EMPLOYMENT TRIBUNALS

Claimant: **Mr Stuart Slark**

Respondent: **South West Water Ltd**

Heard at: **Southampton** **On: 27 and 28 August 2019**

Before: **Employment Judge Rayner**

Representation
Claimant: Mr M Foster (Solicitor)
Respondent: Mr C Edwards (Counsel)

JUDGMENT having been sent to the parties on 26 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant in this case was Mr Stuart Slark. Mr Slark was employed by Southern Water Services Ltd, the respondent until his summary dismissal on 10 December 2018. The respondent accepts that up until the events which concern this ET, Mr Slark had 46 years continuity of service and had a clean disciplinary record.

2. The claimant alleges that he was unfairly and wrongfully dismissed and claims compensation for unfair dismissal and unpaid notice pay.

3. There is no dispute that the claimant was dismissed without notice. The respondent maintains that they had a fair reason for the dismissal which was the gross misconduct of Mr Slark and that it was reasonable in all the circumstances to summarily dismiss him following a reasonable investigation and disciplinary process.

4. Mr Slark accepts that there was a disciplinary process but argues that
    a. his behaviour was not as serious as alleged by the Respondent and was not proved;
    b. the procedure that was followed was an unfair procedure and that the dismissal is therefore fundamentally flawed.
    c. that in any event given his previous disciplinary record and length of service worked that the sanction of summary dismissal was not reasonable in all the circumstances;

5. At the start of the hearing I was provided with documents agreed between the parties; witness statements from Mr Griffiths and Mr Thomas on behalf of the respondent and a statement from Mr Slark who gave evidence on his own behalf. The parties also provided an agreed list of issues as follows:
    a. Was the principal reason for the claimant's dismissal gross misconduct and if so was the dismissal for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996 in particular
        i. Did the respondent reasonably believe the misconduct occurred
        ii. Did the respondent have reasonable grounds to support this belief
    b. Did the employer act reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee without notice taking account of the equity and substantial merits of the case
        i. Did the respondent carry out a reasonable investigation prior to reaching its conclusion
        ii. Did the respondent follow a fair procedure?
    c. Were the procedural arrangements for the disciplinary process in accordance with the disciplinary policy and procedure of August 2018?
    d. Was the procedure otherwise fair or reasonable in determining the decision to dismiss?
    e. did the respondent act reasonably in treating the reason as sufficient.
    f. was the respondent's decision to dismiss the claimant within the range of reasonable responses that a reasonable employer in the circumstances might have adopted?
    g. did the appeal process remedy any defect the procedure?
    h. Irrespective of the decision as to the fairness of the dismissal, was the claimant as a matter of fact in breach of a fundamental term of his employment contract which would entitle the respondent to treat the contract as repudiated by him and thus justify dismissal without notice?
    e. if the claimants claim is upheld
        i. what financial compensation is appropriate taking following
        ii. Should any compensation awarded be reduced in accordance with Polkey principles and if so what reduction is appropriate?

iii. If any compensation is awarded, should it be reduced by reason the contributory fault of the claimant and if so what reductions would be appropriate?

Unfair dismissal and Misconduct – Applicable Legal Principles

6. In cases involving dismissals for reasons relating to an employee's conduct, the Tribunal has to consider the three stage test set out in **BHS -v-Burchell** [1980] ICR 303;
   a. did the respondent genuinely believe that the claimant was guilty of the misconduct alleged;
   b. was that belief that based upon reasonable grounds;
   c. was there a reasonable investigation prior to the respondent reaching that view?

7. Crucially, in the context of an unfair dismissal claim, it is not for the Tribunal to decide whether the employee actually committed the act complained of. What the Tribunal must do is decide whether or not the respondent had formed a reasonable belief in the employees misconduct, which is reached on reasonable grounds after a fair investigation, taking account of relevant matters.

8. The sanction must be fair, taking into account the equity and merits of the case

9. The decision in **Polkey-v-AE Dayton Services** [1988] ICR 142 introduced an approach which requires a tribunal which has found a dismissal to be unfair on the basis of an unfair procedure to consider a reduction in compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a Tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A Tribunal Should consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (**Singh-V-Glass Express Midlands Ltd** UKEAT/0071/18/dm).

10. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. a degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a Polkey issue simply because it involves some degree of speculation (software 2000 ltd.-v-Andrews [2007] ICR 825 and Contract Bottling Ltd-V-Cave [2014] UKEAT/0100/14).

Contribution

11. I have been invited to consider whether the claimant's dismissal was caused by or contributed to by his own conduct within the meaning of s 123 (6) of the act. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (**Nelson-V-BBC** [1980] ICR 110).

12. I have also considered the slightly different test under s. 122 (2); whether any of the claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Findings of Fact

13. The Claimant worked as an engineer for Southern Water. Part of his role requires him to visit offices of organisations which provide services to the respondent .

14. One such office was that of Kappa Brown. This office was staffed by about 8 members of staff. Part of the Claimants job involved him visiting their offices to work on documentation, and whilst there he would sit and work in the office with the Kappa Brown staff.

15. Sometime in October 2018 the respondent's human resources department received a complaint from one of the customers that a number of employees had raised concerns about Stuart Slark. These concerns were put in writing was it email dated 11th of October 2018.

16. The respondent wrote to the claimant on the same day stating the company had decided to commence an investigation into allegations made against him. The letter did not set out in detail of the allegations made but did refer to date of alleged misconduct being made by a Southern Water service partner in relation to his behaviour at their Horsham offices whilst carrying out his role. The letter also stated that the complaint relates to constant sexual remarks and innuendos directed to female employee and stated that the alleged misconduct had been ongoing for some period

17. On 17 October 2018 the claimant received a letter suspending him on full pay whilst the investigation was carried out.

18. In October Mr Slark received a letter, which he said as he received on 14 October. The letter stated that the company was to commence an investigation into the allegations made about his conduct in the workplace. The letter states

that the alleged misconduct was in relation to his behaviour at the Horsham offices whilst carrying about his role.

19. The letter states as follows:
    a. the complaint relates to constant sexual remarks and innuendos that are directed to a female employee, said in front of other employees, ……..and his behaviour has been ongoing for some period.

20. The letter gave the claimant notice that the company would be carrying out a fact-finding investigation which was expected to take approximately 2 weeks and would involve interviewing relevant witnesses and collecting documentation and considering next steps. The letter also stated that Mr Slark may himself be invited to attend an investigatory meeting to explain his version of events and that any such meeting whilst itself not a disciplinary action may lead to disciplinary action.

21. This letter was sent by Mr Lawrence Turner.

22. Coincidentally Mr Slark sent Mr Turner email on 12 October giving notice of his intention to retire from the company from 15 January 2019. He requested that nobody in the company should be informed of this fact.

23. The respondent then interviewed 7 employees of the Horsham office of Kappa Brown utilities ltd. page 62-74 of the bundle.

24. The statements are all signed and there is a fair degree of corroboration been 7 statements. Whilst the words used by witnesses are not always the same, the nature of the behaviour described is clear from each witness and some particular allegations or mentioned .

25. BM; SB and KW, all female employees all refer to an incident where the claimant sniffed a female employees chair when she went to the bathroom, and said that he could still smell her. SS states that she had seen the claimant sniffing Ks chair a couple of time.

26. BM; KW and LW all refer to an occasion when the claimant made a comment about *coming in between them*. LW says the remark was over the top, KW states that the comment was, *I am not going to come on you. I am going to come between you* and SS states that she heard him say *I am going to come between you but not over you*.

27. Other comments were that *things were worse when they were only ladies in the office, it got worse over time,* that included *women should be in the kitchen* and that he demanded tea and was generally demanding.

28. The claimant was suspended on 17 October 2018.

29. The respondent interviewed the claimant following a letter inviting him to hearing at a meeting on 2 November which was described as a fact-finding exercise.

30. The meeting took place and following the meeting the claimant was sent a copy of the notes and invited to annotate them and sign as a true copy.

31. Mr Slark did make annotations to the notes, and in particular made notes in respect of the suggestion that he had said *I won't come on you though*. He stated that he believed he would have said "I won't come onto you" meaning that he would not flirt with the staff, and had been misheard.

32. In respect of the allegation that he had sniffed K's seat it had been recorded in the note that he had said that *the only thing I remember sniffing her seat is one day she wasn't there likely I said I can still can smell the perfume of seat*. The claimant annotated the note to say the information is referred to the upper part of the chair not on the seat.

33. Following an interview with the claimant the respondent prepared an investigation report and the claimant was then invited to a disciplinary hearing by a letter dated 30 November 2018. The meeting was set for 10 December 2018. The purpose of the hearing was stated to be *to discuss your alleged misconduct*.

34. The letter enclosed investigation report and the claimant accepts that he received the investigation report in advance of the meeting and that it included all the statements that have been made by 7 staff members who had complained about him.

35. The letter also stated that if any of the allegations were established that the outcomes which could be considered included summary dismissal for gross misconduct

36. Following some initial investigation as to whether there was a need for further disciplinary action the respondents decided that there was and appointed Mr Griffiths to conduct a disciplinary hearing. Mr Griffiths told me that he did not know what the matter concerned until he received file. When Mr Griffiths reviewed the file he saw a report which included written statements from a number of staff in the office setting out their concerns and complaints. Mr Griffiths told me that he did not make any further enquiries of the witnesses but that he accepted that the investigation report contained within it sufficient information for there to be a need for a disciplinary hearing.

37. Mr Griffiths maintained that he did not make a decision at this point and recognised the need for the hearing so that any new evidence could be taken into account. He stressed that he wanted to hear what Mr. Slark had to say and that he saw his job as being to test whether or not the information which had been provided to him, including the written statements should be accepted taking into account anything that Mr Slark may say, or ask to be considered.

38. Whilst Mr Griffiths accepted that there were some shortcomings in the investigation report he considered that he had the information that he needed in order to proceed.

39. Mr Griffiths then sent a letter to the claimant informing him that there would be a disciplinary hearing and providing a pack of documents which he stated and I accept set out the allegations that had been made against him.

40. The letter itself refers to two allegations which were considered to be potential sexual harassment. The incidents were both matters that had been referred to in the witness statements he had received from the staff at Kappa Brown.

41. The disciplinary hearing took place on 10 December in front of Mr K Griffiths. At The hearing Mr Slark had the opportunity to give his version of events and to make any comments that he wished to make to Mr Griffiths.

42. At the end of the meeting Mr Griffiths adjourned for three quarters of an hour after which he told the claimant that he had decided that under the disciplinary policy gross misconduct had been established and that the claimant would be dismissed with immediate effect.

43. On the 13th December the claimant sent in his appeal letter referring to the allegations that had been made and the decision to dismiss him claimant.

44. An appeal hearing was then called before Mr Thomas. A meeting was held following which Mr Thomas wrote claimant 24th of January 2019 dismissing the appeal.

45. He stated the decision has been taken because he found the evidence in the witness statements was compelling in its nature and volume and the behaviours set out were not acceptable to the company colleagues that you would be working with. Mr Thomas also noted that he had looked into the issues raised by the claimant.

Conclusions

46. I find that the respondent dismissed the claimant following allegations of behaviour which amounted to sexual harassment in the workplace.

47. The respondent has a contractual disciplinary policy which identifies discrimination and harassment contrary to the Equality act as acts of possible gross misconduct which summary dismissal can be penalty.

48. The respondent relies primarily upon two incidents which are reported by 3 of the 7 women who gave witness evidence to the investigation in one case and by 4 of the 7 women in the other case.

49. The 2 incidents were
    a. an incident in which the claimant was observed to sniff the chair of the female employee who had gone to the bathroom and in which he commented that he could still smell her;
    b. an incident in which the claimant was heard to say words to the effect to 2 female employees in reference to him sitting between them that he would come between them but will not come on them.

50. The claimant has maintained throughout that in respect of the second allegation his words were misheard and he did not say he would not come *on them* but said *I will not come onto* you meaning he would not flirt with them.

51. In respect of the first incident the claimant clarified that although he accepted that he had made these comments, he said he was not sniffing the seat of the chair. The claimant categorises this as an innocent comment about perfume.

52. The respondent witness Mr Griffiths accepted in evidence that if he had believed the claimant's account in respect of the words *come on you*, or *come onto you* that whilst the incident would have been considered misconduct, it probably would not have amounted to gross misconduct. Mr Griffiths stated in evidence that although, if it were an isolated incident, it probably would not have led to the claimant being sacked, in this case the claimant would have been sacked in any event because of the other incident and because of the context.

53. The claimant raised concerns both at the appeal hearing and before this court that at no time had any of the women who complained about him been asked whether or not they may have made a mistake, or whether it was possible that they had misheard him.

54. Mr Griffiths accepted that he had not gone back to the witnesses to seek clarification, because he did not consider that it would have mattered to the final outcome.

55. Mr Thomas who conducted the appeal was satisfied with the quality of the decision made by Mr Griffiths and the evidence which he had in front of him which was the written form statements, and did not consider it was necessary for him to go back to the women and re question them in order to make his decision on appeal.

56. I have not heard any evidence from any of the women in this court, although it is clearly open to the respondents to call such evidence. In respect of the unfair dismissal claims the legal test requires me to consider the reasonableness and fairness of the respondents actions, but in the breach of contract claim I am reminded by both parties that I must decide whether or not I am satisfied that it is proven on balance of probabilities that there has been a fundamental breach of contract such that the respondent was entitled to dismiss.

57. In this case I conclude that the respondent was reasonable to conclude, after a fair investigation that the claimant had committed acts of gross misconduct.

58. I find that the respondent honestly believed, on reasonable grounds that that that the claimant
    i. did make comments in respect of sniffing a female employees chair when the employee was out of the room;
    ii. this was heard by a number of other female employees who found it offensive and complained;
    iii. the claimant did make comments about bullying between 2 female employees and a comment was made which clearly offended the employees who heard it

59. I find that the respondent took into account its own guidance on acceptable standards of behaviour both in the disciplinary procedure but also, I am told by Mr Griffiths in the form of online training tools which all employees were required to look at.

60. He told me and I find as fact that he took account of the part of the online tools which specifically addressed equal opportunities and within that context, the types of behaviour which were and were not acceptable to others.

61. The respondent was reasonable to conclude that

    a. the claimants behaviour and demeanour when at the office of a 3rd party contractor staffed largely by women was such that 7 women were prepared to give evidence in an interview and to sign statements in which all of them to a greater or lesser degree expressed concerns about the behaviour of the claimant, with emphasis on the sexist nature of some of his comments.
    b. The claimant showed no insight into the effect that his behaviour had on women employed by the contractor for which he was working, and continued to maintain that their complaints were motivated not by any genuine sense of grievance, but by collusion and collaboration because of the criticisms that he might be making of the company.
    c. The claimant was in a public facing role, and his behaviour had the potential to seriously damage the reputation of the respondent

62. I find that the respondents conducted a full and fair investigation which satisfy the tests set out in case law.

63. In particular I find that there was a full investigation of the allegations, that the claimant was given a full opportunity both to see and understand what the allegations were, in that he was provided with a copy of the investigation report, and that he had a full opportunity to discuss the allegations, put his case, and provide any further information to Mr Griffiths the course of a full interview.

64. I also find that the claimant was provided with an opportunity to appeal, and that a full and fair appeal hearing took place.

65. The respondent's set out with sufficient clarity the nature of the allegations made, and I find as fact that the claimant did indeed know that there were 2 primary allegations against him but also knew that there were other allegations and knew of the context and that this was a factor with which the respondent was equally concerned. I Find this on the basis of the discussion that took place and was clearly noted at the initial disciplinary hearing, the claimants own letter of appeal, and the appeal hearing itself.

66. I find that the respondent's had a reasonable and honest belief that the claimant had committed gross misconduct, based on Mr Griffiths evidence of his concerns about the claimant's behaviour and demeanour, witness statements of 7 female employees, the lack of any insight by the claimant into the effect that his behaviour had had upon female employees, the claimant's lack of any real apology, and no apology made to the women employees, the respondent's concerns about how the claimants behaviour would impact on the relationship with a 3rd party, the respondent's concerns about reputational damage, and the claimant's own statements about what he had said that the chair incident, and in respect of his cheeky chap persona.

67. I find that the honest belief that the claimant had committed misconduct was reached after a fair and reasonable procedure,

68. I find in particular that the failure to re-question the witnesses about the nuance between the claimant's version of the words alleged and their own understanding was not unreasonable in the context of the allegations being made. Whilst the respondent's own procedure provided the option of crosschecking such nuances if they arose there was no absolute obligation to do so. This was an internal investigation and not a legal process, and I find that it was not so unreasonable as to undermine the fairness of the procedure as a whole. Whilst in most cases it will be appropriate to ensure that a conflict in evidence is checked so that the claimant may be sure that all avenues have been addressed, in this case I accept the respondent's evidence that it would have made no difference in any event. I accept that even had the claimant's version of the words been accepted by all 3 women who reported the wording, come on you, as the correct one, that the respondents would still have considered this to be misconduct although of itself not leading to summary dismissal.

69. However I accept the respondents evidence from Mr Griffiths that he would still have dismissed on the basis that chair incident and the context within which the behaviour occurred, and in the light of the claimant's lack of insight; lack of apology and the potential reputational damage. I also take into account the seriousness with which the respondent treats such behaviour in the workplace, and note that this is in line with most reasonable employers. I accept that this employer places a particular emphasis on reputational damage and has particular concern about the outward facing public role and its role when working with employees of contractors.

70. I find that the penalty of summary dismissal was reasonable in all the circumstances taking into account the merits and equity in the case. I take into account the nature of the allegations which the respondent found proven, the lack of insight or contrition from the claimant and his willingness to blame others who were complaining of his own behaviour. I also take account of the public facing nature of the business and the role that the claimant had in it, and the emphasis that the respondent puts on this.

71. I have considered whether or not the fact that another employee was treated in a different way following a complaint about a racist remark he made. The parties appear to agree and I find as fact that he was treated in a more lenient manner than the claimant was treated.

72. I also find that neither Mr Griffiths nor Mr Thomas were aware of how this other individual was being treated by the internal procedure at the time that they made their decisions about the claimant. Neither of them was involved in the disciplining of MP.

73. On its own merits the decision to summarily dismiss the claimant is one which I find to be fair, and the fact that another person who had made different comments of a different nature was treated differently does not on the facts before me undermine the reasonableness or equity of the decision to dismiss in the claimant's case.

74. In respect of the claim for unfair dismissal the claimant's case is therefore dismissed.

75. Whilst it does not now arise, had I found that there was a procedural error, so that the dismissal was procedurally unfair because of the failure to revert back to the 7 witnesses for clarification, I would have found that it would have made no difference to the outcome. Even if one of the women who complained had expressed doubt the respondents would still be entitled to find that the events took place, and even if all of them had expressed doubt I find that the respondents would still have dismissed in respect of the other proven allegation and would have been reasonable to do so. It follows that there would have been a 100% reduction of any damages in respect of *Polkey*.

76. In so far as it may then be necessary to consider contributory fault and ask whether the claimant's dismissal was caused or contributed to by his own behaviour I would have considered whether his conduct was culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (nelson-v-BBC [1980] ICR 110).

77. I would have found that the claimants behaviour both in the actions in the workplace, and in respect of his lack of insight into the offence that he might be causing was foolish and unreasonable and would have led to a finding of contributory fault of 100%.

Wrongful dismissal

78. In respect of the claimant's case for wrongful dismissal I am reminded by both parties that it is for the respondent to prove that the claimant was in fundamental breach of contract such that they were entitled to dismiss summarily without notice. It is for the respondent prove to me on the balance of probabilities that the gross misconduct upon which they rely as founding that breach occurred as a matter of fact.

79. The respondent has not called evidence from any of the 7 women who made allegations about the claimant, and in particular has not called any live evidence from any women to deal with the claimant's assertion that his words in respect of the, *onto you* comment were misheard and misunderstood

80. Whilst the respondents may act fairly in not addressing an issue where there is a conflict evidence in the course of an internal disciplinary, the Employment Tribunal is a court of law, and in order to prove a fact, where there is live evidence before me, which raises a clear conflict, I would expect to have live evidence to counter the assertion. The respondent could have called any one of the women. Whilst they do not have to, by not doing so they run the risk in a case of this type, that the breach will not be proven.

81. On the evidence before me I find on the balance of probabilities that the comment alleged to have been made by claimant that he would *come between you not come on* you is **not** proved.

82. Had the respondent dismissed the claimant summarily in respect of this allegation alone, I would have found that there was a wrongful dismissal, on the basis that there was no proven fundamental breach of contract

83. However I find as fact that the allegation in respect of the chair sniffing is proven and that the context within which this occurred including the surrounding allegations of sexist comments and that this is capable of amounting to gross misconduct.

84. I take into account the claimant's own evidence in this respect as well as the written signed witness statement evidence of the 7 employees.

85. I find as fact that the written evidence is consistent across a number of different women and that the events described by those women occurred. The claimant does not deny that the event occurred but appears to say that it was not meant to be offensive. I note that the respondent includes sexual harassment in its list of potential acts of gross misconduct, and I note that the definition of sexual harassment does not require that the treatment is intended to cause offence. It is sufficient that the behaviour is unwanted conduct related to sex and that it has the effect of violating the woman's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the woman.

86. I am satisfied that in this case given the outward public nature of the job that claimant was doing, and given that his role requires him to go into offices of contractors that his behaviour was a repudiatory breach of his contract of employment.

87. I therefore find that the claimants claim for breach of contract is also dismissed.

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Employment Judge Rayner

Note: online publication of judgments and reasons

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The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness