EMPLOYMENT TRIBUNALS

Claimant: Mr C Murray

Respondent: Muller UK and Ireland Group Limited

HEARD AT: Cambridge Employment Tribunal

ON: 17 September 2019

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Ms Guggerty (lay representative)
For the Respondent: Mr Clark (Counsel)

RESERVED JUDGMENT

1. The Claimant's unfair dismissal claim is not well founded, and is dismissed.

2. The remedies hearing provisionally listed for 22 November 2019 is vacated, and directions given for that hearing on 17 September 2019 are revoked.

REASONS

BACKGROUND

3. From 23 April 2017 until 2 May 2018, the claimant worked as a HGV driver for the respondent and was based at a distribution centre for the respondent's milk and other dairy products in Northampton.

4. On 2 May 2018, the claimant was summarily dismissed for gross misconduct. By a claim form presented to the tribunal on 10 August 2018, the claimant asserted that his dismissal was unfair. The respondent resisted the claim.

HEARING

5. I heard evidence from the claimant. For the respondent, I heard from the first instance decision maker, Mrs Hornigold, and the appeal officer, Mr Boom. I was referred to a bundle of papers prepared by the respondent in accordance with the tribunal's directions, running to some 117 pages. I was also taken to the claimant's own bundle of 74 pages, which largely replicated the respondent's bundle.

6. The claimant's representative, Mr Guggerty, confirmed that no claim of wrongful dismissal was made. He also accepted on behalf of the claimant that the stated reason for the dismissal -misconduct- was not in dispute. Hence the issues were:
    a. Did the decision to dismiss the claimant fall within the band of reasonable responses open to the respondent for the purposes of s.98(4) of the Employment Rights Act 1996 ("ERA")?
    b. If the dismissal was unfair, should any award be reduced (and if so, by how much) having regard to s.122(2) and s.123(1) ERA (contributory fault etc) and/or the principles set out in **Polkey v. AE Dayton Services Ltd**?

7. Neither party was in a position to deal with remedy, the claimant's primary case being that he wanted reinstatement. For this reason, and because the evidence I heard on liability took all day in any event, remedy was put off until 22 November 2019 insofar as necessary.

FACTUAL FINDINGS

8. Tesco at the material time was a significant customer of the respondent. It accounts for some 40% to 60% of the respondent's distributed products.

9. On the morning of 29 March 2018, the claimant was due to deliver dairy products to the Tesco store at Chafford Hundred. At about 11:45am, the respondent received an email complaint from a manager at that Tesco store.

10. The manager asserted that the claimant had parked his lorry in a layby area outside the store, which was causing difficulties for other vehicles. He alleged that the claimant had previously been told by him not to park in the area, and that the claimant had been rude to him in the past when asked to move his vehicle but that he had previously ”let this go”. He said that he had seen the claimant showing 2 female members of his staff (‘Tracy’ and ‘Vivian’) a video on his phone. He said that when he asked the claimant to move his lorry from the layby area, the claimant had told him to “fuck off”. Also, that the claimant had said to him “you ain’t getting your fucking milk”. The claimant had then, he alleged, driven off without making the delivery. He said this was “making me look bad… in front of my staff”.

11. Mr Speechley of the respondent was tasked with investigating matters. On 3 April 2018 he spoke on the telephone with Tracy and Vivian, and made notes of his conversations with them. They both had told him that the claimant had showed them a video from his phone on the day in question. Tracy said it was “not something I normally like to see” and that it was “funny but rude”. She said that she was shocked, rather than embarrassed, by content. Vivian said she did not watch it. They both said that when their manager asked the claimant to move his lorry to allow access for others, the claimant said “no, you’ll get your fucking milk tomorrow” (according to Tracy) or “you’re not getting your fucking milk today” (according to Vivian), and had then driven off.

12. Neither of the women appear to have been specifically asked if the claimant had also said “fuck off” as alleged by the manager; nor did they volunteer that he had done so. However, they both confirmed that their manager had not sworn at claimant at any point. Vivian stated that the manager’s request had been “polite”. Tracy, whom the claimant later described as a friend when justifying his showing her the video on his

phone, said that the claimant "can be a bit rude/arrogant … sometimes a bit aggressive".

