EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 5 to 9 June 2023

Claimant: Ms Amber-Kate Ward

Respondent: Dermalogica UK Limited

Before: Employment Judge E Fowell

Mr W Dixon

Mr C Mardner

Representation:

Claimant Mr Colin Ward, Father

Respondent Matthew Sellwood of counsel, instructed by Keystone Law

JUDGMENT ON LIABILITY

1. The claimant's dismissal was fair

2. The dismissal was not in breach of contract

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given at the hearing.

2. By way of introduction, Ms Ward was dismissed for posting comments on Facebook. These were made at the start of the first lockdown when she was protesting about having to come into work. She claims that her dismissal was unfair and in breach of contract. She also has long-standing mental health difficulties but her disability discrimination claim was dismissed at an earlier preliminary hearing on the basis that these difficulties were intermittent and were not expected to last more than 12 months

at the time of her dismissal. She also brings a further claim of harassment on grounds of sex. This relates to a much earlier period, from about the time when she began work for the company in 2013 until January 2015, and involves comments about her appearance and the way she dressed from more senior, female colleagues.

3. There was a case management hearing very recently, on 18 May 2023, which identified the issues in each claim, and the fact that there was a time limit issue in relation to the harassment claim, so we will deal with that first.

Time Limit Issue

4. Harassment claims are governed by the Equality Act 2010. Section 123 provides for a three-month time limit for bringing a claim after an act of harassment, but there are two exceptions. One is where there is "conduct extending over a period." If so, it is treated as done at the end of that period. But the last alleged act of harassment here was on 23 January 2015, over five years before Ms Ward was dismissed.

5. The other exception is where it is just and equitable to extend time. To be clear about the dates involved, time is extended by the period spent in early conciliation with ACAS, which was from 17 November to 17 December 2020 – the same day that the claim form was submitted - so any act or omission which took place more than three months before early conciliation, i.e. on or before 18 August 2020, is outside the normal time limit.

6. Ms Ward says that the main reason for the delay over this period was her poor mental health, but this history was considered at the disability hearing, and Employment Judge Truscott KC concluded that these effects were intermittent. She had seen her GP in 2015 and 2017, but there was a substantial gap between these visits. There had then been panic attacks at work in August 2018 and in January 2020, but again, there had been a big gap between these events when she was not suffering with anxiety, or even taking the medication she had been given.

7. A further reason given for the delay was that Ms Ward had only recently seen relevant evidence that would have supported her claim. It is at page 166 of the bundle and was written to Ms Ward by Ms Davies, the manager in question, on 11 March 2015. It follows a grievance raised by Ms Ward about these comments, and was about the time of the grievance outcome letter. Ms Davies said she wanted to "iron things out" and to apologise if she had been unfair in any way or had singled her out. Her father, Mr Tony Ward, who has represented her throughout and was also a witness at this hearing, stated that had they known about this letter he would have urged her to resign and bring a claim at the time.

The applicable legal principles

8. Time can be extended where it is just and equitable to do so, but that does not simply mean that it should be extended whenever an employee has a good case. This was considered in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, where Lord Justice Auld held that:

> "25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

9. On the other hand, in **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, Leggatt LJ said that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. However, the length of and reasons for the delay would almost always be relevant, as would prejudice to the respondent.

10. This was reiterated quite recently by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 EWCA Civ 23, which again emphasised that the main questions were:

    (a) the length of the delay;

    (b) the reasons for the lateness; and

    (c) the potential prejudice to the other party.

Conclusions

11. Taking these in turn, the period in question of five and a half years has to be contrasted with the normal period provided by statute of three months, so it is over 20 times as long as normally permitted. That makes this a somewhat extreme case.

12. How then is that period of time to be explained? Ms Ward's mental health was clearly badly affected at times, but for most of this time she was going to work as normal. She raised a grievance about the alleged harassment at the time. The missing letter from Ms Davies does not seem to us to make a significant difference to the overall picture. It may be that it would have furnished some evidence in support of this claim at that time, but Ms Ward was in possession of all the facts. She knew what had happened to her. It is clear from the outcome letter that her concerns had been raised with Ms Davies and there was no dispute that Ms Davies had spoken to her a number of times about her appearance. The last alleged act of discrimination was a memo regarding acceptable dress, which was circulated on 23 January 2015, and was intended to address any confusion in this area. So, Ms Ward had all the

information she needed to bring a claim of harassment and had already been arguing her corner with management about it.

