



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs A Jarzyna

v

Hypnos Limited

Heard at: Watford by CVP

On: 17 September 2021

Before: Employment Judge Alliott sitting alone

Appearances

For the Claimant: In person

For the Respondent: Did not attend

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

JUDGMENT

The judgment of the tribunal is that:

1. The claimant’s claim for unfair dismissal is well founded and she was unfairly dismissed.
2. The claimant’s claims of discrimination on the grounds of sex and/or race are dismissed.

ORDERS

Made pursuant to the ET Rules of Procedure

1. The claimant is to send to the respondent by **4pm** on **18 October 2021**, the following:
 - 1.1 A schedule of loss setting out what remedy is being sought and how much is compensation and/or damages the tribunal will be asked to award the claimant at the remedy hearing in relation to each of the claimant's complaints and how the amounts have been calculated. If the claimant claims earnings lost because of dismissal the schedule of loss must include the following information; whether the claimant has obtained alternative employment and if so, when and what; how much money the claimant has earned since dismissal and how it was earned; full details of all social security benefits received as a result of dismissal.
 - 1.2 All documents to be relied upon in support of the remedies sought.
 - 1.3 A witness statement detailing all claims being made together with an explanation of how they have been calculated.
2. The claimant is to send to the tribunal, a hard and electronic copy of her witness statement, schedule of loss and all supporting documents no less than two days before the remedy hearing.
3. The case will be listed for a three hour remedy hearing, Judge sitting alone.

REASONS

Introduction

1. The claimant was employed by the respondent as a Value Team Leader from 3 March 2015 until she was summarily dismissed on 18 November 2019.
2. By a claim form presented on 5 March 2020, the claimant presents complaints of unfair dismissal and discrimination on the grounds of race and sex.

The respondent's absence

3. The respondent was served with the proceedings on the address in the claim form on 14 April 2020. This required a response to be filed by 12 May 2020. No response was received by the tribunal. Following a company search the proceedings were re-served on the registered office address of the respondent. Proceedings were re-served on 20 September 2020. No response was sent to the tribunal and accordingly, on 19 January 2021, Employment Judge Quill decided that it was not appropriate to issue a judgment because the claims included claims of discrimination and the case was listed for a hearing, judge sit alone, with a time estimate of three hours.

4. The claimant was directed to send to the respondent documents by 25 February 2021 and a summary of her evidence by 18 March 2021. The claimant sent a PDF to the tribunal on 23 February 2021 with 25 pages of documents and a letter dated 15 March 2021 containing her evidence.
5. On 5 February 2021 the respondent was warned that a judgment may now be issued. The respondent was sent notice of this hearing on 21 March 2021.
6. Pursuant to Rule 47 Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 I have taken into account the available information as to why the respondent may be absent and determined to hear this case in the absence of the respondent. Proceedings have been served on the respondent's registered address and, for whatever reason, the respondent has not participated in this litigation.

The law

Unfair dismissal

7. Section 98 Employment Rights Act provides as follows:-

“98 General

- (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 sub section (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.”

8. As per the IDS Employment Law Handbook “Unfair dismissal” at 3.5:

“Employer must prove its reason for dismissal.

It is up to the employer to show the reason for dismissal and that it was a potentially fair one – ie one that fell within the scope of section 98(1) and (2) and was capable of justifying the dismissal of the employee. A “reason for dismissal” has been described as “a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employer” – Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.

The burden of proof on employers at this stage is not a heavy one.

...”

9. And at 3.6:

“In cases of dismissal for capability or conduct where the statute only refers to a reason which “relates to” either of these grounds, it is sufficient that the employer genuinely believed on reasonable grounds that the employee was incompetent or

guilty of misconduct. The employer does not have to prove the offence or inadequacy – Alidair Limited v Taylor [1978] ICR 445, CA. Furthermore, an honest belief held on reasonable grounds will be enough, even if it is wrong.”

10. Thus, the respondent has to have a genuine belief in the reason for dismissal based on reasonable grounds following a reasonable investigation.
11. Thereafter the fairness of the dismissal has to be considered in the context of section 98(4) Employment Rights Act 1996. In particular, it is not for the tribunal to substitute its own views for the views of management and that there may be a band of reasonable responses of an employer.
12. In addition, I have the non-statutory Acas Guide on Discipline and Grievance at Work.
13. Under the principle in Polkey, tribunals will be entitled, when assessing the compensatory award payable in respect of the any unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss. However, the burden of proof is on the employer so long as the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure.

The evidence

14. The claimant has provided me with a 25-page bundle and a statement dated 15 March 2021. The claimant gave sworn evidence before me.

The issues

15. The issues have not been formally formulated.
16. The claim form is relatively brief. The claimant has ticked the unfair dismissal and discrimination on the grounds of race and sex boxes. The claim form deals with three basic complaints:-
 - 16.1 Firstly, the claimant complains about the grievance made against her which led to disciplinary action and her dismissal.
 - 16.2 Secondly, the claimant refers to an instance when one of her team was allegedly racially harassed by Mr Bowler. That when she reported it to her manager and the issue was escalated to an HR representative, she was told nothing could be done. She contrasts that treatment of Mr Bowler with how she was treated.
 - 16.3 Thirdly, the claimant highlights another employee, Mr Steward Movatt, who she asserts was caught stealing from a vending machine and who was dismissed. However, he was offered his previous job after his appeal. The claimant complains she was not offered the same opportunities to defend herself.

The facts

17. It is clear to me that the claimant did not get on with Mr Daniel Bowler and his girlfriend, Ms Erika Mateova. Mr Daniel Bowler was a Purchasing Manager in a higher managerial position to the claimant. Ms Mateova was a Sewer.
18. The claimant told me that within a short time of being employed she was promoted. The claimant told me that Mr Bowler's girlfriend, Erika Mateova, wanted her job and this appears to have been the cause of antipathy between them. She said that Mr Bowler made her life hard.
19. The claimant gave evidence about an incident which she thought was around May 2019. One of her team was a Ms Jan Hussain who was apparently from Pakistan. She had an argument with Mr Bowler at work and later, in Tesco's car park, it is alleged that Mr Bowler said to Ms Hussain words to the effect, "Fucking Paki – Jump under the bus". This was reported by Ms Hussain to the claimant. The claimant says that she escalated the issue to her Line Manager, Ms Lorrain Downes who, in turn went to HR, Ms Stephanie Yule. The claimant told me that nothing was done as she was told it was outside work and so did not count.
20. From the documents, on 4 November 2019 Mr Daniel Bowler and Ms Erika Mateova both raised grievances against the claimant. Mr Bowler's grievance concerned what he had been told about the claimant's comments in a wine bar on 24 October 2019. The complaint was as follows:-

"Anita referred to me as the fucking Paki Danny Bowler in conversation with the others, one of these did say you cannot say that and Anita responded with I can say what I like, I am Polish".
21. Mr Bowler states that it was a third party who informed him of that comment. He also highlights that on the following Monday 28 October 2019 he spoke to the claimant and says that thereafter she went around the workplace trying to find out who had informed him of her alleged comments.
22. The claimant agreed that she had gone to the wine bar, that she had talked about Mr Bowler and that she was complaining about him to friends. However, she denied calling Mr Bowler a fucking Paki.
23. The claimant told me that Mr Bowler is English although she thought his mother was English and that his skin was slightly tanned. I do not know what his nationality or race is.
24. Ms Erika Mateova's grievance was as follows:-

"On Monday 4 November 2019 it was brought to my attention from Tom White that Anita refers to me as the gypsy cunt and has said this on a few occasions to him."
25. The claimant denies ever having used that wording.

26. On 6 November 2019 the claimant was sent a letter from her Line Manager, Ms Lorrain Downes, which states as follows:-

“Further to our conversation I write to confirm the details of our discussion. Two serious allegations of racism have been made against you by company employees. In line with our Grievance and Disciplinary procedures you are now suspended on full pay to allow Stephanie Yule, Group Head of HR, to investigate the allegations. As part of the investigation could you please attend an interview on Monday 11 November at 2pm to discuss the allegations. You have the right to be accompanied at this interview.

You should be aware that pending the outcome of this investigation you may face disciplinary action which may result in outcomes up to and including dismissal for gross misconduct.”

27. On 11 November 2019 a statement was taken from the claimant. She denied using the word Paki but alleged that Mr Bowler had used the word, referring to Jan. The statement records the claimant saying, “When we talked about him in the wine bar I swore a lot but didn’t call him a Paki.” She complains about Mr Bowler, refers to him lying about her and asserts that he was trying to get her fired.
28. A number of other statements were taken. Mr Bowler reiterates that he had heard that the claimant had called him a fucking Paki in the wine bar. The statement from Erika Mateova alleges that the claimant does not like her and that she does not normally speak to her.
29. There are statements from seven other colleagues. Four of the colleagues could not recall or would not say what they had seen or heard on that evening.
30. There is a statement from a Mr Tom White. This states:-

“I speak to Anita a lot and when we talk about work she often talks about herself. She has been annoyed with Danny Bowler for a while, she doesn’t get on with him at all and doesn’t like him. Her main gripe is with Danny, she doesn’t like Erika because she’s with him and often doesn’t talk to her when she needs to. I think is jealous of Erika getting attention because of the job she does.

It started a couple of months ago when Anita and I were talking while I was working and I said my next job was for Erika, she said “Oh, You’re going to see that gypsy cunt!” She’s called her that to me probably four more times on different occasions since then. The last time was last Thursday. I’d heard she’d been suspended so I called her to make sure she was ok. She told me what had happened and that she’d lost her temper outside and people had heard her shouting gypsy cunt and Paki. She then called them a gypsy cunt and Paki to me again. We talked for about 20 minutes. She admitted to me what had happened in the wine bar and what she’d said about Erika. She tends to get stressed, not act (sic) for help and then react badly to situations. I asked her why she’d said what she did and she said she’s Polish and can say what she likes, it’s ok to say it in Poland so why is it not ok here? She clearly doesn’t think saying it is wrong.

After her suspension she went around everyone trying to find out who had grassed her up, she assumed it was them and then said she'd been grassed up by that Paki and gypsy cunt."

31. The statement from Mr Sam Hatt states as follows:-

"We were all sat around the table talking and someone mentioned the word Christmas party and who was going. Someone mentioned that Danny & Erika were going and Anita shouted loudly "I'm not going if that gypsy cunt is going". We all told her she couldn't say things like that and she didn't say it again that evening."

32. There is then an anonymous statement from a member of staff who would prefer not to be named. She is described as Polish and very worried about retaliation. This states:-

"The main problem with Anita is she just doesn't like anybody. I've often heard her talking badly about Erika, she always calls her a gypsy to the rest of the Sewing Team but everybody is too scared to come and tell you. She is mean to most people."

33. The claimant told me that the allegations made against her by Mr Bowler and Ms Mateova are lies. Further, that those two had persuaded Mr Tom White to lie . She disputed that Mr Sam Hatt was even in the bar. The claimant denied using the word gypsy.

34. On 11 November the claimant made a formal complaint against Mr Daniel Bowler. She complained about his uncooperative and disruptive behaviour and accused him of calling her a "Polish cow".

35. On 13 November 2019 the claimant was written to by Mr Graeme Bailey, Manufacturing Manager, as follows:-

"Further to your suspension pending investigation into two allegations of racism I write to confirm that the investigation has now concluded and invite you to a disciplinary meeting to face the charge of gross misconduct".

36. The disciplinary hearing was set for 18 November and the claimant was informed of her right to be accompanied at the meeting.

37. The claimant told me that she was given all the investigation interviews and was aware what the allegations against her were.

38. On 14 November 2019 the claimant wrote to Mr Bailey disputing that Mr Tom White could be a reliable and honest witness and claimed that she had a witness who had overheard a conversation between Ms Mateova and Mr White convincing him to lie on her behalf.

39. The claimant attended the disciplinary hearing and was accompanied by her GMB Union Representative. Although the claimant said she was on medication and could not really recall, she told me that the statements were read out to her and she was probably asked what her account was. The meeting then adjourned for 15 minutes after which she was dismissed.

40. The claimant appealed on 19 November 2019. The claimant reiterated her complaints about Mr Bowler. Further, the claimant made new allegations against Mr White concerning sexual harassment towards her. No appeal hearing was undertaken.
41. On 20 November 2019 the claimant was written to in the following terms by Mr Bob Eastoe, Chief Operating Officer, as follows:-

“I have carefully read your appeal letter handed to me today. I have found it very difficult to identify on what grounds you are appealing the decision but I have investigated the conduct of the investigation into the grievance brought against you, the seriousness of that grievance and the decision taken by the company as a result of the investigation at your disciplinary hearing.

Findings

- The investigation into the grievance against you was conducted professionally and with care.
- The statements received from individuals was given freely and without coercion.
- The statements relate to conduct both whilst you were at work, in public and on social media.
- You were given opportunity to explain your actions and comments.

Conclusion

Within the disciplinary, grievance and appeals procedure it states that “Unacceptable standards of conduct including indecency, childish behaviour, persistent bad language and personal abuse giving offence to others” are considered gross misconduct. In light of the evidence provided by members of staff and your response to these statements it would appear that you do use language in the workplace and in public that would give offence. As such, the company’s decision is upheld and your appeal is unsuccessful.”

42. The claimant complains that, contrary to the ACAS code, she did not have an appeal hearing and the matter was dealt with on paper. She asserts that had there been a hearing she might have retained her employment.

Conclusions

43. It is clear to me and I find that the reason given by the respondent for the dismissal was gross misconduct for making racist and derogatory comments about two co-workers.
44. Gross misconduct is a potentially fair reason for dismissal.
45. However, given the burden of proof, I cannot find that the respondent genuinely believed in the reason for dismissal in the absence of any evidence from the respondent. Accordingly, I have to find that the dismissal was unfair.

46. Further, I find that the failure to afford the claimant a hearing for her appeal renders the dismissal procedurally unfair. I accept that an appeal hearing is not mandatory, that the ACAS code is non-statutory guidance and that the issue has to be reviewed in context. However, the claimant pointed to an individual who, whilst charged with an offence of theft, did apparently retain his job on appeal. The respondent has not been here to contest the issue.
47. Again, given the burden of proof when dealing with 'Polkey' considerations, I cannot find what the chances were that she would have lost her job in any event had a fair procedure been adopted in the absence of the respondent.
48. As regards the race and/or sex discrimination claims, my findings are as follows:-
49. The claimant on the one hand and Mr Bowler and Ms Mateova on the other, did not like each other. This appears to go back to when the claimant was promoted.
50. Mr Bowler and Ms Mateova did raise formal grievances against the claimant alleging racist remarks.
51. The claimant asserts that the grievances were inventions, were trying to get her fired and were motivated by her race and/or sex. I reject the claimant's assertions on this. I have relied upon the three work mate's interviews, in particular, Mr White's, which I find are probably accurate. The claimant did use offensive and racist language both in and out of the workplace. Accordingly, a comparator would be a non-Polish male worker. I do not find that the making of the grievances was less favourable treatment than a comparator in that the comparator would have had a grievance raised against them in the circumstances. As such there is no prima facie case to reverse the burden of proof. In any event I find that the treatment was not because of the claimant's race or nationality.
52. I reject the claimant's evidence that she heard Ms Mateova persuading Mr White to lie about her. I find the claimant's grievance against Mr Bowler to be unpersuasive as it was lodged after disciplinary proceedings had been launched against the claimant and so appears to be retaliatory. I find the allegations made about Mr White sexually harassing the claimant are similarly unreliable being a further attempt to discredit Mr White's evidence at the appeal stage.
53. I find that there is no evidence of less favourable treatment of the claimant in her treatment during the disciplinary procedure and in her dismissal. I find that a comparator would have been treated the same, including the appeal being dealt with on paper. In any event, I find that the treatment was not because of the claimant's race or nationality.
54. As regards the treatment of Mr Bowler in May 2019, following his alleged remark to Ms Hussain, I find that no action was taken by HR. I find that the circumstances are not comparable as no formal grievance was raised either

by Ms Husain or the claimant. I find that faced with formal grievances the respondent had no option other than to investigate the claimant.

55. Accordingly, the discrimination claims are dismissed.

Employment Judge Alliot

Date: 29 September 2021

Sent to the parties on: 14 October 2021

For the Tribunal Office