EMPLOYMENT TRIBUNALS

Claimant:
Mr Stephen Walford

Respondent:
KCOM Group Plc (sued as Kcom Group Plc)

Heard at: **Kingston upon Hull** **On: Friday 1 November 2019**

Before: **Employment Judge R S Drake**

Representation
Claimant: In Person (not represented)
Respondent: Mr A Rhodes (of Counsel - Instructed by Pinsent Mason)

JUDGMENT

1 The title of the Respondents is amended so as to describe them as KCOM Group Plc.

2 The Claimant's complaint of unfair dismissal fails and is dismissed

3 Because this decision was given extempore after deliberation and is now promulgated in greater detail, I have decided to exercise my power under Rule 62 to set out Reasons in full as below.

4 The Respondents' application for costs fails and is dismissed

REASONS

Introduction

First, I record my gratitude to the parties for their effective and in some cases disarmingly candid presentation of their respective cases, helpful and co-operative

advocacy, and also very helpful preparation of the presentation of documentary evidence and the presentation of final oral submissions.
Second, though I was able on the day of hearing to reach my conclusion on the merits of the substantive case and give brief oral reasons, I reserved the giving of full reasons and my deliberations particularly on the Respondents' application for costs.

Issues

I determined (with the assistance of the parties and thus largely by agreement) that the issues to be examined were agreed as follows: -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed;

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, could the Respondents establish what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts their reasons were principally a reason relating to conduct under S.98(2)(b) ERA 1996 and/or (by implication) some other substantial reason under S.98(1)(b) ERA being consequent loss of trust and confidence;

1.3 If a/the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Can the Respondents show - (i) they genuinely believed the Claimant was guilty of misconduct, - (ii) did they have reasonable grounds for such belief and - (iii) had they identified such grounds after undertaking as much investigation as would be carried out by another reasonable employer?

1.3.2 In short, was the decision to dismiss arrived at in accordance with the above three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondents act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996)?

2 Remedy

If the Tribunal were satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119 and 123 ERA. This was not a live issue once I reached my conclusions as set out below, but I started my consideration with an awareness that this may become a live issue.

The Law

3 The relevant law applicable to this case (I have not quoted each part of the section/subsections not relevant to this case) is set out in Section 98 of the Employment Rights Act 1996 ("ERA") which provides: -

" - (1) In determining … whether dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal - and -

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee…."

" – (2) A reason falls within this subsection if it -

(a) ……..
(b) It relates to conduct … "

4 If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

"Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) Depends whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case."

5. The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office and HSBC Bank –v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

My findings of Facts and my Reasons

6. I made the following findings of fact based upon evidence which I heard from the Claimant himself and the Respondents' witnesses Elizabeth Holmes who is a Team Leader and was the dismissing officer, and Christopher James Akrill who is a Field Control Manager and was the officer who heard the Claimant's appeal. Each was thoroughly cross-examined in that where the Claimant had difficulty framing his questions, I framed them for him in the interest of ensuring equality of arms and raised the questions he needed to ask in order to test the oral testimony with which he took issue. I commend both sides for giving candid and frank evidence even where they perceived that in parts it damaged their own positions. I also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to it, the contents of a combined documents bundle comprising over 175 pages. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

7. Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses by their initials (**EH** and **CJA**) and the documents in bold type page numbers in the Evidence Bundle (**P1 to P175**) or paragraphs in witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

9.1 C was employed by R at their location in Hull and at the time of the termination of his employment by them had been engaged (by them since 1 November 2009 (**P9 – ET1)**. At the time of dismissal, he held the post of Technical Support. Events occurred in January 2019 which gave rise to R calling C to a disciplinary meeting which, though initially scheduled to be earlier, eventually took place at C's behest on 14 March 2019. C was given a concise description of the reason for the meeting in a letter dated 4 March 2019 (**P97-98**) and it advised of his right to be accompanied.

9.2 There are some conflicts of evidence in the considerable volume of documentary (175+ pages) and oral evidence before me. I find the accounts of what happened, and the chronology of events described by R in particular to be persuasive and cogent. Furthermore, I find their accounts of what they had in mind and the sincerity of their attention to what was said to them by C to be convincing to the required standard of proof being a balance of probabilities. I do not find any aspect of their testimony, or anything said by C, who took considerable issue with their accounts of events, to be such as to impeach their credibility.

9.3 The chronology of main events is as follows but with my further findings about them duly added: -

9.3.1 4 February 2019 - Letter calling Investigation Meeting for 8 February 2019;

9.3.2 8 February 2019 - Investigation Meeting (postponed at C's request) concerning a grievance raised by a fellow employee ("Ms IT-F") against C;

9.3.3 4 March 2019 – Letter calling Disciplinary Meeting for 7 March 2019 – this sets out two detailed and significant causes for investigation of alleged verbal sexual harassment by C of IT-F and resultant potential loss of trust and confidence in C;

9.3.4 12 March 2019 – Disciplinary Meeting (undertaken by Mrs EH) commenced after being postponed to this date again at C's request;

9.3.5 14 March 2019 – Disciplinary Meeting reconvened and concluded after an hour – finding of gross misconduct and decision to dismiss summarily reached and communicated;

9.3.6 19 March 2019 – Letter confirming summary dismissal;

9.3.7 22 March 2019 – C lodged his appeal;

9.3.8 9 April 2019 – Appeal heard (by Mr CJA) and decision to summarily dismiss confirmed;

9.5 At all relevant stages C contested the accuracy of what IT-F had reported he had said to her. She said that he had asked her if she had an inappropriate relationship with her brother, that she had a large mouth, that he commented on her apparel particularly addressing his comments to her abdomen and upper legs, even going so far as to say "you could fit a dick in there". C flatly denied making any such comments or statements and questioned the reliability of her account as in his words, "she is a young girl

whose doesn't always realise what she is saying" and whose account couldn't be trusted as the events weren't directly witnessed.

9.6 C also questioned R's reasoning as a witness (Mr AT) to the aftermath of the events complained of had changed his testimony when asked to confirm what he had first reported of what he saw of IT-F's state of mind and demeanour after the event in question. C also questioned reliance upon the testimony of other similar witnesses Ms ED and Ms KP who gave similar observational but again indirect testimony.

9.7 C complained at the time as he does today that reliance upon the testimony of witnesses who didn't actually hear the words he used to be fatally misplaced as it was indirect and not probative. R argued that in cases where one person's word is diametrically opposed to another as in this case, all they can and should do is examine what they can of surrounding circumstances, reports of what others have seen (preferably directly but otherwise if that is not possible then indirectly) so as to reach as best a judgment as they can, bearing in mind the standard of proof necessary is not whether something is proved beyond reasonable doubt but whether it is more likely on a balance of probabilities.

9.8 C concluded that the balanced of probability fell against C and that there was nothing further they could examine to reach any other conclusion and that thus they found the words complained of had been uttered by C to IT-F.

9.9 R have in place a Bullying and Harassment Policy (**P34-40**) which provides for a definition of Harassment as including amongst other things "unwanted propositions, insults, jokes or name calling" and "lewd behaviour". After reaching their conclusions as to what was said by C, they characterised his behaviour as being within these definitions. The Policy clearly states (**P40**) that if such behaviour is found to have occurred it will lead to invocation of Disciplinary Procedure, which is otherwise provided for (**P41-48**) which includes reference to findings of gross misconduct being possible for bullying (covered by the Bullying and Harassment Policy) and acts which irrevocably cause loss of trust and confidence. The Policies in short permit dismissal (even summary dismissal) for such acts as being examples of gross misconduct.

9.10 It is noted that at all relevant times, C was given the right to be accompanied and was made aware of the jeopardy he faced if found to have acted in a manner characterised as gross misconduct. He argues that to be told this is a possible outcome betokens pre-judgment.

Conclusions on Application of Law to Facts

10 I find that R has shown that C was dismissed because of a reason relating to conduct which is the reason they had in mind for dismissal and that they also had in mind resultant loss of trust and confidence because they could discern no grasping by C of the seriousness of the comments he made and thus that

he lacked necessary insight when describing the expectation of him as being rather "PC". I take the law as described in para 3 above as my guidance and my further findings in this respect are as follows: -

10.1 R reached this conclusion after as full an investigation as another reasonable employer would carry out with no material gaps in the evidence they could gather;

10.2 R undertook a careful and indeed textbook process of Disciplinary and Appeal hearing ensuring C knew what he had to face and yet still had ample opportunity to offer his side of the case as well as arguments as to why his case should be preferred. They preferred the complainant's version of events to that offered by C and it was open to them to do so since rarely if ever is direct evidence found and so a reasonable employer has to base a balanced case as best it can on seeking evidence either way which upsets the balance one way or the other and in this case against C. When faced with the argument that the complainant was a young girl, Mrs EH as decision maker took into account her awareness that harassment is a concept not characterised by considerations of lack of intent but by the subjective reaction of the hearer, and in this case she had before her the evidence of what other witnesses observed of the complainant shortly after the event. Thus, she was justifiably able to draw a conclusion I would expect of another reasonable employer. I find the **Burchell** test described in para 1.3.2 above to be well and truly satisfied;

10.3 R allowed the evidence of one witness to be changed but the change was not material and was by way of clarification rather than substantive change in a manner radically altering its content and this is not surprising in any initial statement taking and subsequent verification. This does not impeach the reliability of this witness;

10.4 I do not find that telling an employee that if a finding is made against him may lead to his dismissal to be any evidence whatsoever of prejudgment as to outcome. I find that the conclusion R actually reached to dismiss falls within a band of reasonable responses the Tribunal would expect from another reasonable employer in the same circumstances as a finding of gross misconduct does not preclude a lesser outcome, but it certainly gives a sound foundation for an outcome of dismissal. I reach this finding taking account of the case law guidance described in para 5 above.

10.5 The appeal was conducted with model procedure and attitude of mind as displayed by Mr CJA.

10.6 I find that here were no material errors in approach or conduct by R and that C's criticism of them, beyond disagreeing with their point of view and seeking to test their witness testimony today, amounts to any

basis for finding that they have not acted reasonably in all the circumstances for the purposes of S98(4) ERA as described in para 4 above. Gross misconduct according to all the decided authorities is the only legally valid and fair basis for terminating someone's contract without notice and in this respect all the authorities require that "gross" means the most serious form measured not simply by reference to intent and mental state of the perpetrator of the misconduct, but also in cases of harassment to the measure of the consequences as seen by the victim. A person may be justifiably and fairly dismissed for gross misconduct even if the in harassment there is lack of intent but where the consequences are serious. In short, I can find that the reason thus relied upon in the Disciplinary Hearing (and confirmed on appeal) as a basis for dismissal was a sufficient reason on the facts of this case.

10.7 R has shown to my satisfaction that it had conducted a fair and reasonable procedure in leading up to and reaching a conclusion to dismiss. This was manifestly fair though I recognise C's sincerity in his challenge of the witnesses both at the time and today as he was en tiled to test them in formal evidence giving;

11 A significant test, as in all unfair dismissal cases, is as set out in **Iceland** and is based on what **an** other reasonable employer might do (emphasis added) not what it might not do, nor what many or all employers would do. The outcome of dismissal was one which in this case and in this Tribunal's finding potentially fell within the bounds of what "an" other reasonable employer would do in the same circumstances. The dismissal was therefore fair.

12 The Tribunal further concluded that C was acting genuinely and in mistaken belief (he was not significantly represented in this case) that he could challenge the witnesses' testimony and beat it today because he based his thinking on an erroneous impression as to the weight of evidence which an employer can rely on in a case such as this.

13 In subsequent deliberations, I have carefully considered my power in Rules 74 to 84 of Schedule 1 to the Employment Tribunals Regs 2013 and concluded as follows: -

13.1 R did not make any prior application for a Strike Out (Rule 37) or Deposit Order (Rule 39) on the grounds that the claim had no reasonable prospect of success or was unreasonably pursued –

13.2 I understand he was warned I n August in a costs letter that he would face a costs application if he lost because R believed its case to be strong and that thus he must accept his pursuit of his claim as unreasonable – witness statements were exchanged at a later date so far as I can see -

13.3 C contested the testimonies and conclusions of the main witnesses and took issue to large degree with the testimonies of the event aftermath witnesses and the complainant and the weight which could be attached to them, and thus I find his challenge telling because it demonstrated his lack of insight on the one hand but also on by contrast his genuineness of perception, and that thus he was entitled to ensure the witness testimony particularly today was fully challenged;

14 Thus, I concluded that it would not be appropriate in this case to find that C's pursuit of his claim was unreasonable or doomed to fail as such, since a test of testimony was useful valuable and in this case decisive when coupled with the evidence of how much and how well R investigated and then dealt with the matter procedurally.

Employment Judge R S Drake

Date: 13 November 2019