



EMPLOYMENT TRIBUNALS

Claimant: Miss A Blackshields
Respondent: Cabello Ltd
Heard at: Nottingham Employment Tribunal
On: 10 December 2019
Before: Employment Judge D Dyal (sitting alone)

Representation

Claimant: Mr C Watson (Partner and lay person)
Respondent: Mr T Wood (Counsel)

JUDGMENT having been sent to the parties on 13 December 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

The issues

1. The Claimant complains of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996. The issues for the tribunal to determine are, firstly, what was the reason for the dismissal and, secondly, if it was a potentially fair reason, was the dismissal fair or unfair having regards to the test at section 98(4) Employment Rights Act 1996.

The hearing

2. The tribunal was presented with an agreed bundle of documents running to 165 pages. It heard live evidence from Mr Tapp and from Mr Massey for the Respondent and from the Claimant on her own account. All witnesses were cross-examined. At the conclusion of the evidence there were brief closing submissions from the parties, which are summarised briefly below.

3. The tribunal thanks the representatives and witnesses for conducting the proceedings with civility.

Findings of fact

4. The Respondent is a micro business that operates a small hairdressing salon. It is owned by Mrs Loren Tapp (who is known as Lorraine) and by Mr David Tapp. Mrs Tapp is statutory director; Mr Tapp is Company Secretary. Immediately before the Claimant's dismissal, the business had six employees:

- 4.1. the Claimant
- 4.2. Claire Round (Salon Manager)
- 4.3. Beth Dawson (Junior Hair Stylist)
- 4.4. Lucy Richardson (Stylist)
- 4.5. Nikki Coxon (Stylist)
- 4.6. an apprentice.

5. The Respondent has no in-house HR officer or expert but, through the National Hairdressers' Federation, it has some HR and employment law support from Ellis Whitham Ltd. This is an advisory service only.

6. The Claimant has spent her entire working life at the salon commencing in 1986. Her continuous employment was broken by two career breaks which she took when she had her children. The breaks were between 1998 and 2002. Her continuous employment for current purposes began in November 2002.

7. The Claimant's employment with the Respondent was, until the index events in this case, unremarkable with the exception that in her 2016 appraisal adverse comment was made about her attitude. She was criticised for swearing and raising her voice and having an aggressive manner towards Mrs Tapp. Otherwise, her service appears to have been unblemished.

8. An incident took place at the salon on 26 January 2019. The Claimant's daughter had a hair appointment. Claire Round, assisted by Beth Dawson, was attending to the Claimant's daughter. A trivial dispute about the appointment began (along the lines of whether the Claimant's daughter did or did not know what she wanted done to her hair). However, the dispute escalated out of all proportion. It moved from the salon to the kitchen area adjoining the salon. What then transpired was a terrible row between the Claimant and Ms Round in which both sides were shouting loudly at the other. The Salon owner (Mrs Tapp) had to intervene. That much is uncontroversial.

9. There are some controversial elements to the incident which ultimately the decision makers had to take a view on. The most important are these:

- 9.1. The extent, if any, of physical aggression on the Claimant's part towards Ms Round, and in particular whether or not the Claimant lunged at her with a view to hitting or grabbing her.

