



EMPLOYMENT TRIBUNALS

Claimant

Mrs A Zych

V

Respondent

Northants Vision Plus Limited

Heard at: Watford Employment Tribunal

On: 15 October 2021

Before: Employment Judgment Allen sitting alone by CVP

Appearances:

Claimant: Mr Thomas Gracka, caseworker

Respondent: Mr Baker, counsel

Attending: Mrs A Zych and Mr J Edwards

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

"This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 83 pages, the contents of which I have recorded. The order made is described at the end of these reasons."

JUDGMENT Having Been sent to the parties on 2 November 2021 and written reasons having been requested in accordance with rule 62(3) of the Employment Rules of Procedure 2013, the following reasons are provided:

REASONS

Law

Unfair Dismissal

S98(2)b Employment Rights Act 1996

- (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 as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it-
 - (a)
 - (b) Relates to the conduct of the employee

Alidair Ltd v Taylor 1978 ICR 445, CA If an employee is dismissed for dishonesty or incompetence, it is sufficient for the employer to prove that he honestly believed on reasonable grounds that the employee was dishonest or incompetent; he need not prove that the employee was in fact dishonest or incompetent.

ACAS guidelines representation at disciplinary hearings

Paragraph 13: workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- A formal warning being issued; Or
- The taking of some other disciplinary action; Or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

Paragraph 14: the statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker. Employers must agree to a workers request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practise, in making their choice workers should bear in mind the practicalities of the arrangements. For instance, a worker may choose to be accompanied by a companion who is suitable, willing and available on site rather than someone from a geographically remote location.

Paragraph 15: to exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does not have to be in writing or within a certain time frame. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are fellow worker or trade union official or representative.

Paragraph 16: if a worker is chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a

time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.

Findings

1. The parties agree the claimant was employed as an optical assistant commencing with the respondent in 2016.
2. Effective date of termination was the 11 August 2020.
3. I am satisfied the document of page 41h of the bundle is a file note (made at the time in November 2019) by Miss Gleeson recording racist name calling by the claimant of another employee and witnessed by her. She records that she witnessed the claimant call him a '*black monkey*'.
4. The respondent appointed Mr Patel to investigate the claimant's conduct. I accept his notes of the interviews he conducted with staff which are consistent with the allegation.
5. I do not accept the claimant's evidence she cannot remember calling her colleague a '*black monkey*'. I disagree with her representative, Mr Gracka who suggests her assertion 'I can't remember' is a denial; it is in my view an absence of both admission and denial. 'I can't remember' is a concession on her part that she could and would use such language. It is also consistent with the challenged evidence from Mr Patel's statement that the claimant conceded she may have said it in jest.
6. I do not accept that the claimant's assertion her former colleague 'Claudia' was present during the incident in November 2019. Had she been mentioned by any party during the investigation, including the claimant, I am confident the investigator, Mr Patel, would have noted it as he did the claimant's allegation of Polish staff being subjected to racism. I note both staff members named by the claimant denied experiencing such behaviour when interviewed. I'm also confident Miss Gleeson would have mentioned 'Claudia's' presence in her file note about the incident in November 2019.
7. I accept the claimant was frustrated about the management of staff rest breaks during the working day but I note she did not identify if and when she raised it with management. In fact, quite the opposite, she asserted in her statement she didn't report it because she didn't believe management would act. The only time it can be said with any certainty it was raised by her was during the disciplinary hearing with Mr. Edwards. I accept the evidence I have heard that the claimant chose to deal with the issues of staff breaks by bullying and harassing one colleague in particular (the colleague she referred to as a '*black monkey*' in November 2019) to take his breaks promptly including referring to him as '*black man*' rather than by his name. This occurred between the return-to-work following furlough and the appointment of Mr Patel to investigate these issues.

8. I note the claimant was given 48 hours' notice of the disciplinary meeting. Much was made of the fact that the letter inviting her to the disciplinary meeting gives limited information of the allegations. The claimant accepted however that the letter was accompanied by the witness statements which did give that detail. 48 hours is not unusual and I conclude that such a period of notice was fair.
9. Mr Patel interviewed witnesses and I'm satisfied it was a fair investigation, he extended his investigation to include witnesses identified by the claimant whom she said had been subjected to racism and I note she did not identify 'Claudia' as a relevant witness at all.
10. Much was made of the issue of representation at the disciplinary hearing; Acas guidelines were not in my view breached in this respect. The former employee who attended the disciplinary meeting with the claimant (Claudia) did not fall into any of the categories of permitted representatives covered by the guidelines. Consequently, the respondent did not breach the guidelines when it excluded her from the meeting. Paragraph 15 of the Acas guidelines makes it plain that in order to exercise the statutory right to representation workers must make a reasonable request. The claimant stated in her statement that she treated this as a suggestion not a requirement and did not comply with it. I don't accept Mrs Zych's claim that she made a request to be represented by 'Claudia' on the 5 August 2020. Mr Patel made a note of their meeting and if she had said it, I am confident he would have recorded it as he did her allegation of racism experienced by Polish colleagues.
11. That Mrs Zych asserts she was called 'White Flour/Flower' troubles me; it is not, so far as I am aware one of the common racist insults in circulation and I conclude it was not said.
12. I am satisfied the real reason for dismissal was the claimant's behaviour towards her colleague which I have heard included racist comments, bullying and harassment.
13. I have no difficulty in accepting the respondent's view that conduct of this sort amounts to gross misconduct warranting summary dismissal without notice of payment in lieu of notice. Such behaviour is so abhorrent in our modern multicultural society that a clean disciplinary record could not mitigate it so that it warranted a warning not least because I have heard this conduct was repeated throughout July 2020.
14. I accept it was entirely appropriate to take the conduct alleged from November 2019 into account in this decision which demonstrated this was entrenched behaviour on the part of the claimant.
15. That the claimant's frustration about staff rest breaks motivated her behaviour can never justify the language she chose to use. The proper way to have dealt with her grievance would have been to raise it in accordance with the respondent's grievance procedure. She chose not to, had she done so as she claimed she would have been able to identify the manager she spoke too about it. Other than a vague assertion

during the hearing that she raised it she presented no persuasive evidence on this point and is inconsistent with her statement which asserts she formed the view management would not act if she did. The claim under section 104 ERA'96 is dismissed.

16. Unfair dismissal - I am satisfied the respondent has demonstrated the principal reason for dismissal was the claimant's bullying, harassing and racist conduct towards her colleague. That reason falls within subsection 2 (b) of section 98 ERA'96 namely the conduct of the employee.
17. The respondent company employed around 50 staff at the time and has an HR department.
18. I am satisfied Mr Patel's investigation was pursued promptly. That is not undermined by the lack of immediate investigation following the November 2019 incident. That matter was not pursued at the request of the victim. Consequently, there was no delay and it was reasonable to include it in the subsequent investigation into the same member of staff for similar behaviour.
19. Mr Edwards, the disciplinary manager, acted reasonably in concluding the claimant's conduct amounted gross misconduct under the respondent's policies given the consistent accounts from witnesses and the inconsistent accounts from the claimant.
20. Mr Edwards' decision to dismiss the claimant was within the range of responses of a reasonable employer. The claim under section 98 ERA'96 is dismissed.
21. Breach of contract - The claimant's contract of employment refers employees to the disciplinary policy and procedures which are available to them. Contract clause 10 makes it plain summary dismissal will follow a finding of gross misconduct. The respondent's equal opportunities policy makes it plain discrimination on the basis of race will not be tolerated. It also makes it plain it is discriminatory to bully or harass an employee and that serious breaches of company rules, policies or procedures (paragraphs 8 and 9) namely in this case serious acts of intimidation, bullying and harassment including foul and abusive language amount to gross misconduct.
22. In the circumstances I have no difficulty in concluding the dismissal was not in breach of contract and the respondent was entitled to dismiss the claimant without notice or payment in lieu of notice.
23. All claims brought by the claimant are dismissed.

Employment Judge **Allen**

Case Number: 3315344/2020

Date: ...8 December 2021.....

Sent to the parties on: ..8.1.2022.....

.....GDJ.....

For the Tribunal Office