13. It is not of course necessary to resign or be dismissed before bringing a claim, but many employees feel too daunted – as Ms Ward did - by the prospect. However, that is not generally a good enough reason for extending time, especially for this long.

14. There is then the prejudice to the respondent. Most of the complaints are made against Ms Davies, who is not here to give evidence. She has left the business. Those complaints were investigated at the time, but not in any detail. It was treated as a case of confusion over the appropriate dress code. So, for example, one of the allegations is that in or around March 2014, when Ms Ward was wearing a crewneck jumper, Ms Davies stated "I do not want your breasts thrust in my face." In the missing letter from March 2015 however, she disputes this form of words, and without hearing evidence from her we could simply not deal with that accusations fairly.

15. Some of the allegations also involve Ms de Kerk who was also left the company is and is not available to give evidence as a witness. Two of the allegations mention Ms Gover, who has provided a witness statement, but it follows that on six of the eight allegations in question the company has no first-hand witness who can defend its case. In those circumstances, given in particular the length of time and the prejudice to the respondent from the lack of witnesses, we conclude that it would not be just and equitable to extend time.

The remaining claims - procedure and evidence

16. In dealing with the remaining claims of unfair dismissal and wrongful dismissal, we heard evidence from Ms Ward and, in support of her case, from:

    (a) Ms Aarti Luthra (Senior Customer Services Advisor), a former colleague of hers;

    (b) Mr Dan Gesese, another former colleague from the IT department;

    (c) Mr Colin Ward, her father, who has represented her throughout these proceedings; and

    (d) Mrs Joanne Ward, her mother.

17. On behalf of the company we heard only from Ms Sarah Beardsworth, Head of Human Resources. A witness statement was presented from Ms Maxine Richardson, Consumer HR Manager, who provided HR support during the grievance process, but she has also left the company and did not choose to attend. Similarly, a witness statement was provided by Ms Gover, who was the Customer Service

Manager at the time. She has since left the company but was willing to give evidence on their behalf. Unfortunately, she is presently in Spain.

18. An application was made on 23 May 2023, at the time of the last case management hearing, for her to give evidence remotely from Spain but that was only two weeks ago and no response has been received. Permission is required from the Spanish authorities on a case by case basis. Mr Sellwood did not ask for an adjournment to secure her attendance and so the company's case was based largely on the written record, supported by Ms Beardsworth's account. That written record involves a bundle of about 500 pages. Having considered this body of evidence and the submissions on each side we make the following findings of fact. By no means all of the points raised can be dealt with because a good deal of that evidence was about historical or background issues, particularly about the alleged harassment.

Findings of Fact

19. Dermalogica makes high quality skin care products. Their head office is in Leatherhead where they have about 110 staff, about a third of the total in the UK. They distribute to salons directly or through prestigious stores such as Harvey Nicholls. Customers can also order from them online.

20. Ms Ward was part of their Customer Services Team, handling calls from customers, receiving orders or sometimes dealing with complaints. It was a busy role, with a lot of time spent with a head-set on taking calls. From the various exit interviews we have seen, some members of staff left in a positive spirit and enjoyed their time there, while others were very critical. Mr Gesese, for example, was very unhappy and spent some time off sick before handing in his notice. Ms Luthra, who left in 2016, felt that there was an in-crowd in the Customer Service team, which she described as a group of bullies, and if you were not in their group you were undermined and excluded.

21. Ms Gover took over from Ms Davies as manager of the Customer Services Team in October 2018. Not long afterwards, at Ms Gover's instigation, Ms Ward was promoted to a Team Leader role. However, in December 2018, Ms Ward had a panic attack on the way to work. When she reached the car park she was too distressed to get out of the car. Ms Beardsworth and Ms Gover came down, and Ms Beardsworth then took her to a coffee shop to discuss things, before Ms Ward went home. All this shows a supportive attitude. As Employment Judge Truscott KC noted, in Autumn 2018 Ms Ward was going through a difficult time with a legal claim over an eviction and was taking beta blockers. After that incident there were no further GP consultations until January 2020, and she carried on at work as normal, so we have nothing to suggest any ongoing tension with Ms Gover or others.

22. The January 2020 consultation followed another panic attack at work, although this time it was less public. She emailed Ms Gover (page 99) to say that she thought she needed to go home and that she felt really low, to which Ms Gover responded

> "Ok cool. Please do come in tomorrow as I know you are off then until Wednesday.
>
> Also I know the team want to make a fuss of you for your birthday tomorrow ☺"

23. This indication of low mood is as far as Ms Gover would have been aware of her problems at home.

24. On 8 February 2020, Ms Ward was physically attacked by a man outside work. Given that the man in question went on to kill someone, we fully accept that this must have been an extremely frightening ordeal. She had to spend most of the night at the police station and was physically hurt.

25. It is not clear what she told work about it. Ms Ward's evidence was that she rang Ms Gover, who was unsympathetic, and said that she should not bring her personal problems to work. Ms Gover was later interviewed as part of the appeal process (page 366) and said that Ms Ward did not provide her with many details, although she was open with the team about it and took the next day off.

26. Although we did not hear from Ms Gover, we find it very difficult to accept that she was so unsympathetic, especially given that she was accommodating and supportive in January. There is no record of this discussion, and no complaint from Ms Ward at the time. Ms Ward did not go to see her GP about the incident, or for some time afterwards, which suggests that she thought she could cope and carry on as normal. And it seems that she did carry on as normal. We do not doubt that she would have been very anxious after this attack, but she did not take any time off and did nothing further to alert her employers to those concerns.

27. During February and March 2020 it became more and more clear that a lockdown was looming and preparations were undertaken for more homeworking. An email was sent to all staff (page 246) stating:

> "Boris Johnson has just announced a Stay at Home Order for the UK meaning that all activities that require you to be at the office should stop as of midnight tonight, with the intention to be reviewed in 3 weeks' time. Both **customer service** and education are making the transition to work from home which is allowed, and we foresee this completing by Friday.

28. So by Friday the plan was that her department would be working from home, or they could take the rest of the week as holiday. Ms Ward was incensed about this. She felt, to put it mildly, that it was illogical to require some people to come into the office to cover the phones. It was not, in her view, essential work and if laptops were needed they should have been ordered much earlier. At 1148 pm that night, about an hour after this email, she gave vent to her views to a group of about 30 of her friends (page 243):

> "If anyone was worrying just to let you all know Dermalogica is still open for business. I am sure there are many people that had concerns after Boris speech this evening .... so

> if anyone needs a fucking clearing skin wash or a poxy skin smoothing cream your in luck coz apparently the CEO believes that skin care is essential for the nation at this point"

29. There was then a response from a friend of hers, someone who did not work at Dermalogica, stating

> "they need to give you a laptop Amber or you will have grounds to just refuse"

30. To this she replied:

> "they haven't arrived because the fucking morons ordered laptops from another country so are taking their time to arrive it's a joke no salons are open who the fuck is going to be …"

31. All this was sent to a group of about 30 friends and we heard that about 20 of them read it. Two members of the group were fellow employees at Dermalogica, and no doubt one of them reported it to the company.

32. The following day Ms Ward came into work and was still very angry about the situation. She wanted to speak to Ms Gover. Ms Gover was not in but rang her that day, by which time she had been made aware of these posts, and asked Ms Ward to take them down.

33. The company had a Standards & Business Conduct document (page 498) which provides:

> "As social media becomes increasingly popular and sometimes the use of sites such as Facebook can get employees into potential disciplinary situations due to a lack of understanding their action on such sites can have on the business and brand. Although, their actions may have been due to a lack of judgement, or may have started with innocence, there is no denying the negative impact it can have when associated in any way with Dermalogica."

34. Examples are then given over the page and then this passage concludes:

> "Depending on the serious of each incident disciplinary action can be up to and including summary dismissal so please consider your actions carefully when using social media. Please note Facebook has been used as the example above but this covers use of all media streams."

35. Accordingly, Ms Ward was suspended. (Rather unfortunately, that letter referred to her having committed gross misconduct rather than alleged or potential gross misconduct.) She was then invited to a disciplinary hearing to take place on 30 March. There was an extensive correspondence from that point on which we will merely summarise.

36. Ms Ward emailed to say that she had well documented mental health issues and needed more than two weeks' notice of a hearing. She also wanted to have a face to face hearing, i.e. when everyone was back to work.

37. Her father also wrote on 25 March (page 252) saying that what she had done was an error and that she should not have done it but she had been under pressure, had poor mental health and was not thinking as a rational person.

38. Miss Beardsworth responded to say that she had to communicate directly with Ms Ward, rather than with him. He replied stating:

> "If you insist upon a disciplinary hearing it will be enacted without Amber being present as you cannot demand someone attends a disciplinary when the office is shut and has no way of being able to connect remotely.

39. By then, Ms Ward had been to see her GP and obtained a medical certificate signing her off work with anxiety from 26 March 2020 to 9 April 2020.

40. On 27 March a grievance was sent to the company as an attachment to an email. It is at page 64. Unfortunately, it was never received. It may have gone into a junk folder or it may be that the attachment caused difficulty, but for whatever reason we accept that Ms Beardsworth did not see it. She responded promptly to all other correspondence and was in fact keen to obtain something directly from Ms Ward setting out her position. Essentially, what she was looking for was an apology.

41. Although it was not seen at the time this document is relevant to Ms Ward's position and state of mind. She stated:

> "Obviously, I regret that some comments I made on a private forum are being used against me"
>
> …
>
> "My comment about the CEO was not insulting, nor could it be construed as attacking the company. It was wholly about the policy that customer service was required to be in the office when others were not and that skincare was deemed essential."
>
> …
>
> "With regards to the accusation that I denigrated the IT department that is clearly not the case. Again, it was the process of the ordering of the computers. If we were essential to Dermalogica then it was imperative that Dermalogica gave us the tools to keep us safe and get us laptops. From where I was sitting that was not the case.
>
> Like all employees of Dermalogica I have the utmost respect for the IT team. I apologise unreservedly for any implication that I hold the IT team in anything other than the utmost respect and any inference my post may have made. I would be happy to write a letter of apology to the head of IT."

…

"I remain a loyal employee committed to the brand values of Dermalogica and will of course attend any meeting once the office re-opens. In the interim I am happy to return to work remotely and would accept a written warning regarding my private postings and I have stated that I will not be posting anything again and have removed all work colleagues from my Facebook friends list."

…

"I accept that I am not allowed to set out sarcasm that relates to my health and well-being relating to a deadly virus the world has never seen before on a private forum or have a right to privacy on that forum. "

42. It is difficult to reconcile this professed loyalty to the company with her insistence that her comments were essentially justified or were being unfairly used against her. Later in that letter she suggested that a written warning would be a sufficient punishment. Although there is an offer to apologise to the IT team, this is only in the context of the "moron" comment about ordering the laptops. There is nothing in the original post to point the finger of blame at the IT Department, and in any event the lack of laptops is very much a secondary issue when set against the accusation that the CEO was putting profit before safety.

43. The correspondence continued. Ms Beardsworth emphasised that Ms Ward had the right to be accompanied to the meeting and could contact a colleague about this if she did not have a trade union representative. She noted the medical certificate and agreed to move the hearing back but made the point that Ms Ward was able to access work remotely on her laptop so they should be able to have a remote hearing.

44. The next day Ms Ward telephoned her GP suffering from anxiety and was crying on the phone. He or she was sufficiently concerned to make a referral to the mental health team.

45. Ms Ward also responded directly to Ms Beardsworth (page 285) on 2 April, insisting that she had no way of logging in to work and suggesting that they courier a laptop to her instead if they meant to have a virtual hearing. She followed this up with a further message on 6 April to say that she was now staying at her parent's house. Ms Beardsworth then wrote back on 17 April (page 279) giving way on the video hearing point and agreeing that any disciplinary hearing would be face to face. But in response to that concession, Ms Ward changed her position and said that she couldn't drive to a meeting and asked again that she be sent a laptop to allow her to have a remote hearing. Ms Beardsworth was firm however that the hearing would be face to face and in the meantime Ms Ward would remain suspended on full pay.

46. There was then a considerable lull in the correspondence; Ms Beardsworth was of course very busy with Covid precautions and arrangements during this time. So it

was not until 29 May that she got back in touch to say that it would not be possible to have a face to face meeting yet because of the number of other people back in the office.

47. After that there was an even longer gap. Ms Beardsworth wrote on 20 August (page 290) to say that they might not be able to have a meeting that year.

48. Shortly after this, a shocking event occurred; the man who had attacked Ms Ward in February attacked somebody else and killed him. The attack took place not far from Ms Ward's home, and she was naturally extremely shaken by it. Since she was still suspended it had no immediate impact on her work but she mentioned it in an email to Miss Beardsworth on 21 August (page 296), explaining that she had spent about four hours at the police station that day.

49. That incident, however shocking, was not the main point of the letter however, which was to raise concerns about the bullying culture at work. It may be that this violent incident had triggered further anxiety on her part, and made her more apprehensive about a return to work. Or it may have simply been an attempt to deflect the disciplinary proceedings. Whatever the motivation, this became the issue that Ms Ward focussed on from then on.

50. Ms Beardsworth responded (page 295) to say that she could raise a grievance and it would be dealt with alongside the disciplinary process. That then led to further correspondence with Ms Ward demanding disclosure of paperwork to support her allegations of bullying. No doubt by this point Ms Beardsworth was anxious to conclude the disciplinary process. In a further effort to secure her attendance, she wrote to Ms Ward offering to meet her conditions and to courier a laptop to her. Remarkably, Ms Ward refused. She said that she suspected that there would be spyware on it or that she would be accused of damaging it. She also accused Ms Beardsworth of trying to force her to attend a meeting remotely and without representation. The representation point was still an issue. Ms Ward wanted the company to arrange a trade union representative for her, or to be accompanied by her father or by someone she knew who happened to be a trade union representative for the Fire Brigades Union, but Ms Beardsworth stuck to the company policy that it be a work colleague or her own trade union representative.

51. In a yet further attempt to arrange a hearing she wrote on 14 October (page 315) to say

> "Further to our correspondence last month over email whereby you refused to attend a virtual hearing for your suspension I can confirm I have now been given permission to hold this meeting in the Leatherhead office"

52. The hearing was then arranged for 23 October. Ms Ward took exception to this form of words, which suggested that she had refused to attend a virtual hearing, and responded (page 317):

> "I note that the bullying culture has extended to you making a false statement and, as such, I will set out the following. …"

53. She went on to say that her grievance should be resolved first and demanded a response to the subject access request she had made in support of her allegations about a bullying culture at the company.

54. The grievance itself was submitted on 21 October, two days before the hearing. It was a lengthy document setting out a great many complaints about the way in which she had been treated over the years, going back to the comments made to her about her appearance in the period to 2015. Ms Gover was mentioned a number of times, but was not the focus of the complaints, and there was no suggestion or request that Ms Gover not hold the disciplinary hearing.

55. As a result, it went ahead as previously arranged, but Ms Ward did not attend. Questions had been set out as part of pre-populated notes of the meeting, no doubt with considerable input from Ms Beardsworth. Ms Gover and Ms Beardsworth waited for about 15 minutes and then accepted that she would not be turning up. In the circumstances, given that there had been no explanation or apology for the post in question, the decision was taken to dismiss her. That decision was recorded in a letter dated 26 October 2020 (page 332) and concluded that given the nature of the posts it amounted to gross misconduct and a breach of the company's social media policy.

56. Following the dismissal Mr Ward took over the correspondence with the company and submitted an appeal the following day. Ms Louise Lupton, a more senior manager, was assigned to deal with it and set about what appears to have been a substantial and conscientious exercise, in the course of which both Miss Gover and Ms Beardsworth were interviewed at some length to understand why they had taken the decision in question and about the process followed. It is not necessary to go into any great detail. The upshot was that Ms Ward was invited to an appeal hearing but did not attend, and so her appeal was not upheld.

57. It may well be that by then she was not in a psychological position to deal with such matters. Her medical notes record that she saw her GP again on 2 November 2020 and was having suicidal thoughts. By then she had returned to living on her own but was going to go back to live with her parents. She had been sufficiently distressed the night before this call that paramedics had been called out to her. But not long after that it appears that she did take an overdose and was admitted to hospital for a time. We did not explore the circumstances at this hearing but that must of course have been a hugely distressing event, for her and her family.

58. There is a further factual issue that we need to deal with concerning of colleague of Ms Ward's, TR. It seems that she was also disciplined for a number of WhatsApp exchanges which are a pages 301 to 307. These exchanges were not shown to Ms

Ward at the time but she became aware of them, and TR made a number of pointed remarks about her. She suggested that Ms Ward had not really been concerned about Covid and had been to the pub with a friend who had contracted it, adding the words "The Actual Fuck." In context this seems to be saying (rudely) words to the effect - what on earth did she think she was doing? Ms Ward interpreted it instead as simply abuse directed at her, i.e. that she was being described as The Actual Fuck. TR was not dismissed over this. Nor was she suspended. But she was invited to a disciplinary hearing, which she attended and at which she apologised. She received a written warning. Ms Ward's view however is that this remark was at least as serious as her own posts.

Applicable Law

Unfair Dismissal

59. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal, in this case conduct. If that is shown, then by s.98(4)

> …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.

60. Since Dermalogica is a substantial organisation, operating in more than one country, with professional HR support, it follows that a high standard of fairness is to be expected.

61. As is well established, the correct approach normally involves the following steps:

    (a) Was there a genuine belief on the part of the decision-maker that Ms Ward did what was alleged?

    (b) Was that belief reached on reasonable grounds?

    (c) Was it formed after a reasonable investigation?

    (d) Was the decision to dismiss within the range of reasonable responses open to an employer in the circumstances?

62. The first two steps here are not in issue since the wording of the post is plain for all to see. The required investigation is therefore limited to the context, to exploring

why she did it and what mitigation she put forward. Where the facts are not in dispute, it may not be necessary to carry out a full-blown investigation at all: **Boys and Girls Welfare Society v Macdonald** 1997 ICR 693, EAT.

63. However, in all cases, we have to consider this "range of reasonable responses" test. This reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker. This applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the disciplinary process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer: **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111

64. We were not referred to any particular cases on unfair dismissal in the context of misuse of social media, although those cases do involve arguments about human rights, in particular as to whether or not the disciplinary action involves a breach of Article 8 of the European Convention on Human Rights - the right to respect for private and family life, a right which includes privacy of communications - and Article 10, the right to freedom of expression. Our view however is that neither of these rights is engaged in circumstances where the post in question is public and defamatory. If the position were otherwise, this would be a recognised defence in a claim of defamation.

Conclusions

65. Looking at the traditional tests for unfair dismissal in the circumstances, the Facebook post essentially speaks for itself. There is no doubt that Ms Ward was responsible for it, and that it amounted to misconduct. She accepted as much and offered to accept a written warning at the time. There was therefore an honest belief that she was responsible, and one based on reasonable grounds.

66. The first real issue is the extent of the investigation required. No real investigation in the traditional sense of the term was needed, such as by collecting documents or interviewing other witnesses to see what had happened. The investigation was always going to be limited to understanding what had prompted this outburst, and that could only be done by obtaining information from Ms Ward. That could be obtained at a meeting or possibly provided in writing. There was a good deal of correspondence about all this but no definitive statement from Ms Ward about the context and circumstances of the post.

67. Applying the guidance already referred to in the **Boys And Girls Welfare Society** case, we cannot find that it was outside the range of reasonable responses in the circumstances to go straight to a disciplinary hearing rather than holding an investigatory meeting first. That is not to say that an initial and less formal

investigation meeting might not have been beneficial. With hindsight, it is easy to see how an initial telephone call to discuss the circumstances might have led to less suspicion and defensiveness on Ms Ward's part, and avoided the saga of efforts to arrange a disciplinary hearing. However, that would not have been obvious from the outset and so the company chose to suspend her formally. Again, that is within the range of reasonable responses.

68. We have some concern about the suspension letter, since it refers explicitly to an offence of gross misconduct rather than to potential gross misconduct and may therefore have given the impression that the outcome was a foregone conclusion. Ms Beardsworth said that this was from their standard template. If so, it clearly needs revising. However, neither Mr Ward nor Ms Ward took the point in all the letters we have seen. Nor was it a point raised this hearing. Consequently, we accept it was not such a flaw in the procedure as to make the outcome unfair.

69. Having decided to hold a disciplinary hearing it seems to us that the company did all they realistically could to arrange a hearing in suitable circumstances. The first and most obvious point is that they were extremely patient. Relatively few employers would be willing to wait so long between a suspension and a disciplinary hearing while the employee was being paid in full, unless the delay was caused by ill health. There was also considerable patience shown in trying to meet Ms Ward's requests. Without going back over the various twists and turns, they went to great lengths to arrange a face-to-face meeting, which is clearly preferable, and when that resulted into greater delay they were willing to courier a laptop to Ms Ward for a virtual hearing. Once again, all this seems to us consistent with a view that they wanted to conclude the process, with a hearing but it is very far from certain that Ms Ward would have been dismissed had she attended and made some reasonable explanations and apology.

70. The one respect in which they did not give ground was over trade union representation. The word representation is something of a misnomer in this context. There is a statutory right to be accompanied by a work colleague or trade union representative and that person has a very limited role. It generally involves providing moral support, taking a note and suggesting points to the individual. They may also request breaks or, if permitted, make points on the individual's behalf, but it is very different from the role of representative at a Tribunal. Had Ms Ward appreciated this she might not have attached so much importance to the issue.

71. With hindsight the company may well consider that it would have been better to agree to Mr Ward attending, as requested, or at least to allow her to be accompanied by her acquaintance from the FBU. There is certainly no obligation of the company to provide a representative. We accept that Ms Ward found the whole business very confusing, and being told that she was entitled to be accompanied by a trade union representative gave her the impression that this was something which would be arranged for her if need be. The reality however is that it is an entitlement that only

extends to those who have joined a trade union in advance, paid their union dues, and so have the right to call on such assistance in their hour of need. These letters reflect the statutory right to be accompanied, which is a limited one, and although it might have been better explained or some more flexibility shown, we cannot say that it is outside the range of reasonable responses to go no further than they did.

72. Having adopted that position, the disciplinary hearing went ahead and she chose not to attend. That of course placed the company in a difficult position, or at least it did if they had been hoping that the whole business could be resolved without dismissal.

73. Looking at the substance of the allegations, it does contain some stinging criticisms of the company's decision to require her and her colleagues to come into work and the particularly biting comment to the effect that the CEO was doing so to put profit ahead of the safety of his staff. It appears to be plainly defamatory although he is not named. It is difficult to imagine circumstances in which it could simply have been overlooked. It called out for some sort of explanation and apology. The nearest that Ms Ward came to an apology is the reference in her letter of 27 March to being happy to write a letter of apology to the head of IT. That letter of 27 March was not of course received at the time but even so, an offer of apology is not a bargaining chip. It was open to Ms Ward at any time to apologise for those remarks and perhaps to offer to write to the CEO personally to apologise. Instead, sought to argue that her comments were essentially justified.

74. The main point she relied on at this hearing was her poor mental health, but she always stopped short of stating that this was the reason why she made these comments. Had she done so, the obvious follow-up remark would be an apology, but that has not been her position, and so her mental health difficulties have less relevance. In any event, when this happened, she had said little or nothing to her employers about her mental health. She raised it later, but always in the context of needing to delay the disciplinary hearing, not as mitigation for the offence.

75. One point which was emphasised on her behalf was that the disciplinary hearing went ahead without her grievance being resolved. We have to say that the grievance appears to be no more than another delaying tactic. It goes over many events which had already been the subject of grievances in 2015 and 2017, and which had been resolved. Its main thrust is that there was a culture of bullying and harassment at the company. It complained about other individuals being bullied and expected the company, by implication, to halt the disciplinary process while all this was investigated.

76. It might have been better then to appoint another manager for the disciplinary hearing, but there is no hard and fast rule in such circumstances. Generally speaking if a grievance is made about the decision maker, alleging that they will be biased or unfair in the disciplinary hearing it is obviously better for that grievance to be investigated first and in any event for another manager to be appointed. But this is

a whole swathe of allegations covering a period of years, most of them long before Ms Gover joined the company. In those circumstances it seems to us again that the decision to proceed with the hearing was within the range of reasonable responses.

77. If we are wrong about that, there was an appeal process, and a further opportunity for Ms Ward to attend and explain why she did not think it was appropriate for Ms Grover to have made a decision. That would also have been a further opportunity to provide some relevant context to the offence including, for example, the few practical details which we have since heard about the number of people who saw the post. Again, that opportunity was not taken, and the company accepts that by November 2020 she was disabled by reason of her mental health.

78. Finally, the remarks made on WhatsApp by TR do not seem to be a comparable case and we believe Ms Ward has misconstrued them. The main difference in the two cases is that TR attended a disciplinary hearing and apologised for the remark, and there is also the fact that this was not a post made to the people outside work.

79. In those circumstances we have to conclude that dismissal was within the range of reasonable responses and all of the other requirements for unfair dismissal were met.

80. There is a final issue concerning whether she did in fact commit a fundamental breach of contract. That requires the company to prove on the balance of probability that this was a fundamental breach, i.e. one going to the root of the contract. There is certainly a question about that given the indication by Ms Beardsworth that dismissal might not have followed had she attended the disciplinary hearing. However, she has not apologised, and in the absence of any apology this statement about the company and the CEO, which she did little to distance herself from afterwards, strikes us as going to the root of the contract.

81. For all of the above reasons the claim is dismissed.

Employment Judge Fowell

Date 21 July 2023