- 9.2. Whether or not the Claimant swore at Mrs Tapp. The Claimant accepts that she swore but not that she swore at Mrs Tapp. The “f” word is the swear word in question.
- 9.3. Whether Ms Round swore at the Claimant.
10. On 28 January, there was an exchange of text messages between the Claimant and Ms Round in which they appear to have cleared the air as between themselves and to have mutually apologised for what had transpired.
11. However, Mrs Tapp and Mr Tapp decided that the matter should be escalated to a disciplinary investigation. It is fair to observe that although Ms Round was the other participant in the argument, she was not the only one who was affected by it. Mrs Tapp was also, as was Beth Dawson who was present during the argument.
12. Mr Tapp assumed the role of investigator. In essence, this was because there was nobody else within the business who was better suited to the role. The salon manager (Ms Round) was a party to the argument and Mrs Tapp was a witness to the events and, indeed, a participant in them. There were no other layers to the management of the business.
13. Mr Tapp adopted an impressively forensic approach to the investigation which he commenced with letters to each of the employees that had been at the salon on the day of the incident. He invited them to give an account of what had happened. He was at pains in that letter to tell them to give their own account, not to talk to others and indicated that if they failed to follow those instructions, they would be at risk of disciplinary action.
14. Witness statements were obtained from Claire Round, Mrs Tapp, Beth Dawson, the Claimant, Nikki Coxon and Lucy Richardson. The Claimant's daughter also produced a short statement.
15. Having considered the statements, Mr Tapp invited the Claimant to a disciplinary interview. He enclosed with the invitation copies of the statements of Ms Round, Ms Dawson and Mrs Tapp. He said that the interview was to explore allegations as follows:
- 1) *Threatening, aggressive and abusive behaviour*
 - 2) *Swearing at the Salon Owner*
 - 3) *Insubordination.*
16. It was clear, of course, that this referred back to the incident on 26 January 2019.
17. At this stage, Mr Tapp had decided not to include the statements of the remaining witnesses. Firstly, the Claimant's daughter (however there is nothing contentious about that, it was not probative and the Claimant does not object to this omission). But secondly, and more controversially, the evidence of Nikki Coxon and Lucy Richardson. Mr Tapp omitted the statements because he did

not think that they were probative (or therefore relevant). He wanted to focus upon the key issues.

18. On 14 February 2019, there was an investigation interview which Mr Tapp chaired with the Claimant. This was extremely thorough. It was recorded and the notes run to some 32 pages. The Claimant found it an uncomfortable experience but I find that was simply because Mr Tapp took a forensic approach, traversed some difficult issues and because the evidence which had been gathered was inculpatory of her.
19. At the investigation hearing the Claimant admitted swearing but she did not admit that she had sworn at Mrs Tapp. She denied physically assaulting Ms Round or lunging at her or having the intention to assault her, although she admitted that she had gesticulated with her arms and had been angry. She also admitted that there had been a stand up row.
20. On 20 February 2019, Mr Tapp wrote to the Claimant notifying her that the matter was proceeding to a disciplinary stage and inviting her to a disciplinary hearing. He set out the charges and they were the same as in the letter inviting the Claimant to the investigation hearing.
21. Mr Tapp took on the role of disciplinary officer (for the same reasons that he took on the role of investigator). The disciplinary hearing took place on 9 March 2019. At the meeting there was a fulsome discussion of the issues. The Claimant was upset during the course of that meeting and not as entirely co-operative as she might have been had she not been upset. She was however given a full opportunity to defend herself.
22. Following the meeting, the Claimant was summarily dismissed by letter dated 11 March 2019. The letter gave detailed and again forensic reasons for the dismissal and having heard all of the evidence and reflected on it as a whole, I accept that the letter sets out the true reasons why Mr Tapp decided to dismiss the Claimant.
23. The Claimant appealed against her dismissal on 15 March 2019. She asked for the appeal to be dealt with by correspondence. In summary, she considered that the outcome had been harsh; that her version of events had not been taken into account properly; that she had a clear record, long service and generally that she had been singled out.
24. Mr Tapp replied briefly saying that arrangements were being made for the appeal to take place and that he would be in touch again.
25. On 31 March 2019, the Claimant asked for the appeal to be by correspondence. She indicated that she would be uncomfortable going into the salon for the appeal to be heard.
26. On 22 April 2019, Mr Tapp wrote to the Claimant again offering her a neutral venue and indicating that he would not be the decision maker.

