



EMPLOYMENT TRIBUNALS

Claimant

Mr I Adionye

v

Respondent

London Energy Limited

Heard at: Watford by CVP

On: 27 April 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Ms Ruth Kennedy (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant was employed by a predecessor of the respondent on 29 May 2016. The claimant was "TUPE" transferred to the respondent on 16 October 2017. The claimant was dismissed with immediate effect on 10 October 2019. The reason given by the respondent is gross misconduct.
2. By a claim form presented on 27 February 2020, following a period of early conciliation from 2 January to 2 February 2020, the claimant brings a complaint of unfair dismissal.

The evidence

3. I have been provided with a hearing bundle running to some 145 pages. In addition, I have been provided with witness statements and heard evidence from the following:
 - 3.1 Mr Tafi Harris, responsible for day-to-day management of the respondent's site.

- 3.2 Mr Alec Turner, Head of Waste and Recycling Operations for the respondent.
- 3.3 Mr Gustav Woudberg, Operations Director for the respondent.
- 3.4 The claimant.

Preliminary issue

4. Case Management Orders were made on 12 September 2020 providing deadlines for service of a schedule of loss, a list of documents, the preparation of a bundle and the exchange of witness statements. On 9 November 2020, the claimant sent a document to the tribunal (but not to the respondent) that could just about be said to comply with the requirement for a remedy document.
5. On 21 December 2020 the respondent wrote to the tribunal indicating that the claimant had failed to comply with the requirement for a list of documents. Consequent upon that application, on 1 February 2021 Employment Judge Lewis made an Unless Order requiring the claimant to comply with the case management directions by 12 February 2021. The unless order was sent to the claimant on 2 February 2021. There is a clip of documents on the file, including a hand-written letter from the claimant, dated 10 February 2021, which states that the respondent's solicitor was "CC'd". That letter has attached to it, some documents, a payslip and the previous document dated 9 November. It is stamped received by the Tribunal on 15 February 2021. However, there is a pencil mark on it as well recording "12:30 – 12/02" – what that means I have no idea. On 17 February 2021, the respondents wrote to the tribunal asserting that the claimant had failed to provide a list of documents and on 1 March 2021, Employment Judge Lewis declined to strike-out the claim at present and indicated that an application to strike-out could be dealt with at the start of the hearing.
6. Ms Kennedy, on behalf of the respondent, has renewed the application to strike-out. She further relies upon the fact that the claimant only served a hand-written witness statement on Friday 23 April 2021 as against the Case Management Order deadline of 11 January 2021.
7. Thus, it appears to me that the claimant did send something to the tribunal by 15 February 2021. If sent on the day it was dated and if a copy was sent to the respondent it would have arrived by 12 February 2021. It is not a list of documents in the conventional sense but does contain some documents. Further, it is clear that the claimant was well out of time in serving his witness statement.
8. The claimant is representing himself. He sent something to the tribunal and possibly to the respondents possibly by the deadline for the Unless Order of 12 February 2021. The respondent has prepared for this case. In my judgment, I cannot rule that the claimant has been in breach of the Unless Order and so this case has not been automatically struck out.

Even it had, I would be likely to reconsider that judgment and hear the case on the merits. I do not consider that the respondent has been prejudiced by the late service of the claimant's witness statement, save to the extent that if any points are raised that have not hitherto been raised, then, if the respondent could not deal with them, I indicated that the claimant may be in significant evidential difficulties. Consequently, I decline to strike-out the case and have heard this case on the merits.

The issues

9. What was the principal reason for the claimant's dismissal?
10. Was the claimant's dismissal fair, taking into account Section 98 of the Employment Right's Act 1994?
11. In particular, was the decision to dismiss the claimant within the range of reasonable responses of a reasonable employer?

The law

12. What was the reason for the claimant's dismissal? Or, if more than one, the principal reason?
13. Did the respondent genuinely believe in that reason and was it based on reasonable grounds, following a reasonable investigation?
14. Was the decision to dismiss within the range of reasonable responses of a reasonable employer? It is not for the tribunal to substitute its view for the views of the employer.
15. Was the dismissal fair taking into account Section 98(4) ERA 1994?

The facts

16. This case principally concerns an incident that took place on 26 September 2019 between the claimant and a colleague at work, Mr Maxwell Saani. The only person I heard oral evidence from on this incident was the claimant. However, having examined the claimant's claim form, his 9 November 2020 document "set up and unlawful dismissal" and his more recent hand-written witness statement, the claimant's case has not been assisted by the fact that he has not really dealt with the incident on 26 September 2019 in any great detail.
17. I have been provided with an extract from the respondent's employee handbook, disciplinary procedure. This provides, under the section of gross misconduct, that matters that would constitute gross misconduct include:
 - Physical violence or aggressive behaviour
18. The incident on 26 September 2019 took place within the canteen. Mr Saani went to Mr Harris' office to complain. Mr Harris gave evidence that

Mr Saani was agitated and upset and complained that he had been threatened by the claimant, poked in the head, challenged to a fight and that the claimant had insulted his family. The claimant also went to Mr Harris' office, interrupting them. Mr Harris asked the claimant 'yes or no' if he had poked Mr Saani. The claimant said 'yes' he had. I accept Mr Harris' evidence of this meeting.

19. After the meeting in Mr Harris's office, Mr Harris contacted HR by mobile. Mr Harris took a written statement from Mr Saani. Ms Tasleem Bi, HR business partner, asked the claimant to bring the documents over and he informed her of what he had been told. A decision was made to suspend the claimant and he was summoned and given a suspension letter which stated as follows:

“It has been reported that you allegedly displayed aggressive and threatening behaviour towards an employee, and with physical and verbal abuse. In those circumstances, the company has no other option but to immediately suspend you”
20. The claimant suggested that the incident was started by Mr Maxwell Saani. The claimant told me that he was sitting in the canteen and Mr Saani came in, rubbed his (the claimant's) bald head and said words to the effect “a bald head with no ideas in it”. I find that in all probability, this did not happen on that occasion. The reason I make that finding is that if that was what had happened, I would have expected the claimant to have made the assertion that Mr Saani started it when he was investigated, either initially or in his disciplinary hearing. There is no record of the claimant so doing. Even if I am wrong about that, the claimant repeatedly referred, in the investigation notes and disciplinary hearing, to his interaction with Mr Saani being 'banter' or 'teasing'. I observe that one man's 'banter' or 'teasing' can often be construed by those on the receiving end as 'bullying and threatening behaviour'.
21. The claimant left work.
22. Following the claimant's suspension, Mr Harris obtained written statements from Mr Kabba and Mr Pantelli on 26 September 2019.
23. It is clear to me that the interaction between the claimant and Mr Saani began as banter or a joke. The statement of Mr Pantelli on 26 September refers to the two of them arguing for a joke. The interview notes from 30 September of Mr Kebbeh and Mr Pantelli both refer to it starting with banter and having a joke.
24. On 8 October 2019, Mr Saani was re-interviewed by Mr Harris and, in my judgment, the interview notes are an accurate reflection of how the incident began. Mr Saani refers to going into the canteen and that as soon as the claimant saw him coming in, made a comment about Maxwell having a break. Mr Saani states that the claimant said that Mr Saani could not drive. Mr Saani accepts that he came back with a remark that he, Mr Saani, drove better than the claimant and that another employee did as

well. Mr Saani has always accepted this. In his first statement from 26 September he states:

“It all started between myself, Maxwell and Innocent when we kept saying you don’t know how to drive machine, to a point he took it too far to of attacking me verbally. He said am broke, am suffering with my family, am in debt and my father, my mother and my generation all mention. In return I also called him disable. Now he got furious and he got up, started pushing my head with his finger three time, asking me to get up and fight – from there I told him that I will report. He asked me to go report. That’s when I went to Tafi (our manager). I know this is out of my hands now but if he could be spared with written warning”

25. I note that Mr Saani was requesting that the claimant only be given a written warning, which is incompatible with Mr Saani being in cahoots with Mr Harris to engineer the dismissal of the claimant.

26. On 26 September 2019, Mr Patelli signed a statement stating that:

“then it became serious. I saw Innocent touching Maxwell’s cheek about three times, and then Maxwell went to report it. Innocent and Maxwell were talking about work and then it became serious and I heard Innocent mentioned Maxwell’s Mum and Dad in the argument.”

27. Mr Harris conducted the investigatory interviews on 30 September 2019. Mr Kebbah stated:

“The incident took place in the canteen area where I saw it started with a banter and then led to an argument, where he heard Innocent calling him ‘small boy’, Maxwell replied ‘stop staying that’ Max then said ‘Jordan is a better driver than you’, Innocent then said ‘you are black – that is why you got the job, if you don’t get this job then your children will starve’.”

28. Mr Pantelli stated as follows:

“I was in the break area and I saw Innocent and Maxwell having a joke, but then it became louder. I saw Maxwell saying nothing, but Innocent said few things. He said negative comments about Maxwell’s Mum and Dad, I saw him poking his cheeks a few times, then Maxwell said he was going to report to the manager”.

29. Mr Saani put it as follows:

“We generally have a banter that Innocent can’t drive the loading shovel, but on Thursday Innocent said ‘you got this job because you are black and your kids will starve and you don’t want them to suffer’.

Yusupha (Kebbeh) was around and when he heard this he walked away.

Innocent further said ‘you came in UK on the boat’ and Maxwell replied ‘I have my passport and ticket and can prove that I did not come off the boat’.

He has been constantly abusing me for few months and I have told him that he is not mentally right and disabled.

.... On Thursday 26 September, while we were arguing, Innocent came forward and poked his finger on my head three times. Innocent also made abused my father who is dead”.

30. In his interview, the claimant stated as follows:

“I firstly would like to apologise to what happened last week, it was a banter and we are like brothers. Maxwell made a comment that I am not good at driving the loading shovel, he was constantly teasing me.

This happened in the break area, Yusupha was sitting on the area. Maxwell said that Jordan has been asked to drive and not you because you can’t drive.

Maxwell said I don’t have a passport and I am not like you, I did not come through the sea”.

31. Later the claimant referred to ‘banter’ and stating, ‘we always tease each other but I did not abuse him’.

32. It is clear to me and I find that the exchanges between the claimant and Mr Saani were begun by the claimant and that he became very angry when he was accused of not being able to drive. I have considered why this should cause him to become so angry. In my judgment an indication comes from what the claimant said during his appeal hearing on 5 December 2019. This was as follows:

“Maxwell keeps telling me I am a waste of space and I don’t know how to drive, that’s why responsibilities aren’t given to me. They give the others overtime, but not me, and I said it wasn’t fair. I stepped on Tafi as I said this directly and asked why I wasn’t being given more responsibilities. Tafi said he was the boss and decides who does what. I have been there three years and they’ve brought someone in who has been there three months to drive bigger machines than me”

33. In his hand-written statement the claimant also referred to complaining about ‘a new boy being brought in and imposed on all of us’. I find that the claimant had a resentment that someone, in his eyes, junior to him was being given more opportunity to earn overtime and that this may have been related in the claimant’s mind to the fact that he was perceived as not being such a good driver.

34. I find that the claimant did become angry and aggressive on 26 September 2019, did poke Mr Saani in the head on three occasions, said he wanted to fight him and made offensive remarks concerning Mr Saani’s family and race.

35. Thereafter, Mr Harris conducted the investigation, interviewing Mr Kebedi, Mr Pantelli, Mr Saani and the claimant on 30 September 2019.

36. The investigation notes were forwarded to Mr Alec Turner who made the decision to invoke the disciplinary process. The claimant was written to and invited to a disciplinary hearing on 4 October to answer the following charges:

- “On Thursday 26 September 2019, in the BWRF break area, it has been reported that you allegedly displayed aggressive and bullying behaviour towards an employee.
- It has also been report that you allegedly displayed physical abuse whereby you poked three times on the employee’s head when you were arguing with the employee.
- It is also alleged that banter was initiated between yourself which then escalated to verbal abuse and derogatory remarks made to the employee’s family member.
- It was claimed during the argument you made racial remarks which was extremely offensive and upsetting the employee. There was another team member in the break area, who also found this very upsetting and offensive and therefore walked away from the break area.”

37. The claimant was sent copies of the documents that were to be used at the disciplinary hearing.

38. Mr Alec Turner conducted the disciplinary hearing on 4 October 2019. The claimant is recorded as saying that the incident on 26 September started as a joke and he refers to banter ‘as usual’ and states that Mr Saani commented on his food. No comment is made, as already recorded, concerning any touching of the claimant’s bald head with a remark about the lack of ideas. The claimant accepted that he touched Mr Saani’s face but claimed it was not hard. It was put to the claimant that he had a reputation of anger and being aggressive and the claimant conceded that Tafi had spoken to him but only once.

39. Mr Turner decided to adjourn the disciplinary hearing in order to make further enquiries. The claimant has concluded by stating as follows:

“Yes, I understand. I would like to apologise for the inconvenience. I did not want this to happen and it won’t happen again. I have learned that I need to understand people’s mood in the work environment”.

40. Mr Harris was tasked to re-interviewing Mr Saani. On being asked if he had been abused for a few months and why he hadn’t reported it, Mr Saani stated:

“No one wants to report Innocent because we know he might lose his job, he is always attacking people. I have stopped other people from reporting him because we know what will happen”.

41. In addition to giving clarity as to how the incident on 26 September 20019 had started, (already referred to), Mr Saani went on to say:

“In the last incident Innocent pushed me to my limit by touching me in the head and asking me to fight him, I felt like I wanted to fight him but I reported him instead because it was too much”.

42. Mr Turner also made enquiries of Mr Harris as to the previous informal warnings. On 9 October 2019, Mr Harris provided information of two previous incidents where the claimant had had to be informally dealt with for shouting and acting aggressively. The claimant claimed that this had only happened on one occasion and that that was unwarranted. I find that those informal warnings were warranted and were given to the claimant.
43. The claimant has suggested that Mr Harris, in some way, had decided to engineer the dismissal of the claimant. The claimant said that he became aware beforehand that Mr Harris was saying that he wanted to get the claimant dismissed. I reject the suggestion that Mr Harris was actively seeking to have the claimant dismissed on a pretext. Mr Harris had been responsible for the claimant's promotion to a driver which had involved an increase in his pay. There may have been issues between Mr Harris and the claimant but I find that these were due to the claimant's aggressive conduct in the workplace which, whether or not the claimant regarded it as 'banter', was clearly not regarded as innocent banter by many of his colleagues.
44. The claimant was given a disciplinary outcome letter dated 15 October 2019.
45. I find that the reason for the claimant's dismissal was gross misconduct. I find that the gross misconduct was as set out in the disciplinary outcome letter, namely aggressive and bullying behaviour involving physical contact by poking Mr Saani three times on the head and saying offensive remarks relating to Mr Saani's family members and race.
46. I find that Mr Turner genuinely believed the reason for dismissal. I find that these were reasonable grounds for such belief following a reasonable investigation.
47. I find that in all the circumstances, including the size of the administrative resources of the employee's undertaking, the respondent acted reasonably in treating the gross misconduct as a sufficient reason for dismissing the claimant.
48. I have considered carefully whether the decision to dismiss can be characterised as being outside the range of reasonable responses of a reasonable employer. I have decided that it is not outside such a range. Gross misconduct was defined in the employment contract as including physical violence or aggressive behaviour and the claimant's conduct fell within that category.
49. The claimant was given an opportunity to appeal. He did so and the appeal was heard by Mr Wouderg. The decision to dismiss was reviewed and upheld. The claimant was informed on 10 December 2019.
50. Following his dismissal, the claimant endeavoured to raise a whistleblowing complaint against Mr Harris concerning the alleged unlawful disposal of certain of the respondent's property. Mr Turner

indicated that he did not regard this as being relevant to the issue of gross -misconduct and that in any event, he investigated the matter and found it to be spurious. The alleged onwards sale value of the property allegedly sold by Mr Harris was disposing of second hand equipment for a price in excess of what have been required to buy them new.

51. Accordingly, I do not find that the claimant's claim was either procedurally or substantively unfair and his claim is dismissed.

Employment Judge Alliott

Date: 19 May 21

Sent to the parties on: 27 May 21

For the Tribunal Office