13. Mr Speechley spoke with the claimant, on 29 March 2018. The claimant -who is a a well-built man- asserted that he had been "showing the girls of video on my phone" when the manager "went off on one" for no good reason and told him to "park around the fucking corner". He said that after his last suspension, which had arisen out of previous disciplinary matter, he has been "told to avoid confrontation". So, on this occasion he said "sorry you're not getting your milk today" and left. He said that he may have sworn, not at the manager but in conversation. He said it "scared him" when the manager got "het up".

14. So, his account was in several respects very much at odds with the two female witnesses, both of whom said they were close at hand at the time.

15. Mr Speechley told the claimant that he was suspending him on full pay, due to the serious nature of the allegations.

16. The disciplinary hearing took place on 2 May 2018, presided over by Mrs Hornigold. At the same time, she also dealt with the grievance which the claimant had submitted, and which essentially addressed the same points he raised in his defence to the disciplinary charges. She wanted a human resources representative to attend, because she understood that the claimant's chosen representative, Mr Guggerty, could be "difficult". Accordingly, Mr Cairns from HR was present as well (and his attendance took some time to arrange).

17. Whilst his presence was, as I find, perfectly appropriate, Mr Cairns wrongly asserted the Mr Guggerty did not, as a non-union representative, have the same rights as a union representative might have had such a meeting. This was an error, and an unfortunate one. However, Mrs Hornigold told me -and I accept- that it did not actually impact on the claimant's ability to raise any points or argument that he saw fit to make. Moreover, has the notes of meeting show, Mr Guggerty did in fact contribute to it.

18. The claimant was questioned about the events at issue. He claimed he was being victimised by the Tesco manager. He denied swearing at all. He claimed that the manager was "raving at him", "had a look in his eye" when he told him to "move your fucking truck", and that he had replied by saying "I'm not being spoken to like that". Of course, this was not quite the same account as that which he had given at the investigatory meeting.

19. The claimant asserted that Tracy and Vivian had "no choice" but to say what they did in their statements (i.e. were coerced). He said that the video he had shown them was "just funny", but declined to show it to Mrs Hornigold. He told me this was "because she has no sense of humour". He described the footage as being of a woman kicking a naked man in the backside.

20. When it was asserted to him at the disciplinary hearing that the two women were supposed to be working at the time, he did not seek to claim otherwise at the hearing. Only before me was this asserted to be incorrect.

21. Mrs Hornigold decided that the claimant had committed acts of gross misconduct within the meaning of clause 4(c)(xiv) of the respondent's disciplinary procedure i.e. "inappropriate behaviour with regards to a customer". Specifically, she considered there was sufficient evidence to believe that claimant had sent to the manager "you're not getting your fucking milk today" (or words to that effect), and that had also told said "fuck off", in circumstances where neither such comments were warranted and where (as she found) neither had been provoked.

22. She rejected the assertion that the women must have been coerced into making statements. She disagreed with the assertion that the claimant needed training to understand that it was inappropriate to swear in such circumstances and act in such a way. She said in cross examination that she considered this to be "common sense".

23. She found there was no evidence to support the claimant's assertion that he had been singled out for harsher treatment. She took into account the email of the manager and the statements of Tracy and Vivian. She also considered that it was

highly inappropriate and misconduct for the claimant to be showing the 'naked man' videos to the two women in the (third party's) workplace.

24. She told me, and I accept, that she did not hold against the claimant his previous expired warning, beyond noting – as the claimant had done previously– that the claimant ought to have learned from it to walk away from confrontation (assuming it had arisen as he said). She bore in mind the claimant's long and good service. She did not think it sufficiently exculpated him. She expressed regret for the amount of time the hearing had taken to convene, but said that she did not think claimant had been materially prejudiced as a result. She decided that summary dismissal was the appropriate sanction.

25. The claimant was informed of her decision that day, and fuller reasons were set out in her letter of 9 May 2018.

26. The claimant appealed his dismissal. It dealt with by Mr Boom, by way of a rehearing at a meeting on 3 July 2018. As part of the appeal process, Mr Speechley got Tracy and Vivian to sign the notes he had taken of their previous interviews to confirm their accuracy.