27. The Claimant replied on 24 April 2019, again indicating that she did not want to attend the appeal hearing and asking who the decision maker was. Mr Tapp replied, telling the Claimant that the decision maker would be Mr Massey.
28. I accept Mr Tapp's evidence that he had made wide enquiries to try and find a suitable appeal officer. He started by asking Ellis Whitham whether their service included providing a decision maker, but it did not (it was advisory only). He tried two other contacts who he thought might be suitable to hear the appeal but, for one reason or another, they could not. In the end, the best he could do was to contact Mr Massey who agreed to hear the appeal.
29. Mr Tapp considered that Mr Massey would be a suitable appeal officer because he was a Managing Director of a business of medium size with about 70 employees. As a senior manager, he had dealt with employee relations issues including disciplinary issues. Like Mr Tapp, he was a former police officer and indeed that is how they had known each other; they had worked together about 12 years previously for a period of around a year. In the meantime, they had maintained loose contact, they were on friendly terms but were not close friends.
30. The Claimant replied to that letter indicating that she still wanted the hearing to be dealt with by correspondence.
31. The appeal hearing proceeded in the Claimant's absence on 15 April 2019. The appeal was dismissed by Mr Massey in a well-reasoned letter dated 18 April 2019 and which I accept truly sets out the reasons why he dismissed the appeal and, in my judgement, shows that he did indeed consider the essential grounds on which the Claimant appealed, and did so in good faith.
32. The Claimant was paid the minimum wage. Because of her age, she received the full rate of the minimum wage. At the time of her dismissal, Beth Dawson had recently qualified as a stylist and was 18 years of age. She was also paid the minimum wage but at the lower level applicable to someone of her age.

Submissions

33. Mr Watson focussed primarily upon the procedure that the Respondent adopted. He focussed his submissions on the identity of the decision makers and submitted that they were not appropriate people to decide matters because they were not sufficiently impartial. He also focussed on the exclusion from consideration of two witness statements: those of Lucy Richardson and Nikki Coxon. He submitted that the sanction was too severe and he alluded to the Claimant's age and level of pay being the real reason for her dismissal.
34. Mr Wood submitted in essence that this was a case in which conduct was the clear reason for dismissal, that the investigation had been careful and thorough; that the decision makers might have decided differently but that their decision, including in relation to the sanction, was within the band of reasonable responses.

35. Mr Wood submitted that the statements of Ms Robertson and Ms Coxon were permissibly omitted because they added nothing. No relevant comparison could be made with the treatment of Ms Round.

The law

36. By section 94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. It is for the employer to show the reason for the dismissal and that it was a potentially one. If a potentially fair reason is shown, fairness turns on the test identified at section 98(4), in relation to which the burden of proof is neutral.

37. In ***British Home Stores Ltd v Burchell [1980] ICR 303***, the EAT gave well-known guidance as to the principles of fairness in a conduct dismissal. In essence there must be a genuine belief that the employee has committed misconduct, that belief must be a reasonable one and it must be based upon a reasonable investigation.

38. It is trite law that the range of reasonable responses test applies to all aspects of dismissal, including not only the sanction but also the procedure adopted (see e.g., ***Sainsbury v Hitt [2003] IRLR 23***).

39. In ***Hadjoannou v Coral Casinos Ltd [1981] IRLR 352***, the EAT held that there were limited circumstances in which a dismissal could be unfair by reference to a comparison with the way in which the employer has treated other employees. So far as relevant it may do so, firstly, where it is evidence of an ulterior reason for dismissal. It may do so secondly, where there is disparity of sanction in like cases. However, in order for any relevant comparison to be made, the circumstances of the claimant and the other employee must be truly comparable. The EAT advised tribunals to scrutinise arguments based upon disparity of treatment with care and stated it was the highest importance that flexibility should be retained and generally deprecated a tariff approach to disciplinary sanctions.

40. I have also had regard to the *ACAS Code of Practice No.1 – Disciplinary and Grievance*. I had regard to the whole code but considered that paragraphs 6 and 9 were particularly relevant.

Discussion and conclusion

The reason for the dismissal

41. I am satisfied on balance that the reason for the dismissal was conduct. In particular, Mr Tapp found that the Claimant had not only been involved in a stand up row with Ms Round, but moreover that she had been very aggressive toward Ms Round. She had lunged towards her and appeared to have the intention of hitting or grabbing her. She was thwarted by Mrs Tapp coming between her and Ms Round. I am satisfied also that Mr Tapp found that the Claimant swore at Mrs Tapp by saying words to the effect of “*you would f***ing take her side*” and that Mr Tapp found that the Claimant had continued the

argument even after Mrs Tapp had ordered her to stop. I am satisfied that those are the reasons that caused him to dismiss the Claimant.

42. I did consider whether there was an ulterior motive on either Mr Tapp's, or Mrs Tapp's, or Mr Massey's part. I do not think that there was. The given reasons were the true reasons. In essence, there were cogent and obvious reasons for taking serious disciplinary action (the Claimant's conduct) and upholding the disciplinary action upon appeal. On the other hand there was very little basis to consider any ulterior reason, other than the bare fact of the Claimant's age and amount of her pay compared to Ms Dawson.
43. In my judgment, there was a reasonable basis for the conclusions that Mr Tapp reached. In essence, the conclusions that he reached were well evidenced within the materials generated by the investigation, particularly in Mrs Tapp's and Ms Round's statements and, to a lesser extent, Beth Dawson's statement. There was of course disputed material but I am satisfied that he weighed the conflicting material carefully and came to a conclusion that was open to him as to what account of the incident of 26 January he preferred. A good summary of the most material evidence is extracted at paragraphs 8 – 10 of Mr Tapp's witness statement.
44. I also consider that there was a reasonable investigation. All people that might reasonably have had a statement taken from them were invited to provide a statement. Mr Tapp then analysed the evidence that they produced. The Claimant was invited to an investigation and disciplinary hearing, at which she had a full opportunity to talk matters through and put her version of events. In broad terms she did that in a forceful way at the investigation stage and did that, to some extent, at the disciplinary stage also. She also had the opportunity of appealing. Overall, the evidence that the investigation generated did not speak with one voice. There were difficult findings of fact to be made. However, the evidence was carefully considered and weighed and permissible findings of fact were made.
45. There are particular issues about the procedural fairness of the process in this case. The first relates to Mr Tapp's decision not to share the statements of Lucy Robertson and Nikki Coxon. I can understand why the Claimant feels aggrieved by this.
46. I found this a difficult issue. Paragraph 9 of the ACAS Code of Practice provides some relevant guidance (which chimes with general principles of fairness and natural justice):

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

47. The Claimant certainly had sufficient information to prepare to answer the case at the disciplinary meeting. But she was not sent all of the witness statements that had been gathered. However, as the ACAS Code illustrates by use of the qualifying word “normally” it is not *always* necessary in the interests of fairness to be sent *all* witness statements. In my view, if statements are not probative and are not relied upon by the employer then that is an example of a situation in which it may be fair to proceed without sharing the statements with employee.
48. On balance I thought that Mr Tapp’s decision not to share these statements with the Claimant was within the band of reasonable responses. Mr Tapp analysed those statements and considered them to be lacking in probative value. For that reason (rather than any malign reason) he did not add them to the disciplinary pack or rely upon them. Neither Ms Robertson nor Ms Coxon could give any cogent evidence as to the detail of what had happened in the kitchen since neither was there. It was an uncontroversial fact that Ms Round had been a participant in a stand up argument with the Claimant and that she had shouted at the Claimant. Whether she swore at the Claimant or not was a matter that only Ms Round and those that heard what she said could give evidence of. Ms Robertson and Ms Coxon did not hear what she said. Overall, then, I think it was within the band of reasonable responses to exclude those statements.
49. If I was wrong about that, then I agree with Mr Wood’s submission that I can be sure that the exclusion of those statements made no difference and that a 100% **Polkey** reduction should apply. In essence, everybody has seen those statements now and they have been discussed at length at the hearing. My view is that they do not change matters in any material way, or rather that they would not have changed matters in any material way had they been shared contemporaneously with Claimant.
50. Another procedural issue relates to the identity of the decision makers in the case. Mr Tapp and Mrs Tapp are married. Mrs Tapp was a key witness and her evidence was a vital part of the case against the Claimant. It was plainly far from ideal for Mr Tapp therefore to be the investigator or the disciplinary officer, or both. There was the obvious risk of Mr Tapp lacking and/or appearing to lack impartiality. However, this was a very small business and there was nobody else better suited to hear the investigation or the disciplinary process than Mr Tapp. There simply were no other managers. Mr Tapp enquired of Ellis Whitham Ltd whether they could provide a decision maker and they said that they could not. In those circumstances, I think this was a case in which it was within the band of reasonable responses for Mr Tapp to be the investigator and the disciplinary officer provided of course that he did his best to approach the matter objectively and without prejudgment despite his relationship with Mrs Tapp. I am satisfied that he did that. He approached the matter in as forensic a way as was possible. He did his best to make sure witnesses gave independent accounts and conducted hearings in a focussed, structured and forensic manner. He ultimately came to a conclusion through a well-reasoned decision.

51. I am also satisfied that it was within the range of reasonable responses to appoint Mr Massey to hear the appeal. It is true that he had worked with Mr Massey; but that was a long time ago. It is also true that he was a friend of Mr Tapp's; but not a close friend. In any event, there was not a more independent decision maker that could be called upon to take the decision. I accept that Mr Tapp tried to find somebody that was completely impartial in the sense of being unconnected in any way to him or the business, but he was unable to. I find that the loose friendship between Mr Massey and Mr Tapp was not a point of unfairness in this case in the circumstances. I also find that Mr Massey was a suitable decision maker because of his professional experience as a senior business leader; as somebody with employee relations and HR experience and as someone with experience of disciplinary decision making. It was of course vital for the sake of fairness that he approached the matter with an open mind. I am satisfied that he did. I am satisfied that he felt able to overturn the decision to dismiss in principle and that is what he could and would have done if he had thought that it was the right thing to do. I am satisfied that Mr Tapp did not try to bind Mr Massey to uphold the appeal and did not do so. I am satisfied, that the appeal was dealt with in good faith and that the reasons given for dismissing the appeal are genuine ones.
52. I move on then to consider the sanction of dismissal. It is relevant firstly to consider the argument that there is a relevant comparison to be made with the treatment of Ms Round. She was also involved in the argument but she was not dismissed. In my judgment there are major differences between her case and the Claimant's case. There was no allegation, never mind any finding, that Ms Round had been physically aggressive and/or attempted to assault anyone. There was in the Claimant's case and that was a critical difference between the two cases. There was also no finding that Ms Round had sworn at Mrs Tapp or at all. This was also a significant difference.
53. Bearing in mind those differences in the circumstances of the two cases, the conduct was of a different order altogether and I do not think it surprising that there was a difference of outcome. I do not think the cases were truly alike and therefore I did not think that anything significant can be learned from the respective treatment of the Claimant and Ms Round, whether in terms of the reason for or fairness of the dismissal.
54. The final matter for me to consider is the sanction more generally. I do think that the Claimant's conduct as it was found by Mr Tapp amounted to gross misconduct. That is also what Mr Tapp considered it to be. I am satisfied that the dismissal was not a kneejerk reaction and that Mr Tapp thought the matter through carefully. I am satisfied that he did consider the Claimant's length and quality of service and took this into account when reaching his decision. I am also satisfied that he considered alternative sanctions but that he rejected them, including the possibility of a final warning, because he took the view that the conduct was so far below the standard that could be tolerated that a final warning was not sufficient.
55. I also recognise (as did Mr Tapp) that the air had been cleared between the Claimant and Claire Round. However, whilst that is mitigation, it is not even

close to being a complete answer to the disciplinary issues. Ms Round was far from the only person affected by the incident. Mrs Tapp and Ms Dawson were also significantly upset by the incident which happened in the workplace. So although it is true and a relevant factor that the air had been cleared between the Claimant and Ms Round, that is not in any way decisive or dispositive of the appropriate sanction.

56. Overall, whilst I think the dismissal was on the harsh side, I come to the conclusion that the decision to dismiss (the procedure, the sanction and the two combined) was in the band of reasonable responses open to a reasonable employer. I therefore dismiss the complaint of unfair dismissal.

Employment Judge Dyal

Date 10.02.2020

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE