EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4100960/2020 (V)

Held remotely by video on 27 and 28 October 2020

Employment Judge: W A Meiklejohn

Mr Abram Domenech	**Claimant** **In person (with Mr J Oya as Interpreter)**
Edinburgh Park Hotel Ltd	**Respondent** **Represented by:** **Mr W Haines, Legal Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondent and his complaint of unfair dismissal fails and is dismissed.

REASONS

1. This case was listed for a final hearing to deal with both liability and remedy. The hearing was conducted remotely using the Cloud Video Platform ("CVP"). The claimant appeared in person, assisted by Mr J Oya as Spanish/English interpreter. Mr Haines appeared for the respondent.

Nature of claim

2. The claimant alleged that he had been unfairly dismissed by the respondent. The respondent admitted dismissal but denied unfairness. Their position was that the claimant had been fairly dismissed for gross misconduct.

Applicable statutory provisions

3. The right not to be unfairly dismissed is set out in section 94(1) of the Employment Rights Act 1996 ("ERA") which provides as follows –

"*An employee has the right not to be unfairly dismissed by his employer."*

4. Section 98 ERA deals with the fairness of a dismissal and, so far as relevant, provides as follows –

"*(1) In determining for the purposes of this Part whether the 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 holding the position which the employee held.

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

….(b) relates to the conduct of the employee….

(3)….

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

(a) depends on 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."

Procedural history

5. The claimant presented his ET1 claim form on 17 February 2020 complaining that he had been unfairly dismissed by the respondent on 6 December 2019. The respondent lodged an ET3 response form in which they resisted this complaint.

6. A preliminary hearing for the purpose of case management was held on 25 May 2020 (before Employment Judge Macleod). It was agreed, and ordered by EJ Macleod, that the case should proceed to a final hearing conducted by CVP. EJ Macleod also made Orders for the exchange of documents and witness statements, and for the claimant to provide a schedule of loss.

7. These Orders were not complied with according to the timescales set by EJ Macleod and it appeared that both parties were responsible for this to some degree. However, by the start of the CVP hearing there was a joint bundle of documents, with the claimant's letter of appeal against dismissal being provided separately, and written witness statements from the respondent's witnesses. The claimant confirmed to me that he had had sufficient time to read these statements and to prepare his questions for the respondent's witnesses.

8. The claimant did not provide his own witness statement in advance of the hearing and indicated that he did not feel able to do so. However, the claimant did provide a written witness statement before the start of the second day of the hearing and the respondent took no issue with this.

Evidence

9. For the respondent the witnesses were –

- Ms K Girard – she was the claimant's line manager and undertook the investigation which led to the disciplinary proceedings against the claimant.

- Mr E Felix – he conducted the disciplinary hearing and made the decision to dismiss the claimant.

- Ms J Fisher – she heard the claimant's appeal against his dismissal.

10. I also heard evidence from the claimant.

11. The witness statements were taken as read in accordance with Rule 43 of the Employment Tribunal Rules (which are contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

12. With the exception of the claimant's letter of appeal which was dated 11 December 2019 (the "appeal letter"), I will refer to documents in the joint bundle by page number.

Findings in fact

13. The respondent is a company which operates the hotel known as Novotel Edinburgh Park ("NEP"). It is part of the Accor Group of hotels.

14. The claimant is Spanish and comes from the Catalan region of Spain. Before coming to Scotland in 2012, he worked at the Pullman Skipper hotel in Barcelona which is also part of the Accor Group. He commenced his employment at NEP in October 2012 as a night shift conference team

manager. He progressed to become a supervisor in 2014, a team leader in 2015 and he became Food and Beverage ("F&B") Manager in 2017. His statement of main terms of employment ("contract") as F&B Manager was dated 15 and 16 February 2017 (61-64).

Handbook

15. When he started to work at NEP the claimant went through an induction. He received a copy of the Novotel Edinburgh Park Handbook (the "handbook") and signed an acknowledgment and acceptance form (39) in which he confirmed that he had read and understood the procedures and rules contained in the handbook. In fact the claimant had not done so as his English was not good enough at that time. He was however well aware of the handbook because it formed part of the induction process for new members of the F&B team.