27. The claimant was again represented by Mr Guggerty, who asserted that abusive behaviour for the purposes of the disciplinary procedure constituted misconduct, rather than gross misconduct. (In my view, this argument was misconceived –it must always depend on the specific facts, as the respondent's policy itself makes clear.)

28. Mr Boom found that the claimant had said "you're not getting your fucking milk today", or words to that effect, as well as "fuck off", to the manager in what appeared to be unprovoked circumstances. He found that both such comments each and of themselves amounted to gross misconduct. When it was pointed out to him in cross-examination that the women were not asked, and did not say, if the claimant had also said "fuck off", Mr Boom confirmed that "you're not getting your fucking milk today" was to his mind in itself gross conduct justifying dismissal -even if "fuck off" had not also been said.

29. Mr Boom accepted in his 21 August 2018 decision letter that Mr Guggerty had incorrectly been told that he did not have the same rights as a union representative at first disciplinary hearing, but he concluded that this matter -and the various delays in the disciplinary process- had not materially disadvantaged the claimant.

30. He therefore upheld the dismissal decisions.

31. After the event, Mr Boom made further enquiries as regards various individuals the claimant said had been treated more leniently in the same circumstances. He decided that each of the (slightly varying) examples given by the claimant could be distinguished on the facts. In most cases, any instances of swearing had been at the respondent's workplace, rather than in front of customers or at third-party sites. In one case where a colleague had potentially sworn in front of customers, there were extenuating circumstances.

32. The respondent's procedure provides -unusually- for a further right of a (written) appeal. The claimant duly exercised that right, in a 30 August 2018 email. The matter was determined by Mr Hamby, under cover of a letter dated 22 February 2019 -and after a period of regrettable and excessive delay which was caused, it seems, by an oversight on the respondent's part.

33. Amongst other things, Mr Hamby looked into the cases of the individuals the claimant had asserted had been treated more leniently in allegedly the same circumstances. He found (as I consider he was entitled to do) that their circumstances were distinguishable. He rejected (as I consider he was entitled to do) the assertion that a "breach of confidentiality" -namely an alleged comment by the Tesco manager prior to the 2 May 2018 hearing that he had caused the Claimant to be dismissed- somehow demonstrated that the decision of Mrs Hornigold was prejudged. She told me, and I accept, that it was not. Mr Hamby rejected the appeal.

THE LAW

34. The following principles are material:

a. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small**[1].

b. Whether a lesser penalty than dismissal might have been considered can be relevant, but only in the limited context of the range of reasonable responses test, i.e. 'whether a lesser sanction would have been one that right thinking employers would have applied to a particular act of misconduct': **Connolly v Western Health and Social Care Trust**[2].

c. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt**[3].

d. As regards that process:

    i. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd**[4].

    ii. It does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably unfair. A "*forensic or quasi-judicial investigation*" is not required. **Santamera.**

    iii. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the

[1] [2009] IRLR 563, CA, §43 *per* Mummery LJ.
[2] [2018] IRLR 239.
[3] [2003] IRLR 23, CA.
[4] [2003] IRLR 273, *per* Wall J, at §35 & 36.

employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? See **Rajendra Shrestha v Genesis Housing Association Limited**[5].

e. An employer will find it easier to justify a dismissal for a particular single act of misconduct where a rule explicitly states that breach will or may lead to a dismissal than where such a rule is absent. Effectively the rule acts as a substitute warning, in the case where the absence of the rule might have led a court to hold that dismissal is too harsh a sanction. See e.g. **Meyer Dunmore International Ltd v Rogers**[6].

f. Disparity in treatment can found a claim for unfair dismissal. However, it is uncommon for such a case to be made out. See **Paul v East Surrey District Health Authority**[7], where the Court of Appeal approved the dicta of Waterhouse J in **Hadjioannou v. Coral Casinos Ltd**[8]:

> "… *evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate …. [Nevertheless] … Tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by [s. 98(4) of ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case… It is of the*

[5] [2015] EWCA Civ 94.
[6] [1978] IRLR 167.
[7] [1995] IRLR 305.
[8] [1981] IRLR 352.

highest importance that flexibility should be retained…" (underlining added).

g. **MBNA v. Jones**[9] spells out that "*if it was reasonable for the employer to dismiss the employee whose case the ET is considering, the mere fact that the employer was unduly lenient to another employee is neither here nor there. That is why arguments about disparity must be considered with particular care and why the guidance in* ***Hadjioannou*** *is important*". The facts of **MBNA** (two employees fighting) are a useful reminder of what is, and what is not, "truly parallel".

h. Both **Securicor Ltd v Smith**[10] and **Scottish Prison Service v Laing**[11] suggest the test as regards alleged inconsistency of treatment as between employees is whether the employer's decision to differentiate was 'perverse'.

i. In the event of a finding of unfair dismissal:

   i. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.

   i. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

   ii. Pursuant to **Polkey v. AE Dayton Services Ltd**, if the tribunal finds that procedural unfairness may or would, if remedied, not in fact have made a material difference, the tribunal can reduce in whole or in part

[9] EAT/0120/15.
[10] [1989] IRLR 356, CA.
[11] [2013] IRLR 859, EAT.

any compensation the claimant might otherwise have received.

APPLICATION TO THE FACTS

35. There were some procedural deficiencies in the process. In particular, there was excessive and unacceptable delay (particularly as regards the final appeal stage). Further enquiries of Tracy and Vivian might usefully have been made as regards whether or not the claimant had said “fuck off”. Mr Boom could also usefully have considered the claimant’s alleged comparators at the appeal hearing over which he presided, rather than ‘after the event’. But in my judgement, these matters do not of themselves render the dismissal unfair.

36. I find that it was within the range of reasonable responses for the respondent to believe that claimant had at least said to the Tesco manager “you’re not getting your fucking milk today”, or words to that effect, in the circumstances described by the manager and corroborated by the two female staff members.

37. I consider that it was within the range of reasonable responses open to the respondent to believe this amounted to gross misconduct justifying dismissal, notwithstanding the claimant’s previous good service. (I note that the claimant in his evidence to me candidly and realistically accepted that if, which he did denied, he had said such a thing, it would at least have constituted misconduct.) Hence dismissal was warranted for s.98(4) ERA purposes even if -contrary to the respondent’s findings- the claimant had not also said “fuck off”.

38. I consider that the respondent was entitled to find that comparisons the claimant sought to draw with other employees were insufficiently aligned to his own circumstances to assist him, and that the respondent made adequate enquiry into that issue. I also find that adequate enquiry was made by Mr Speechley of Tracy and Vivian for the respondent to be able to rely on their evidence. I reject the assertion that the respondent ought to have spoken to the two women face-to-face to avoid the

possibility that they may have been put under undue pressure to support their manager (or even impersonated on the telephone, as Mr Guggerty sought to suggest to me). This was not necessary in the light of the guidance given in the authorities I have cited at para 34(d) above.

39. The claimant's showing of the video clip was also part of the context, and again I think the respondent was entitled to find it amounted to inappropriate conduct on the claimant's part.

40. Tesco was an important client. The respondent had good reason to maintain good relationships with that client. The respondent also had reasonable grounds, based on reasonable enquiry, to believe that the claimant's behaviour that day had been unprovoked and wholly unprofessional. This, even making due allowance for the fact that– as Mr Guggerty submitted (and as respondent did not dispute) – bad language was more common in the claimant's line of work than in some others.

41. Whilst, as I have said, I do think further enquiry could usefully have been made of the two women as to whether or not the claimant had also said "fuck off" as alleged by the manager, for the reasons are set out above I do not find this makes any difference.

42. Even if the dismissal was unfair by reason of the procedural issues I referred to above, I find that such issues would have made no material difference to the final outcome applying **Polkey** principles. Further or alternatively, I would have considered the claimant was wholly to blame for his dismissal, by reason of his blameworthy conduct in acting in the way alleged (probably accurately) by the two women.

43. It follows that the claim is dismissed, and that the remedies hearing set for 22 November 2019 is to be vacated. The directions I gave at the conclusion of the 17 September 2019 hearing as to remedy are revoked.

Employment Judge Michell, Cambridge
18/9/2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS