



EMPLOYMENT TRIBUNALS

Claimant: Mr G Stiddard

Respondent: Ford Retail Limited t/a Trust Ford

Heard at: Bristol **On:** 5th, 6th and 7th November 2019

Before: Employment Judge R Harper MBE
Members Ms G A Meehan
Mr E Beese

Representation

Claimant: Ms L Taylor, Counsel

Respondent: Mr W Smith, Solicitor

JUDGMENT having been sent to the parties on 12th November 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. With the agreement of the two representatives at the commencement of the hearing the Tribunal have anonymised references to three employees or former employees of the respondent who will be referred to in this Judgment as A, B, and C.
2. This was an allegation of direct sex discrimination under Section 13 of the Equality Act 2010. In relation to our assessment of the evidence we have applied and considered **Section 136 of the Equality Act 2010** and to the cases of **Igen v Wong** and **Madarassy v Nomura International Plc**.
3. There has been a Case Management Order in this case and in paragraph 6 (vii) of that order it was stated:

“the claimant relies on a hypothetical comparator, that is a woman in his position and responsible for the same conduct”.

4. Rather surprisingly, at the commencement of the hearing the Tribunal were told that the claimant relies on an actual comparator namely person C. The respondent had little notice of that, except that there was reference to this

person in paragraph 27 of the claimant's witness statement. The Tribunal proceeded on the basis therefore that the comparator that was being used by the claimant was indeed C.

5. In relation to the claim of unfair dismissal, under Section 98(2)(b) where the respondent advances the potentially fair reason for dismissal of conduct.
6. In relation to the procedural aspects of the unfair dismissal claim the Tribunal have had regard to Section 98(4) of the Employment Rights Act 1996 which requires the Tribunal to have regard to equity and the substantial merits of the case and the size and administrative resources of the respondent.
7. The third head of claim related to notice and was brought under the Extension of Jurisdiction England and Wales Order 1994.
8. The Tribunal heard evidence on oath from the claimant, from Mr Panton, Mr Jolley and Mr Jukes. The Tribunal considered all the evidence that was placed before it, save that if our attention was not drawn to a document in the bundle we have not considered it. The Tribunal has considered the witness statements and the oral evidence of the witnesses and the two submissions made by both the representatives. The Tribunal has considered, amongst others, the cases of
 - **Coulson v DWP 2013 AER page 31**
 - **Miller v William Hill Limited 2013 ER page 110**
 - **Burchell v British Home Stores**
 - **Sainsburys Supermarket v Hitt**
9. The Tribunal has also considered the ACAS Code which was specifically referred to by Ms Taylor in her closing submissions.
10. The test in relation to **Burchell v British Home Stores** is that the Tribunal would have to be satisfied if the respondent was to succeed that the respondent had a genuine belief, reasonably held, after a reasonable investigation. The importance of the Sainsburys case is that the Tribunal are required to consider at every stage whether what the respondent did was within a reasonable range of response.
11. In relation to the application of sanction there are many cases the leading one of which is **Foley v The Post Office** which requires an assessment of whether the application of the sanction of dismissal was within a reasonable range of response.
12. The claimant was employed from 4 February 2008 in the role of Sales Manager and this came to an end on 29 June 2018.
13. On page 40 of the bundle was a disciplinary policy which is specifically stated to be a non contractual one. The important passages to highlight from that are firstly found on page 40 because two examples of gross misconduct are "*abuse of the company petrol card*" and secondly "*harassment or bullying of*

another colleague whether sexual, racial or other grounds". There are other aspects referred to there which are also of some relevance.

14. From the same document we also look at page 37 of the bundle where, under the heading, "investigation", it states

"no disciplinary action will be taken until the matter in question has been properly investigated. The colleague and any relevant witnesses will be interviewed and written notes of any meeting will be kept. The colleague is not entitled to be accompanied at any investigatory meeting".

15. Under the heading "Disciplinary Meeting" the relevant passage to highlight is as follows:

"The colleague must also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by the witnesses. Where an employer or colleague intends to call relevant witnesses, they should give advanced notice that they intend to do this unless in cases of bullying and/or harassment".

16. In December 2017, the claimant started to have mental health issues and the respondent and others suggested to him that he should seek medical help which in fact he did. The claimant had little time off work with these issues but he was placed on medication. The claimant attended work and the respondent was entitled to assume that he was fit for work. The claimant had a good working relationship with Mr Panton. Both he and Mr Panton's evidence mirrored each other in being complimentary towards each other. Mr Panton in his evidence stated that he had had several discussions with the claimant about the claimant's mental health, although the claimant stated that there had only been a couple of discussions.
17. The claimant was in a senior position with the respondent and as such was a role model to his direct reports and he was in charge of his department. There was a correspondingly higher obligation upon him to follow procedures and set a good example.
18. The claimant had a long and unblemished career with the respondent until the events in question. The claimant's long and unblemished career and his mental health were all taken into account before the decision to dismiss took place. It was also taken into account, regarding the fuel card issue, that the claimant had self reported that issue. This however did not detract from the respondent's reasonable conclusion that the misuse of the fuel card was tantamount to dishonesty. It appeared in the policy as an example of gross misconduct. The claimant admitted being liable. It was a serious matter for which, alone, it was within a reasonable range of response to dismiss. An important piece of evidence came out during the hearing that an unrelated person at another branch of the respondent had been dismissed for fuel card abuse.
19. Mr Panton had a discussion in January or February 2018 with the claimant about the claimant's relationship with person A who was a work colleague.

No action was taken as the relationship had ceased or had cooled off. She had a boyfriend at the time. The claimant had been having marital problems.

20. On the 14th June 2018 person A asked to see Mr Panton at the Ashton Gate office. He met with her accompanied by another lady who was the dealership secretary. As a result of what A told Mr Panton, Mr Panton took a very serious view of the issues. Amongst other things that were disclosed was that the claimant had been showing A and person B photographs of his new flat on his phone and whilst doing so showed them a naked picture of his genitals and suggested that she should use it as a background photo. There was an allegation of the claimant trying to kiss B at a Christmas party and other allegations as set out in Mr Panton's statement at paragraph 5.
21. As a result of these allegations by person A, the claimant held an investigation meeting with the claimant to see what he said. In relation to the naked photographs he acknowledged that there were such photographs on the phone but he denied showing them to A. He said that he liked A but played down any relationship. There was a suggestion that A was very keen on him and this was clearly a matter which he was flagging up to be investigated. The claimant said that A was leading him on or blackmailing him and using him when he was in a vulnerable state after he had split from his wife.
22. In relation to the fuel card matter, the claimant stated that the card had been given to A on two occasions. Somewhat curiously it came out that although he now says that those fuel payments were deducted from commission he did not say that at the time. Bearing in mind that is such an important piece of evidence on his part it is surprising that did not come out.
23. As a result of the concerns the claimant was suspended pending further investigations and the disciplinary policy clearly provides for that suspension. As a result of the suspension, Mr Panton carried out an investigation and he had already spoken to person A. He then spoke to person B who said that the claimant had showed a naked photograph of himself to A and then to B and the most important aspect of B's investigation which formed one of the allegations that he was eventually dismissed for, was that she said that the previous day he had said to her *"he wanted to spunk all over my tits"* and then went on to say *"I should not say that to you really should I"*.
24. Mr Panton then investigated David Ferguson and he then saw Turner Mason. As a result of the investigation, Mr Panton received an email which is to be found on page 65 and dated the 16th June 2018. In addition there are in the bundle screen shots of What's App traffic and in the bundle there are messages passing between the claimant and Person A. Those are to be found on pages 83 – 85.
25. As a result of the investigation, Mr Panton *"concluded that there was a disciplinary case for Grant to answer. I therefore wrote to Grant on the 21st June 2018 inviting him to a disciplinary hearing to be conducted by the respondent's financial controller Chris Jukes"*. Paragraph 10 of Mr Panton's statement.

26. A letter was sent to the claimant on 21 June 2018, inviting him to a disciplinary meeting on 27th June 2018 he was advised of the allegations which were clearly set out and are as follows:

“You have shown members of staff naked photographs of yourself.

Secondly, you have shown a female member of staff person A unwanted physical attention including trying to kiss her.

You allowed person A to use your company fuel card to fill up her vehicle which is contrary to the company fuel card policy.

You said to person B I want to spunk all over your tits and I should not say that to you really should I”.

27. The Claimant was therefore left in no doubt of the allegations. He had time to prepare for the disciplinary hearing, he was advised of his right to be accompanied and he was provided with the investigatory notes that had been obtained as at that date.
28. At the disciplinary hearing, the claimant was accompanied by Maxine Viner. The meeting was conducted by Mr Jukes and it commenced at 10.53 and concluded at 14.24. During the meeting, the claimant gave Mr Jukes the document to be found at page 82. After the disciplinary hearing, Mr Jukes spoke with person A between 15.47 and 16.01 and person B between 16.06 and 16.17. Both women were described by Mr Jukes as being upset during the time that he was speaking to them. During the disciplinary hearing, this is to be found at the top of page 80 of the bundle the claimant referred to a number of people who in effect he was suggesting should be seen as part of the investigation.
29. Having considered all the evidence in the case, the Tribunal find that the respondent acted within a reasonable range of response in concluding that the input of those people was not relevant to the four disciplinary allegations which the claimant faced. Minutes were kept of that meeting. In cross examination, the claimant acknowledged that Mr Jukes had the obligation during the disciplinary meeting to weigh the evidence before him and decide whose evidence he preferred.
30. As a result of the disciplinary meeting, the claimant was dismissed and that letter is dated 6th July 2018 to be found on pages 89 – 91. In relation to the photographs, the view taken by the respondent was that he had at the very least allowed A to see naked photographs on his phone and it was of relevance that he had advanced a number of alternatives scenarios as to how that could have taken place. The respondent took the view that as a manager he had in effect breached his obligation because the duties imposed on him were rather higher than being a subordinate employee. The actual findings of the respondent are set out in the dismissal letter. In relation to the unwanted physical attention in relation to A, the claimant in the presentation of the case appears to confuse the finding of the respondent with what actually happened to the comparator in this case. In the comparator’s case the Tribunal are told that C who is female had a relationship with a subordinate and was not dismissed. However, as Mr Smith has said on a

couple of occasions in the case, that is not the reason that the claimant was dismissed. He was dismissed for unwanted attention because the respondents concluded that although there had been some semblance of a brief relationship between the claimant and A, by the time of the unwanted attention that had finished or was finishing and his behaviour as found was unwanted. This is completely different to having a relationship.

31. In relation to the fuel card the respondent concluded that this was gross misconduct and tantamount to dishonesty and, as earlier stated, the claimant did not indicate that the money had been reimbursed through a deduction from A's commission. The respondent, in closing submissions, said that they did not regard the fuel card as necessarily the most serious of the allegations because the respondent viewed all four of the allegations as serious but when one looks at the evidence in relation to that allegation alone, the respondent would have been acting within a reasonable range of response to dismiss. It is important to note that at the commencement of the hearing the claimant confirmed through his Counsel that he acknowledged that some sanction was appropriate but that the application of the sanction of dismissal was outside the range of reasonable response.
32. In relation to the comment made to person B the respondent concluded that he had said the words attributed although the claimant always denied it. The evaluative exercise was undertaken by the person conducting the disciplinary hearing and the claimant acknowledged that in much the same way as the Tribunal, by parenthesis, the person had to evaluate and decide whose view was preferred. We were impressed with the disciplinary officer as a witness.
33. The claimant was dismissed. He raised a data protection issue in a letter dated 12th July but then on a letter also dated 12th July, he appealed against the dismissal, making it very clear in forthright terms that he felt that the respondent had got it wrong. Quite quickly thereafter, the respondent wrote advising of the date of the appeal, which would take place on 25th July 2018 before David Jolley, a General Manager who had little previous dealings with the claimant. The claimant was advised that he could be accompanied, he was sent the notes of the subsequent meetings that the disciplinary officer had had on the telephone with A and B, and therefore was in possession of all the information that the respondent had before them, before the decision to dismiss had taken place.
34. The appeal hearing commenced at 12.01 and was completed by 12.57. The appeal, as far as the claimant was concerned, was unsuccessful.
35. We turn now to apply the law to the facts and vice versa and we turn firstly to the claim of sex discrimination. This was a claim brought under Section 13 a direct claim which alleged less favourable treatment and this was specifically now less favourable treatment than the comparator person C. As earlier set out in these reasons the claimant had a work relationship and was apparently not disciplined. However, the claimant was not disciplined for having a relationship. In fact he was actually spoken to earlier in the year and no action taken. He was disciplined for unwanted physical attention. The comparator person C did not have any of the other allegations against her. Therefore, the situation between the claimant and Person C are completely different. So different in fact that C really is not an appropriate comparator. The claimant

has not demonstrated to the Tribunal that he was treated in any way unfavourably compared to the comparator. Indeed he has not demonstrated that the respondent would have done anything different if he had been a woman accused of the same things as him.

36. The initial burden of proof is upon the claimant. We remind ourselves of the burden of proof in Section 136 and the two cases earlier referred to. We find that the claimant has not discharged that burden, the burden has not shifted to the respondent, and the claim of sex discrimination fails.
37. In relation to the claim of unfair dismissal the evidence supports the contention that there was a potentially fair reason of conduct. As we have found that the dismissal was fair, the claim for notice pay fails and we have not gone onto discuss or make any findings in relation to contributory fault. We remind ourselves it is not for the Tribunal to substitute its own view.
38. Having regard to the test in *British Home Stores v Burchell* we are satisfied that the evidence supports the respondent's contention that there was a genuinely held belief that the claimant had been guilty of misconduct. We find that the evidence supports the respondent's contention that this genuinely held view was reasonably held after a reasonable investigation.
39. Having regard to the cases such as **Foley v The Post Office** and other cases **Iceland Food v Jones**, we find that the evidence supports the contention of the respondent that dismissal was within a reasonable range of response.
40. In relation to the point generally made by Ms Taylor on behalf of the claimant about the investigation it is rarely the case that an investigation is perfect. Perhaps in hindsight the respondent could have interviewed the people suggested by the claimant but for reasons earlier said that this was hardly likely to achieve anything because the matters weren't relevant. Perhaps in hindsight the respondent could have had sight of medical evidence but really the most serious allegation that he faced was one of, in effect, dishonesty in relation to the fuel card which was likely to be unaffected by the question of medical evidence.
41. The Tribunal finds that it may not have been perfect but that it was well within a range of reasonable response as being a reasonable investigation and we find that there are no procedural irregularities. It follows therefore, that both substantively and procedurally the dismissal was fair.

Employment Judge R Harper MBE

Date: 6 January 2020

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