16. The handbook included a disciplinary procedure (57) to which reference was made in the claimant's contract. The disciplinary procedure stated that *"Disciplinary action may take any of the following forms according to the severity of the offence"* and then referred to verbal warning, written warning, final written warning and dismissal. Under "*Dismissal"* the disciplinary procedure stated –

"*Dismissal may be with or without notice depending on the circumstances, and may occur whether or not warnings have been issued."*

17. The handbook also contained a section headed "*Harassment Policy and Procedure"* (59). This included the following –

"*1 Harassment and bullying are damaging to the individual and AccorHotels and will not be tolerated. They will be treated as a disciplinary offence and may in serious cases lead to dismissal.*

2 Harassment is any conduct related to age, sex, marital status, race, nationality, ethnic origin, colour, disability, sexual orientation, religion/belief or any personal characteristic, which is unwanted and unwelcome and which violates the recipient's dignity or creates an intimidating, hostile, degrading or offensive environment for the recipient. It is not the intentions of the perpetrator but the reasonable perception of the recipient that matters.

3 Bullying is the misuse of power or position. Bullying behaviour persistently criticises, condemns and humiliates people and can undermine their ability to the extent that they lose self-confidence."

18. The handbook continued by setting out the "*Harassment Complaint Procedure"* (59-60) under which the employee was advised in the first instance to ask the person responsible to stop the harassing behaviour. If the harassment continued, the employee was advised to raise the matter with their manager. The handbook then stated –

"*If the complaint is against their immediate Manager then the Manager's Manager should be the first stage in the grievance procedure."*

Ms Girard become claimant's line manager

19. Ms Girard became General Manager at NEP on 5 February 2019. As such, she was the claimant's line manager. She already knew the claimant as they had worked together previously.

20. Ms Girard found that the claimant had not received much training. As she was responsible for his training, she arranged for the claimant to undertake training between May and July 2019. This included employment law training which covered bullying and harassment.

21. Ms Girard accepted that the staff at NEP did joke with each other but she did not agree that this was custom and practice. She drew a distinction between laughing with people and laughing at them.

22. Ms Girard did not recall insulting the claimant. She accepted that she had used the word "*cabron"* (which translates into English as "*dumbass"*) but said that this was not intended to be towards the claimant. The claimant's evidence was that Ms Girard had used the word when calling to him from her office when he was in his own office nearby. Given that the word is Spanish and the claimant is Spanish, I preferred the claimant's evidence that the word had been directed at him. However, the word had not been intended to offend the claimant and had not done so.

23. It was normal for the claimant to make and share jokes with his colleagues at NEP. Ms Girard said that the claimant "*had an issue to understand where jokes stop".* She asserted that what was a joke for the claimant might make his staff uncomfortable, and amount to bullying.

Incident on 4 November 2019

24. An incident occurred on 4 November 2019 when the claimant was working an evening shift in the hotel restaurant. He approached a female team member ("A") from behind and *"pinged"* her bra, that is he pulled it and then released it against her back. A remonstrated with the claimant who treated it as a joke and asked A if no-one had done that to her at school.

Grievance against claimant

25. Following this incident, A submitted a grievance against the claimant (66). There were four elements to this –

(a) Using Andalucian stereotypes.

(b) Unprofessional comments.

(c) Commenting on A's hairstyle.

(d) Inappropriate joke (a reference to the incident on 4 November 2019).

In her grievance A also complained about having to work split shifts and said that she felt *"bullied"* by the claimant.

26. Ms Girard as General Manager of NEP (and therefore the claimant's line manager) invited A to a grievance meeting which took place on 19 November 2019. The meeting was recorded and a note was prepared (67-71).

27. A came from Andalucía. She told Ms Girard that, within Spain, people from other regions think that people from Andalucía are lazy. She said that when the claimant thought she was being slow in her work he would make a comment such as *"You are so lazy, you are from Andalucía".* She said that the claimant would say something like this whenever they were working together. She also said that a colleague ("B") who was also from Andalucía had been beside her on one such occasion and had challenged the claimant about it. A herself had not however done so because she did not want "*to have any problem".*

28. A described to Ms Girard what she considered to have been unprofessional comments by the claimant. She alleged that the claimant had made a comment about her mother in relation to the speed at which A was working (A's mother having interviewed unsuccessfully for a job at NEP). She alleged that, on an occasion when she had been a few minutes late for work and another team member ("C") had been some two hours late, the claimant had said something along the lines of not caring about the job and not being responsible and that they could "*just leave".*

29. A told Ms Girard about an occasion when she alleged the claimant had not been helpful when she had a problem with the coffee machine. She

referred to her difficulty in getting to work for a 5.30am start using public transport and said that the claimant had not told her that she could use a taxi. She alleged that the claimant had not been sympathetic on an occasion when she had felt unwell. She complained about lack of training and alleged that the claimant had criticised her for being unable to carry four plates to a table. She referred twice to another team member ("D").

30. A alleged that the claimant had made a comment about her hairstyle, saying "*You look like you are ready for Halloween".* Ms Girard's witness statement indicated that comments were made by the claimant about A's hairstyle "*often"* but she confirmed in oral evidence that this happened only once.

31. A told Ms Girard about the incident on 4 November 2019 as described in paragraph 24 above. With reference to the claimant treating this as a joke she said "*For him was just like a joke but for me no".*

32. On 21 November 2019 Ms Girard met with employee B. Again the meeting was recorded and a note prepared (72-73). B told Ms Girard that the claimant had made similar comments to her about working slowly and people from Andalucía being lazy. She said that she had challenged the claimant about this but he "*had just laughed, saying it was a joke".* She said that the claimant could have hurt feelings "*repeating the same comments on daily basis".*

33. B alleged that she had heard the claimant saying "*because I have more bollocks than all of you together".* She told Ms Girard that she had not heard the claimant saying "*If you are not happy you can leave"* but asserted that what she had heard the claimant saying meant the same. That did not, in English at least, make much sense.

Ms Girard meets with claimant

34. The claimant was on holiday at the time Ms Girard met with A and B. When he returned to work, Ms Girard invited him to an investigatory meeting on 25 November 2019. A note of this meeting was prepared (74-80).

35. The claimant accepted that he had made comments to team members based on where they were from but insisted that he did so as a joke. He said that *"in Spain there are regions that have some conflicts between each other".* He continued, with reference to his Spanish colleagues, "*I know them and I know that I can afford to speak to them like this."*

36. The claimant indicated to Ms Girard that there were jokes based on nationality, giving examples relating to French and Italian, and his comments about team members from Andalucía were similar. When asked by Ms Girard whether he made this kind of joke "*to one person or to more than one*" the claimant replied *"To all of them".*

37. The claimant acknowledged to Ms Girard that his jokes could be "*both positive and negative".* He continued "*For me I never mean seriously, but maybe the other person takes it more seriously".* It was apparent that the claimant had not thought of his jokes as stereotyping towards his colleagues. This was the claimant showing some insight that his jokes might be doing harm as well as good.

38. Ms Girard asked the claimant about saying things like "*If you're not happy with the job you can leave when you want"* or "*You are irresponsible"* or "*If you don't know how to do something, you need to do it by yourself because I will not always be here to help you".* The claimant denied telling anyone that "*if you don't like your job, you can leave".*

39. According to the meeting note, the allegation by A that the claimant had commented on her hairstyle was not discussed.

40. When Ms Girard asked the claimant "*Did you, as a joke, pull someone's bra at the back?"* the claimant agreed that he had done so. Ms Girard had not

previously mentioned that the complaints about the claimant had come from A but the claimant immediately appreciated that Ms Girard was referring to A. The claimant said that A had "*not really"* reacted and he could not recall what A had said. He agreed that it had been "*an inappropriate joke"* and that it might make A uncomfortable working with him in the future. He accepted that A might feel embarrassed and he apologised.

41. After an adjournment the meeting resumed and Ms Girard told the claimant that she needed to go further with her investigation and that he was suspended. She handed him a letter dated 25 November 2019 confirming his suspension (81).

Further investigation

42. As employee D had been mentioned by A, Ms Girard approached D who was a team leader in the claimant's team. D did not want to give a statement as, according to Ms Girard, she was "*afraid it could go against her".* Ms Girard did not believe that she should push D to make a statement when she was unwilling to do so.

43. As the claimant had told Ms Girard that he made jokes based on nationality with all of his team, and there were 17 members in the team, I asked Ms Girard why she had not spoken with other team members. Her answer was that she had enough from A and B, and the main issue was the bra pulling incident.

Disciplinary hearing

44. On 28 November 2019 Ms Girard wrote to the claimant (82-83) inviting him to attend a formal disciplinary hearing on 2 December 2019 with Mr Felix. Mr Felix was General Manager, Ibis Styles Edinburgh St Andrew Square (Ibis being part of the Accor Group). The allegations to be considered at the disciplinary hearing were expressed as follows –

"*Using constant Stereotype to members of the team coming from Andalucía when not satisfied with their job level, stating that they are slow or lazy but not taking any formal action to help them to improve within their job role in doing so this is case of Bullying.*

On the 4th of November 2019 in the evening at the restaurant till close to the kitchen door you approached an employee from the back and grabbed and pulled the closure of her bra which slapped her back, when this employee asked you what you were doing your response was Did anyone done that joke to you at school in doing so this is case of Harassment."

45. The letter stated that minutes of the investigation meeting with A and a witness statement by B were enclosed but in fact these items were not enclosed. The letter advised the claimant that *"if the allegations are believed to be proven, it will be considered Gross Misconduct under the Company Disciplinary Rules and your employment may be summarily terminated".* The letter also advised the claimant of his right to be accompanied.

46. The disciplinary hearing took place as scheduled. Notes were taken and a minute prepared (84-103).

47. The claimant accepted that he used stereotypes when joking with team members and said that it came as a surprise to him that a grievance had been submitted against him. The claimant admitted that he had used a phrase in Spanish which translated to "*because I have more bollocks than all of you put together"* but explained that this was intended by way of encouragement to his team. He said "*I never meant to say bad words, I just wanted them to improve."* He also said "*If I say the same things in Spanish, I might be more rude than if I was speaking in English".*

48. The claimant referred to employee C who has a glass eye. The claimant found this out after he told C to "*keep an eye on the bar".* The claimant told

Mr Felix that he asked C if she had any issues with this and C said that "*she was fine with that".*

49. The claimant said that he made constant jokes "*to create a good atmosphere".* He said that there was a stereotype about Catalan people not wanting to spend money and he would mention this in a joke (presumably against himself as he came from that region of Spain).

50. Mr Felix asked the claimant about the allegation that he had made fun of A's hairstyle by asking her if she was ready for Halloween. The claimant accepted that he had said this but not to make fun of A. The claimant accepted that he could have spoken to A in a more professional way.

51. There was discussion about the claimant's management style. The claimant said that he used humour because it made him "*more approachable".* When asked by Mr Felix if this was the only way (to manage his team) the claimant replied "*no, this is Abram's way".*

52. The claimant said that there was a political element to his jokes towards B and acknowledged that this might not be appropriate. He also acknowledged that his jokes towards A might have made her feel bad. He accepted that if A and B had not spoken out he would have continued with his jokes towards them. He said that he did not recall B, or anyone else, asking him to stop.

53. The claimant accepted that his approach to team members might have been wrong and might have been hurtful to them. However, when Mr Felix put it to the claimant that this was bullying, the claimant denied this. His position was that jokes aimed at one person could be bullying but he made jokes towards all of his team.

54. After a break when the claimant became upset, and towards the end of their meeting, Mr Felix asked the claimant about the bra incident. The claimant said that he had been joking with A. He had pulled her bra as a joke. It was

not intended as sexual harassment. The claimant apologised and said "*I am very angry with myself".* The claimant said that he was surprised that A had made a complaint but accepted that it had not been acceptable to touch her bra.

Decision to dismiss

55. Mr Felix decided that the claimant should be dismissed and issued a letter of dismissal dated 6 December 2019 (104-105). After setting out the allegations of misconduct in the same terms as in Ms Girard's letter of 28 November 2019 (see paragraph 44 above) he gave his decision in these terms –

"- *You have admitted to using jokes and actions on a daily basis towards all of your team, stereotyping based on origin and background of your colleagues from specific regions in Spain or other countries but also against the way they look. You have admitted to have made jokes regarding disability with one of your colleague*[s] *who is visually impaired and have also admitted to pulling one of your employee's bra whilst working together.*

- *All the above were proven to be classified under bullying and harassment which is a gross misconduct.*

- *You have failed to provide an acceptable explanation for the above allegations when justified as a way of gaining your team's trust and respect.*

- *I have been mindful of your long service with the company however, because of the importance of the matter and your lack of understanding of the impact on your colleagues of your constant and repeated actions towards all of your team I have to consider the seriousness of the gross misconduct.*

Therefore, I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from Friday 06th December 2019…."

Claimant appeals

56. The dismissal letter from Mr Felix advised the claimant of his right to appeal against the decision to dismiss him. The claimant was told that his appeal should be in writing to Ms Fisher who was General Manager at the Ibis & Novotel Hotel Glasgow Centre. The claimant submitted his letter of appeal on 11 December 2019.

57. The claimant's grounds of appeal can be summarised as follows –

- Friendly jokes within his team were custom and practice and included jokes against himself.

- He had not made jokes concerning a colleague's disability and had not been presented with any part of the investigation upon which this conclusion was based.

- He would never do anything intended to demean, humiliate or embarrass. The bra incident was out of place but happened only once and would not be repeated.

- He had never committed bullying against anyone and his jokes were not meant to be offensive.

- The sanction should have been an informal warning instead of dismissal.

58. The appeal hearing took place on 17 December 2019 and minutes were taken (106-115). According to these minutes the main points covered were -

(a) The claimant described jokes made against himself including being called "*Calvo"* (bald guy) and *"cabron".* He said that the word "*wanker"* had been used but chose not to elaborate on this. He also said that the HR Manager who was taking the minutes had laughed at him for being unable to pronounce "*unbelievable".*

(b) The claimant challenged the finding that he had made jokes about C as the documents for his disciplinary hearing made no reference to this.

(c) He admitted the bra incident but argued that A had not followed the Harassment Policy and Procedure.

(d) He had not received the documents which should have been enclosed with Ms Girard's letter of 28 November 2019.

(e) If he was asked to do things he would do them. If he was asked to stop, he would stop.

(f) The claimant argued that the sanction should have been a verbal or written warning and not dismissal.

59. Ms Fisher wrote to the claimant on 20 December 2019 (116-117) to advise that she was not upholding his appeal. She said that she was "*satisfied that the matter was dealt with properly and thoroughly at the Disciplinary Hearing and that the correct decision was made".*

Schedule of loss

60. The claimant secured employment at Amazon, working through an agency, with effect from 8 December 2019. That continued until his contract expired on 7 August 2020. He had not sought fresh employment since then as he had focussed on these proceedings.

61. The payslips within the joint bundle (120-127) disclosed that the claimant's gross and net monthly pay prior to his dismissal were £1942.39 and £1617.29 respectively. His hourly rate was £11.9723. A payslip in respect of the claimant's new employment (128) disclosed his net pay for a 40 hour week was £353.42, with an hourly rate of £11.26. The claimant described his normal pattern while working at Amazon as one week of 40 hours, two weeks of 50 hours and one week of 60 hours over each four week period.

62. The claimant had not claimed benefit.

Comments on evidence

63. It is not the function of the Tribunal to record all of the evidence presented to it and I have not attempted to do so. I have focussed on the evidence which was, in my view, most relevant to the matters I had to decide. I have, for example, not referred to the claimant having his braces "*pinged"* nor to the text message sent by the claimant to his former colleagues nor to the Facebook (or similar) message sent by the claimant's wife to A after the claimant's dismissal because these had no bearing on the fairness or otherwise of that dismissal.

64. I decided to anonymise the names of the claimant's former team members involved in the events which ended with the claimant's dismissal. In doing so I balanced their right to privacy under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms against the claimant's right to a fair and public hearing under Article 6. The said Articles are incorporated into our law by virtue of the Human Rights Act 1998. I considered that in this case their right to privacy should be given greater weight, and I did not consider that the claimant was prejudiced by this.

65. I was satisfied that all of the witnesses were credible and truthful. There were detailed notes/minutes of the various meetings which took place and these provided a comprehensive record of the disciplinary process and outcome.

Submissions - respondent

66. Mr Haines submitted that the claimant's dismissal had been both procedurally and substantively fair. He argued that, given what the claimant had admitted during the investigation meeting, there was no reason to interview other members of the claimant's team. The complaints had come from A and B. The claimant had been allowed to be accompanied at the disciplinary and appeal meetings if he had wanted this. He had been warned that it could be gross misconduct. He had been given written reasons for dismissal as the law required. The notes/minutes of the meetings with A and B had been omitted but this had been rectified at the appeal.

67. The claimant had admitted making stereotype jokes and the bra incident. He had received training on bullying and harassment at induction and in the period May/July 2019. It was a matter of common sense that jokes of the type made by the claimant were not acceptable. Bullying and harassment were an example of gross misconduct and dismissal fell within the band of reasonable responses open to the respondent.

68. Mr Haines acknowledged that, if it had only been inappropriate jokes, the respondent might have stopped short of dismissal after a wider investigation. However, in relation to the bra incident, dismissal was a fair and proportionate response. That alone was enough to justify dismissal for gross misconduct. Mr Haines referred to ***Sandwell & West Birmingham NHS Trust v Westwood UKEAT/0032/09*** (gross misconduct raises a mixed question of law and fact) and ***London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220*** (Tribunal must not substitute its own view for that of the employer).

69. Under reference to ***Polkey v A E Dayton Services Ltd 1987 IRLR 503***, Mr Haines said that any procedural lapses – such as the absence of any investigation into the claimant's behaviour towards C – would not have

changed the decision to dismiss the claimant. Alternatively, Mr Haines invited me to find that the claimant had contributed to his own dismissal to the extent of 100%.

Submissions – claimant

70. The claimant referred to the description of *"bullying"* in the ACAS Guide on Bullying and harassment at work (40-55, at page 42) –

"*Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient"*

He also referred to the definition of "*harassment"* in the Equality Act 2010.

71. He argued that nothing he had said was ever meant to be offensive. He accepted that B had asked him if he had an issue with Andalucian people but that was not enough to convey that she felt bullied. Making jokes to his team members, and others, was a matter of custom and practice. More investigation would have confirmed this.

72. The claimant acknowledged that the bra incident had been a "*bad mistake"* and "*out of place"* which I took to mean out of character.

73. The claimant said that he was "*deeply hurt"* by the allegations against him of bullying and harassment.

Discussion

74. I had no difficulty in finding that the respondent had shown that the claimant had been dismissed for a reason related to his conduct. That conduct had

been the reason for his dismissal was not disputed by the claimant. The conduct in question was as described in the letter of dismissal sent by Mr Felix to the claimant, as set out in paragraph 55 above. It was a potentially fair reason for dismissal under section 98 ERA.

75. The question I had to decide was the one contained in section 98(4) – had the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him? I approached that in line with the what the Employment Appeal Tribunal said in ***British Home Stores Ltd v Burchell 1978 IRLR 379*** where they set out the three questions which the Tribunal should answer –

(i) Has the employer established that he believed that the employee was guilty of the misconduct?

(ii) Did the employer have in his mind reasonable grounds upon which to sustain that belief?

(iii) When he formed that belief on those grounds, had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

Belief of guilt

76. I was satisfied that Mr Felix did believe that the claimant was guilty of the matters set out in his letter of 6 December 2019 (see paragraph 55 above). This was the conclusion he reached following the disciplinary hearing on 2 December 2019. His evidence about this was credible.

Reasonable grounds

77. I was satisfied that Mr Felix had reasonable grounds for his belief so far as relating to the claimant's use of stereotypes and the bra incident. These

were allegations made by A (and B in relation to stereotypes) and admitted by the claimant.

78. The reference by Mr Felix to "*against the way they look"* was part of what the claimant was said to have done "*on a daily basis towards all of your team".* I did not believe that Mr Felix had reasonable grounds for that belief. The evidence disclosed only one occasion when the claimant had made a comments about A's hairstyle (see paragraph 50 above). Ms Girard did not cover this at her investigation meeting with the claimant. There were no grounds upon which Mr Felix could sustain a belief that this was (a) something the claimant had done on a daily basis and/or (b) that it had been done to anyone other than A.

79. In relation to the allegation that the claimant had made jokes regarding disability with a colleague who was visually impaired, Mr Felix did have reasonable grounds upon which to sustain his belief of this as it had been described to him by the claimant during the disciplinary hearing.

Adequate investigation

80. I was satisfied that there had been an adequate investigation into the claimant's use of stereotypes, his comment about A's hairstyle and the bra incident. However there had been no investigation into the allegation that the claimant had made jokes regarding disability with a colleague who was visually impaired.

81. There may be circumstances where something arising in the course of a disciplinary process can properly be added to the list of allegations against the employee. However, a reasonable employer would investigate the new allegation before relying on it to justify disciplinary action. This did not happen in this case and the allegation of making jokes regarding disability with a colleague who was visually impaired should not have been included in the disciplinary outcome letter. Ms Fisher had an opportunity to address this at the appeal stage and it is unfortunate that she did not do so.

Band of reasonable responses

82. In ***British Leyland UK Ltd v Swift 1981 IRLR 91*** Lord Denning MR said –

"*The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view."*

83. This is normally expressed as whether dismissal fell within the band of reasonable responses open to the employer. I decided that question as follows –

(a) Dismissal for gross misconduct did fall within the band of reasonable responses open to the respondent in this case in respect of the bra incident. To his credit, the claimant recognised the seriousness of this and expressed his regret. However, and fatally so far as the claim of unfair dismissal was concerned, dismissal for this act of misconduct was a reasonable response by the respondent.

(b) I considered that, taken alone, the claimant's use of stereotypes would not have justified dismissal. In the present case, this allegation did not stand alone. A reasonable employer could regard this as an act of misconduct which, although not itself gross misconduct, supported the decision to dismiss for gross misconduct on another ground.

(c) Similarly, the allegation that the claimant had made comments about A's hairstyle did not justify dismissal. Given that the evidence pointed to this being an isolated incident, it added next to nothing to the reasonableness of the decision to dismiss.

(d) The inclusion of the reference to the claimant making jokes about disability with a colleague who was visually impaired detracted from the reasonableness of the decision to dismiss. No reasonable employer would have come to the view, as Mr Felix did, that this amounted to gross misconduct without any investigation having been carried out.

84. Fortunately for the respondent I came to the view that dismissal for the bra incident was clearly within the band of reasonable responses open to them and this was not outweighed by my negative comments about the other grounds. The respondent had in my view been wrong to treat the other matters as gross misconduct (on the basis that no reasonable employer would have done so) but that one act of gross misconduct was sufficient to justify the claimant's dismissal.

Procedure

85. The fairness or otherwise of the procedure adopted by the respondent when dismissing the claimant was an element which I needed to consider in deciding whether they had acted reasonably or unreasonably. I looked at the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code"). The Code sets out principles for handling disciplinary and grievance situations in the workplace.

86. Those principles translate into a series of steps which an employer should take, as follows –

- Establish the facts of each case
- Inform the employee of the problem
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting

- Decide on appropriate action

- Provide employees with an opportunity to appeal

87. I was satisfied that the respondent had taken each of these steps. The claimant had not been accompanied at the disciplinary and appeal meetings but he had been advised of his right to be accompanied. The allegation involving C had not been investigated. However, viewed as a whole, the procedure followed by the respondent had been broadly compliant with the Code and had not been unfair.

Decision

88. For the reasons set out above I decided that the claimant had not been unfairly dismissed by the respondent and his complaint of unfair dismissal required to be dismissed.

89. I was aware that I should not substitute my own view for that of the respondent in coming to my decision on the fairness of the claimant's dismissal. However, I understood that the claimant was very upset to be accused of bullying and harassment and I will offer some comment on that.

90. I did not believe that the claimant had intended that his conduct towards his colleagues (and towards A and B in particular) should be offensive, intimidating, malicious or insulting, or constitute an abuse of power. He did not intend that his conduct should be unwanted, nor that it should have the purpose or effect of violating the dignity of A or B, nor creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

91. I would not have classed the claimant's conduct towards A and B as bullying. I accept that the bra incident could properly be regarded as offensive to A, but I would have categorised that as harassment rather than bullying. The same applies to the use of Andalusian stereotypes. The

claimant had not intended to give offence but, as stated in the respondent's handbook, "*It is not the intentions of the perpetrator but the reasonable perception of the recipient that matters".*

5

Employment Judge:	Sandy Meiklejohn
Date of Judgment:	06 November 2020
Entered in register:	16 November 2020
and copied to parties	

10