EMPLOYMENT TRIBUNALS

Claimant: **Mr S Johnson**

Respondent: **First MTR South Western Trains Limited**

Heard at: **Southampton** **On: 12 – 13 August 2020**

Before: **Employment Judge Reed sitting alone**

Representation
Claimant: **Mr B Jones, Counsel**
Respondent: **Mr N de Silva, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. The claimant contributed to his dismissal such that it is just and equitable that any award of compensation be reduced by 50%.

3. The claimant is awarded a basic award of £7,335.

4. The claimant is awarded a compensatory award of £8,498.50, to which the Recoupment Regulations apply. The prescribed element is £8,248.50 and the relevant period is 27 February 2017 – 13 August 2020.

5. The respondent breached the contract of the claimant by failing to give notice of dismissal and the claimant is awarded damages in the sum of £7,614.

6. The respondent did not breach the claimant's right to be accompanied to a disciplinary hearing.

REASONS

1. In this case the claimant Mr Johnson alleged he had been unfairly dismissed by his former employer, First MTR South Western Trains Limited ("the Company"). For the Company it was accepted that Mr Johnson had been dismissed but it was said that the reason for his dismissal was conduct and furthermore that it was fair.

2. Mr Johnson's dismissal was without notice and he claimed that that amounted to a breach of contract. The Company said that he had committed gross misconduct disentitling himself from notice.

3. Finally, Mr Johnson said that there had been a breach of his right to be accompanied to a disciplinary hearing under Section 10 of the Employment Relations Act 1999.

4. I heard evidence on behalf of the Company from Ms Sullivan, the dismissing officer. I also read a statement from Mr Fairbank, who dismissed Mr Johnson's appeal against dismissal. In addition, I heard from Mr Johnson himself and my attention was directed to a number of documents. I reached the following findings of fact.

5. Mr Johnson was employed by the Company as a Commercial Guard at its Bournemouth depot. He had continuous employment from March 1990.

6. The events that led to his dismissal occurred in November 2017. On 2 November he was in discussion with colleagues in the Company's mess room in Bournemouth. Part of that conversation was covertly recorded by another colleague and I was shown a transcript of what was said. Essentially, Mr Johnson frequently swears in the course of the recording and makes comments that might be regarded by certain people as offensive.

7. Later that day he spoke to a colleague, Ms Smith. Industrial action was in the offing and he indicated to her that if she came to work on a strike day, he would no longer speak to her. There was indeed industrial action on 8 and 9 November 2017 and on 14 November Mr Johnson made a Facebook entry that could only sensibly be interpreted as his view that people who broke the strike had "shit for brains".

8. The covert recording came to the attention of management and a disciplinary process was undertaken. There was a disciplinary hearing that extended over three separate days in January and February 2018. Mr

Johnson's representative at the first two of those days was not available for the third and Mr Johnson sought a postponement of that final day. However, that postponement would have been for roughly two weeks and was not granted by the Company. The hearing went ahead on 27 February with Mr Johnson having a different representative.

9. On that date, Mr Johnson was informed that he was summarily dismissed. He appealed against dismissal but without success.

Unfair Dismissal

10. In a claim of unfair dismissal, it is for a respondent to establish a potentially fair reason for dismissal. In this case, the reason clearly related to conduct and therefore the dismissal was potentially fair.

11. I was then obliged to go on and consider whether the Company acted reasonably in treating conduct as justifying the dismissal of Mr Johnson.

12. It was not suggested that there were any procedural irregularities attendant upon the dismissal. Rather it was said that the dismissal was substantively unfair – that the gravity of any misconduct Mr Johnson was reasonably considered to have committed was not such as to justify dismissal.

13. There were four allegations of misconduct made and found against Mr Johnson.

14. Allegation 1 related to the conversation that was recorded. It was alleged that Mr Johnson had used foul and abusive language.

15. He certainly did swear very frequently in the course of the recording. He was in the mess room which could not be regarded as some sort of private place. However, it was clear that swearing did take place in the mess room, both by Mr Johnson and others. All that could really be sensibly alleged against Mr Johnson was that he had "overstepped the mark" by swearing more frequently than was acceptable. This could not reasonably be regarded as one of the more serious allegations against him. Indeed, it was the sort of behaviour that one might expect to be addressed by way of a quiet word rather than disciplinary action.

16. The more serious element of allegation 1 was that Mr Johnson was abusive, or perhaps more accurately offensive. There were two broad categories of potentially offensive statements made by him. The first was, effectively, to the world at large. He held forth with his less than flattering opinion on various groups, such as Conservative voters and strike breakers. There was clearly the potential for offence on the part of anyone holding a different view who overheard what he said and it was misconduct on his part to be broadcasting his opinions in the mess room in the way that he did.

17. The second category of offence was that potentially taken by an individual taking part in the discussion, Ms Balmayne. Mr Johnson made a statement to her that she herself appeared to identify amounted to bullying of her.

18. However, in this case it was important for the Company to bear in mind the effect of his actions on Ms Balmayne herself. In the course of the disciplinary process she gave evidence to the effect that she was not cowed or offended or in any way upset by what he said, and that despite what she said at the time, he was not bullying her. She was not his subordinate. It is perhaps worth noting that the person who actually undertook the covert recording did so because he believed something significant might develop but his evidence in the course of the disciplinary hearing was that, in fact, nothing had.

19. Ms Balmayne was clearly sufficiently robust to deal with what Mr Johnson said, a fact that no doubt was well known to Mr Johnson himself. While it was inappropriate for him to be speaking to her in the way that he did, she was not bullied by him and Ms Sullivan could not reasonably have concluded that she was.

20. Allegation 2 was that Mr Johnson had used an expression in the course of the recorded conversation, to the effect that "it's Nikki Smith we're after". Ms Smith was a colleague of Mr Johnson.

21. Mr Johnson suggested that he had been misheard but I believed it was reasonable for the Company to believe he had indeed made that statement. However, Ms Smith was not present at the meeting and therefore could not have been offended or felt bullied by what he said. Nor was it clear to Ms Sullivan what Mr Johnson was intending to communicate. In those circumstances it was difficult to see what serious misconduct she could sensibly have concluded had occurred.

22. Allegation 3 related to a conversation that Mr Johnson did have with Ms Smith later on the same day, to the effect that if she came in on a strike day, the result would be that he would no longer speak to her.

23. It would, in my view, have been reasonable for Ms Sullivan to consider this the most serious allegation made against Mr Johnson but again it was necessary, in order to gauge its significance, to take account of the actual effect on Ms Smith herself. She gave evidence in the course of the disciplinary process, the broad thrust of which was that she was not particularly put out by what he said. Although she describes herself as being "a little upset", the general tenor of what she says is that she did not feel threatened or intimidated by him.

24. Allegation 4 relates to the Facebook post made by Mr Johnson. This was something that members of the public could see and it was wholly inappropriate for him to be making comments of the sort that he did in that forum.

25. In the course of the disciplinary process itself I was satisfied that Mr Johnson and indeed his representative could be difficult. In particular, Ms Sullivan was at pains to point out that there was no contrition on Mr Johnson's behalf. While clearly that was a relevant consideration for her, this was not a case in which he was evincing a settled intention to continue behaving in the way that he had (in which case a warning might have been completely pointless).

26. The gravity of Mr Johnson's behaviour had also to be seen in the context of his extremely long service with the Company. Ms Sullivan appeared to consider that there was only a negative aspect to that service – that in the light of his experience he should have been aware that his behaviour was inappropriate. She did not appear to give any sort of credit to him, as she should have done. She did, on the other hand, appear to believe Mr Johnson bore some responsibility for divisiveness in the workplace, and that the person who supplied the recording to management was concerned about what he or she had heard. There was no evidence to back up those conclusions.

27. Bullying in the workplace is clearly a serious matter and something that the Company was bound to take a dim view of. However, looking at the matter in the round and in the light of the considerations to which I have referred, while Ms Sullivan was bound to conclude that Mr Johnson had committed misconduct, I did not believe it was reasonable for her to conclude that there had been bullying, or that he had committed gross misconduct, warranting dismissal.

28. It followed that I concluded he had been unfairly dismissed.

29. For the reasons that follow, I would not have entertained an application for an order of reinstatement or reengagement. Under s122 and 123 of the Employment Rights Act 1996, where a claimant has contributed to his dismissal, any basic or compensatory award must be reduced to the extent that is just and equitable. Clearly there had been misconduct by Mr Johnson which was non-trivial. He had been "shooting his mouth off" in an inappropriate way and his actions were bound to have resulted in a disciplinary sanction of some sort, possibly a final written warning. In all the circumstances, I considered it appropriate to reduce any basic or compensatory award by 50% to reflect that contribution.

Wrongful Dismissal

30. For the reasons set out above, I concluded that Mr Johnson had not in fact committed gross misconduct and therefore he was entitled to notice.

Right to be Accompanied

31. Under s10 of the Employment Relations Act 1999 where an employee is required to attend a disciplinary hearing his employer must permit him to be accompanied by (amongst others) a trade union representative.

32. Subsections (4) and (5) effectively provide that, if the employee's chosen companion is not available at the time of the proposed hearing and the worker proposes an alternative time before the end of the period of five working days after the day proposed by the employer, the employee must be permitted to be so accompanied.

33. Mr Johnson was called to a disciplinary meeting on 27 February and wished to have it postponed until at least 12 March, clearly more than five working

days later. The Company was therefore lawfully entitled to refuse that postponement and by doing so did not breach Section 10.

Remedy

34. The parties were able to agree the figures for Mr Johnson's basic award for unfair dismissal and for notice. I took evidence in relation to mitigation in order to address the compensatory award for unfair dismissal.

35. Mr Johnson gave very brief details of his mitigation in his witness statement. Essentially, he claimed that he had been taking appropriate steps to seek alternative work since his dismissal but had failed to find any. There was a lack of any documentary evidence to support his position and his oral testimony was vague and unpersuasive.

36. While I accepted it had not been his intention to leave work on his 65th birthday, I was not satisfied he had made reasonable efforts to find alternative work since his dismissal. There was really no explanation for the wholesale absence of the paperwork one would have expected to see and his vague recollections of such efforts he had made. I concluded that, had he made reasonable efforts, he would have found work relatively shortly after his notice expired. It was unlikely that that work would have been at the same salary as he earned with the Company but the differential would have been eroded over a period of time. I considered that the best way of representing his loss in those circumstances was to award him a figure representing full loss of wages for a period of six months beyond the end of his notice period.

37. Upon those declarations the parties agreed the awards of compensation and damages referred to above.

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Employment Judge Reed

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Date: 27 August 2020