant made no attempt to apologise to Mr Scott either on that day, or on the succeeding day when the atmosphere in the office remained strained.
12. On the following day, at a time when Mr Scott was out of the office with a client, a member of the public came into the reception area. The lady in question lived next door to a property in respect of which the respondent was the letting agent. She wished to complain about noise from the tenants. It is agreed that she appeared a little upset. Ms Anne-Marie Davies, who was relatively junior compared to the claimant, initially spoke to her. She looked for assistance from the claimant and/or Mr Black. Mr Black was on the telephone. He indicated, most probably by looking at the claimant, that he would like her to assist. The claimant came forward, but declined to deal with the matter, referring to the woman's complaint as a "fucking complaint" whilst making it clear that she was not prepared to deal with it. Mr Black did not hear the expletive. He was still on the telephone, he has 70% hearing loss in one ear and suffers from tinnitus. His good ear was to the telephone. However, Ms Davies did hear the expletive and I accept her evidence that it was clear from the lady's reaction that the person coming in to make the complaint had heard it too. Both Ms Davies and Mr Black apologised to the customer for the way in which the claimant had treated her and the lady left. Mr Black called Mr Scott, and Mr Scott returned to the office.
13. As I have already noted, the atmosphere in the office remained strained as a result of the claimant's behaviour. This was not helped by the fact that she remained angry, continued to shout and swear on occasions and, by way of example, told Ms Davies after the events referred to above "and you fucking ignored me three times today".
14. The claimant had indicated (see above) that she intended to "work to rule". She reiterated this to Ms Smith. In furtherance of that policy, she contacted the ombudsman who was dealing with a particular complaint against the respondent and told him that she was no longer dealing with that complaint and she placed numerous files on Ms Smith's desk for her to deal with.
15. Mr and Mrs Scott took advice as to how they could deal with this situation, considering that it could not be allowed to continue. In accordance with that advice, the claimant was suspended by letter of 8 October while a full investigation took place, including the taking of statements from those involved other than the claimant.

16. On 10 October the claimant's mother died. On 11 October the claimant was sent a letter setting out the reasons for her suspension, summoning her to a disciplinary hearing and enclosing witness statements from the five employees who had been interviewed and provided statements as part of the investigation. The claimant complains of her being sent such correspondence immediately after her mother's death. I am satisfied that the respondent (acting by Mr and Mrs Scott) considered how to deal with the situation given the death of the claimant's mother and decided that as she was suspended, the fairest way forward was to seek to bring matters to a conclusion as quickly as possible. It is noteworthy that the claimant asked for the disciplinary hearing to be postponed for a few days and this was done. It eventually took place on 23 October.
17. The claimant also complained of the respondent's intention to have the disciplinary process conducted by Mr Scott, given his own personal involvement. The Scott's considered this and took advice. Ultimately, they concluded that it was appropriate for Mr Scott to conduct the disciplinary hearing and make the decision. They felt that the only other possibility would be to bring in an outsider, but that this was inappropriate (and somewhat artificial) given that one principle task of the outsider would be to understand the impact of what had happened on such a small business. I note that in cross examining Mr Scott, the claimant did not place any reliance upon this point.
18. At the disciplinary hearing on 23 October the claimant was accompanied by Mr Emerson. The respondent did not object to this and allowed Mr Emerson to question and comment as he thought appropriate.
19. The claimant's position then (as during the tribunal hearing) was that she had sworn for emphasis, rather than using expletives to describe Mr Scott and his wife. She denied using the word "cunt" at all in the conversation with Mr Scott. This greatly concerned Mr and Mrs Scott because they knew, having heard what was said, that she did use that term. They were also concerned that the claimant did not express remorse, or apologise. I note that in evidence she accepted that by the evening of 4 October (having discussed the matter with her husband) she had concluded that she had behaved "like an idiot". Nevertheless, she continued to behave in the way described above on 5 October, which was her last working day before her suspension.
20. Mr Scott was particularly concerned about the claimant's having sworn in the presence of what he described as "a customer". Whether or not that is an appropriate description of the lady in question, the claimant accepted in evidence that had she sworn within the hearing of that lady then this would have been an extremely serious matter in respect of which she would have expected to face the possibility of dismissal. Hence, it is clear to me that she and Mr Scott are at one as to the seriousness of that incident as I have found it to have taken place.

21. By letter of 25 October 2018 the claimant was informed of her summary dismissal. Mr Scott found that the claimant had behaved in the ways alleged on 4 and 5 October, namely during the conversation with him which concluded in the car park, the claimant's behaviour on her return to the office and the incident involving the customer. He considered that the claimant's determination to dispute what had been said (including what had been said to him) and her failure to apologise made matters worse. He considered that trust and confidence between the respondent (in particular, himself and his wife) and the claimant had broken down. He was concerned that the way matters had developed showed that there was a real risk of this conduct being repeated.
22. The letter went on to offer to the claimant the opportunity to appeal against the decision. It set out the respondent's intention to have the appeal heard by Mr Scott, being the person who had made the decision to dismiss. It was said to be "unrealistic" to bring in an independent outside person to consider the matter. The claimant did appeal. Her appeal was heard on 13 November 2018 and dismissed on 22 November.

The Law

23. The burden of showing the reason for dismissal and that that reason was one of the statutorily permissible reasons in accordance with s.98 of the Employment Rights Act 1996 is upon the respondent.
24. Insofar as reasonableness under s.98(4) of the 1996 Act is concerned, my attention was drawn to the three-fold test in British Homes Stores Limited v Burchell [1978] IRLR 379 and the parties were agreed that it was for me to determine whether dismissal lay within the band of reasonable responses of an employer to the circumstances of this case and whether the procedure adopted was one which a reasonable employer could adopt.

Application of the law to the facts

Reason for dismissal

25. The person who took the decision was Mr Scott, although it is clear that this is a matter that he discussed with his wife. I am satisfied that the reason that he did so was because of the claimant's conduct, principally that on 4 and 5 October, but also during the disciplinary hearing when she failed to apologise, but instead denied that she had said what he himself heard and what others said that they had heard. Conduct is one of the statutorily permissible reasons for dismissal.

Reasonableness of the investigation

26. Mr Scott believed that the claimant had committed the acts of misconduct relied upon. He had reasonable grounds for that belief, based on a reasonable investigation. The claimant was not interviewed as part of that process, but she was given the opportunity to comment on the statements

taken from others and to make all representations that she wished to make at the disciplinary hearing. I bear in mind that the investigation and the hearing took place at a time of great personal stress, but I consider that she was afforded a reasonable opportunity to put forward her case. She was also accompanied by an experienced business man who assisted her. Had she asked for more time, I am satisfied that it would have been granted, but (as she herself told me) she understandably wished to get this over and done with.

27. Mr Scott reasonably believed that the claimant's misconduct was established following that investigation and the disciplinary hearing. At the heart of the allegations was conduct which Mr Scott himself witnessed and he had reasonable grounds for believing that what others told him about what they had heard was correct. In so finding, I have had particular regard to the inter-relationship between what the claimant admitted she said and what others contended that she said, especially the use of the word "cunt" in what she admitted to having said to others and the use of the expression "fucking cunt" which Mr Scott maintained was said to him and which she denied.
28. The claimant was allowed to appeal, but the appeal was conducted by the very person who was present at and the decision maker at the disciplinary hearing (Mr Scott). However, given the very small size of the business and the nature of the allegations, I consider that this falls within the band of reasonable modes of procedure available to a reasonable employer in these circumstances. The nature of the appeal was made clear in correspondence and Mr Scott satisfied me that he took the appeal seriously, carefully examining the points made by the claimant.

Was dismissal within the band of reasonable responses?

29. I have found this not be straight forward. It is true that the words used were vile and unacceptable. The claimant accepted as much as regards those she admitted using and the actual words that I find her to have used were more extreme. The claimant accepted that to say what she was alleged to have said in the hearing of a client was serious misconduct. I consider that she did say it so that the client could hear and she was rude and used foul language to colleagues.
30. Nevertheless, as she pointed out with considerable force, she was under great personal pressure at the time. She had coped with her mother being sick for some months and had faced her imminent death. Just after the events in question and just before the disciplinary hearing, her mother died and she had to make the usual arrangements which follow.
31. This was obvious mitigation in respect of her misconduct. However, I must bear in mind that it is not for me to substitute my own view for that of Mr Scott. I am satisfied that he took her personal situation into account, but felt that her behaviour was so extreme and involved so many of the small workforce that the mitigation was insufficient to lead him to impose a

lesser penalty. He felt that this was particularly so because; (a) a client had become involved, (b) the claimant had not offered a full and sincere apology and (c) she had continued to lie about what she said, maintaining that the accounts of himself, his wife and other staff members with whom she had to work closely were seriously inaccurate. I consider (but not without some reluctance) that a reasonable employer was entitled to dismiss against that background.

32. For those reasons, the claim for unfair dismissal must fail and is dismissed.

Costs

33. The respondent made an application for costs on the basis that in bringing and/or continuing the claim the claimant acted frivolously, vexatiously or otherwise unreasonably. In this context the respondent also relies upon a detailed costs warning letter sent to the claimant by its solicitors.
34. I consider that this costs application was misconceived. This is a case several aspects of which made it one which a claimant would be perfectly entitled to bring before an employment tribunal for consideration. In particular, as set out above, I consider that the band of reasonable responses test was one which the claimant was fully entitled to ask the employment tribunal to apply. The seriousness of the language used, the impact upon the working relationships and the inter-relationship of the material events with the claimant's domestic circumstances, are all highly fact sensitive matters where it was entirely appropriate for the claimant to ask the tribunal to evaluate those facts and apply the appropriate law. In particular, as I made clear above, whilst ultimately concluding that the penalty of dismissal fell within the band of reasonable responses, I consider that it fell at the very top end of that band.
35. For those reasons the application for costs must fail, the bringing and/or continuing with the claim not being frivolous, vexatious or otherwise unreasonable.

Employment Judge Andrew Clarke QC

Date: ...27 June 2019.....

Sent to the parties on:

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For the Tribunal Office