



EMPLOYMENT TRIBUNALS

Claimant
Mr A Sinha

v

Respondent
Network Rail Infrastructure Limited

Heard at: Bury St Edmunds (by CVP)

On: 11 & 12 August 2021

Before: Employment Judge Laidler

Appearances:

For the Claimant: Mr M Edwards (Counsel).

For the Respondent: Ms A Ahmad (Counsel).

JUDGMENT having been sent to the parties on 1 September 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The ET1 in this matter was received on 18 July 2019 following a period of ACAS early conciliation between 22 May and 20 June 2019. The claim is for wrongful dismissal only even though due to his salary the claimant calculated his losses at in the region of £97,000 he has limited his claim to the £25,000 which is within the jurisdiction of this tribunal. The respondent has denied the claims stating the claimant was dismissed for gross misconduct.
2. There was a telephone preliminary hearing before Employment Judge Michell on 29 May 2020 when this hearing was listed, at paragraph 4 of his summary sent to the parties the issues were identified as follows:-
 - (i) Was the claimant in repudiatory breach of his contract entitling the respondent to dismiss without notice.
 - (ii) If he was in such breach did the respondent waive or affirm it by delay or otherwise.

3. It was noted that the onus was on the respondent to show that the claimant was in breach and that such breach caused it to dismiss him without notice.
4. Although there has been talk of reasonableness and the appropriateness of the sanction all at this hearing agreed that those are matters for an unfair dismissal claim which the claimant does not have the requisite length of service to bring and is not before this Tribunal.
5. The Tribunal heard from the following witnesses for the respondent: John Edgeley; David Dixon; and Bill Kelly, and the Tribunal also heard from the claimant. The Tribunal had a bundle of approximately 322 pages many of which were not relevant to the issues. Contained in the bundle however were agreed transcripts of the relevant telephone calls, the Judge also had and listened to the actual recordings of those calls.
6. From the evidence heard the Tribunal finds the following facts.

The Facts

7. The claimant commenced employment on 30 May 2017. From his contract of employment (page 41) he was described as Head of Innovation a Band 1 position being the highest salary band. His basic salary in the contract was then £99,000 plus benefits. In the ET1 the claimant stated his total salary as being £148,620.
8. The contract noted that the highest standards were required of the respondent's employees and that the employees must conduct themselves personally and professionally "in a way that does not adversely effect the company's standing and reputation".
9. There is reference to the disciplinary procedure as being non-contractual and contained in the Employee Handbook. Clause 20 of the contract dealt with notice providing that the employer was entitled to terminate without notice should the employee be found guilty of gross misconduct following a disciplinary hearing. Examples of such conduct were given including making any statement or taking any action which may damage the reputation of Network Rail or acting in any way which in Network Rail's opinion brings or will bring it into disrepute.
10. The Disciplinary Policy and Procedure (page 112) gives examples of gross misconduct including bringing Network Rail into serious disrepute, bullying, harassment or discrimination.
11. There was also a Harassment Policy (page 122) clause 3.1 described bullying as covering any behaviour that is threatening, aggressive, intimidating, abusive or insulting and/or an abuse or misuse of power that is meant to undermine, humiliate or injure the person on the receiving end.
12. Guidelines for managers were also seen in the bundle and in particular that for conducting disciplinary investigations. This provided (page 78) that the investigation is about fact finding, establishing what has happened and whether it was appropriate to hold a disciplinary hearing. Clause 3 of

the guidance provided that the aim should be to complete the investigation as quickly as possible and generally within 14 days of suspicion of misconduct.

13. The complaint from Ah!Media was dated 5 December 2018 (page 171). This was from Chris Hadden, it was addressed to the claimant but copied to his HR Director, Tim Craddock. It stated as follows:

‘Having reviewed your call with Josie earlier today and your call with myself and our MD this afternoon we have concluded there are no grounds upon which we should apologise. In fact having listened back to your call to Josie, I have concluded that it was in fact you who was abrupt and rude with Josie; who was following internal processes with her call.

Given your stance on today's calls we have marked your attendance as cancelled and unless you are in fact able to attend, or able to provide a suitable replacement in your place a cancellation charge will apply...

Please find attached the recordings of both of today's calls. I have copied in your HR Director so they can review whether they deem this to be appropriate behaviour from one of their staff. Furthermore given the comments you made about ‘going public’ we will be instructing our solicitors with regards any potential defamatory claim’

14. The next day Mr Craddock forwarded this to the Head of HR and to the claimant's Line Manager Simon Warner.
15. On 7 December 2018 the claimant sent his apologies to Ah!Media for the way he had behaved stating it was not something he was proud of. He acknowledged “These are not at all Network Rail's behaviours” and he was sorry “for letting those high standards slip”. Chris Hadden accepted the apology by email of 7 December. These emails were after the complaint had been sent to the respondent.
16. John Edgeley was approached by HR on 11 December to conduct an investigation. He confirmed that he was able to assist on 17 December but that he had a period of annual leave coming up and would not be able to start the investigation until his return on 8 January. He then listened to the recordings and arranged to interview Simon Warner, Head of Operations, Security and Information, the claimant's line manager and the claimant. The recordings were listened to by the Tribunal, and it had agreed transcripts in the bundle. There are three individual calls though the last two are in the same call but with different people.
17. They start with a call to Josie. The claimant calls her back having received missed calls from her number. She makes it clear she is just trying to obtain confirmation he will be attending a conference of theirs that he had booked to attend. The claimant can be heard being immediately hostile. It is he not Josie as he later alleges who asks her “Do you want to answer yes or no?”. He says at one point early on he is going to put the phone down. He tells her to calm down and have a cup of tea and call him back. He said a number of times that she did not have an appointment with him. He did not want to know anything from her. He did not care about the cancellation fee and would not be attending the

conference. The claimant ended the call.

18. It is quite clear listening to the interaction that it was the claimant who would not allow Josie to speak and that he kept talking over her. She clearly found it difficult to deal with and was only trying to do her job in finding out if the claimant was attending a conference with them that he had booked.
19. The claimant later on that day called and spoke to Chris Hadden. As it is later the same day the claimant would have had an opportunity to reflect on the first call. He is again very hostile. He asserted that the earlier call was the rudest call this side of summer. He accused Josie of just wanting a yes or no answer and that she had been shouting. There is no evidence of that on the recording. He said he was going to lodge a complaint about the company's behaviour. If they asked for a cancellation charge he would sue them. Chris Hadden at one point asked to be allowed to speak as the claimant was doing virtually all the talking but would not allow him to speak. The claimant then said:-

“And I will post about it going all over the internet. This is the worst behaviour I have seen.”

20. The claimant was then passed to Farham Ahmed, a more senior manager. He stated he would not attend the conference and:-

“Most importantly I will file a complaint and tell people how your organisation treats other people. I hopefully should have a recording of that call as well which I am going to make public.”

21. Again, he would not let Mr Ahmed speak. He states he is going to tell colleagues not to come to their conference and about their behaviour. The claimant stated he will be taking legal advice.
22. Simon Warner was interviewed on 18 January 2019. He confirmed there had been an underlying current of confrontation throughout the year between the claimant and other members of the team which had been dealt with informally. Mr Edgeley however confirmed in his evidence that his decision to pass the matter to a disciplinary hearing was based on the phone calls alone.
23. The claimant was interviewed on 18 January also and had a trade union representative with him. Notes of the meeting record the claimant felt that Ah!Media had misrepresented themselves as being from central government, had not disclosed cancellation charges and had chased the claimant aggressively. He stated he was at his GP surgery when the first call came owing to health issues.
24. Mr Edgeley concluded that the matter should proceed to a hearing to determine whether there had been gross misconduct. He explained in cross examination he did not feel the need to speak to Ah!Media, he had the recordings and their letter of complaint and did not see what more they could add.

25. The invite to the disciplinary hearing was dated 5 February 2019 (page 208). The initial meeting of 14 February was re-scheduled to 27 February as the claimant requested more time to prepare. It was made clear in the letter that the respondent considered the allegations to potentially amount to gross misconduct namely that on 5 December 2018 during two telephone calls the claimant displayed bullying behaviours of a threatening and aggressive nature towards three employees of Ah!Media which potentially would bring Network Rail into serious disrepute. The claimant was reminded of his right to be accompanied and that if gross misconduct were established he may be dismissed without notice or pay in lieu.
26. The disciplinary hearing was chaired by Dave Dixon, Chief Operating Officer and the notes were seen at page 212. The claimant was represented by a different trade union official. Mr Dixon also felt that he had sufficient evidence with the recordings, the complaint and the investigation report and did not need to speak to Ah!Media. The claimant stated he felt cheated and harassed by the supplier. Mr Dixon's view was that what he had heard went beyond rude and he considered it to be aggressive and bullying. He based his decision entirely on the tapes. He did not regard it as a one off event as there was the first call and then a period during the day which should have allowed the claimant to reflect but that he then escalated it further. It was he felt ongoing behaviour.
27. With regard to reputational damage, Mr Dixon explained to the Tribunal and it accepts that as a leader in the industry Network Rail has spent a lot of time over the years trying to improve relationships with suppliers so as to be seen as a model of how to operate and they then found themselves in a case where someone was bullied and threatened with a call being put onto the internet. It did in his view bring the respondent into disrepute.
28. Even if Ah!Media accepted the claimant's apology they could still speak to others about the behaviour and there was clear potential for reputational damage. Their opinion was quite clear in that they were prepared to complain to the Head of HR and state they were instructing solicitors. That was quite a step for a company wanting to continue to deal with Network Rail to take.
29. Mr Dixon's outcome letter dated 7 March 2019 (page 219) and clearly sets out his reasons. There had been bullying behaviour, unprovoked and entirely disproportionate in the circumstances which was threatening and abusive. It was such a serious breach of his obligations that it called for summary dismissal. It was likely to bring Network Rail into disrepute and damage Network Rail's reputation. He did not agree that the apology meant there was no reputational damage, as the fact was that Ah!Media had felt the need to write a formal complaint and instruct solicitors.
30. The initial engagement with Josie was found to be threatening and aggressive. There had been a sudden change in the claimant's tone with no obvious cause. Had the claimant not been able to deal with the call at that particular time he could have ended it.

31. The claimant then escalated the matter and was in many ways even more threatening and aggressive.
32. The claimant appealed by letter of 15 March 2019 citing the severity of the sanction, an ongoing investigation into him being a victim of bullying and harassment, breach of contract and the investigation being unfair and incomplete.
33. The appeal hearing was heard on 8 April 2019 before Bill Kelly and he did not uphold the appeal. His outcome letter is seen at page 239 dated 16 April

The Tribunal's conclusions

34. The Tribunal has to determine whether the respondent has established that the claimant acted in breach of his contract of employment. The respondent has established that.
35. The claimant was a very senior employee and the standards expected of him are clearly set out in the contract of employment. In the first call to Josie which the claimant made to her, he was threatening, aggressive and intimidatory. He was harassing and bullying someone who he would have known was a relatively junior administrative member of staff merely doing her job of contacting those attending the conference. She hardly had a chance to say anything let alone be rude as alleged by the claimant. He was incorrect in the way he later described the call which can be heard clearly on the recording. The claimant did not then leave the matter but rang again later that day. He adopted the same approach with Mr Hadden to the extent that Mr Hadden had to ask to be allowed to speak. The claimant made it clear he was going to post the call on the internet. When then passed up to Mr Ahmed the claimant continued and again spoke about going public.
36. The contract gives examples of gross misconduct. They are only examples. The claimant was clearly in repudiatory breach of his contract by behaving in this manner. There was a course of conduct. It was the claimant's choice to escalate it and continue his behaviour later that same day. It is disingenuous to state that the reason for the claimant's tone was a genuine grievance as to the nature of the booking and the cancellation fee when those matters only arose later in the call with Josie and the claimant was displaying inappropriate behaviour towards her from the beginning. There was no "pressure selling" the conference had already been booked by the claimant.
37. It has been argued on behalf of the claimant that the respondent waived the breach if there was one and/or affirm the contract. It is suggested that an alleged delay in the investigation amounted to such a waiver. The respondent's guidance and it is only guidance suggests trying to do the investigation within 14 days. This was the Christmas period which virtually takes out two weeks for most businesses. The manager appointed was about to take annual leave, when he returned he started his investigation which proceeded. There was no waiver.

38. None of the respondent's witnesses dealing with the matter felt the need to speak further to Ah!Media. They did not need to do so. There was no "gaping hole" as submitted on behalf of the claimant. They had the recordings and the complaint. Ah!Media did not need to be consulted with to understand how they felt about the matter. Even if they had said that the apology was the end of the matter for them that it is not relevant to how the employer felt about a senior employee's conduct and its effect. That the claimant had apologised to Ah!Media did not detract from his behaviour and the respondent's concerns about reputational damage. The respondent did not waive the right to summarily dismiss.
39. Several points made on behalf of the claimant were unfair dismissal points for example the sanction raised by the claimant on appeal. The Tribunal is not concerned with the three-fold Burchell test nor the reasonableness of the process and the sanction. It is not applying a band of reasonable responses test. For all those reasons the complaint of wrongful dismissal fails and is dismissed.

Employment Judge Laidler

Date: 10 November 2021

Judgment sent to the parties on

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For the Tribunal office