EMPLOYMENT TRIBUNALS

Claimant:	Mr S Chatterton		
Respondent:	First Travel Solutions Ltd		
Heard at:	Manchester Employment Tribunal (by CVP)	**On:**	22nd and 23rd July 2024
Before:	Employment Judge Thompson (sitting alone)		

REPRESENTATION:

Claimant: In person
Respondent: Miss Gooblar, solicitor

JUDGMENT

The complaint of unfair dismissal is not well-founded and is dismissed. The Claimant was not unfairly dismissed.

REASONS

Claims and Issues

1. This matter was heard before me over two days on 22nd and 23rd July 2024. I gave an oral judgment dismissing the claim on 23rd July 2024. My judgment dismissing the claim was sent to the parties on 24th July 2024. On 1st August 2024 the Respondent made a request for written reasons for my decision.

2. On 31st March 2023 the Claimant was dismissed by the Respondent on the grounds of gross misconduct. In this claim, the Claimant claims that he was unfairly dismissed.

3. This has been a remote hearing which has been consented to by the parties. The Claimant has represented himself. The Respondent has been represented by Miss Gooblar. I am grateful for the helpful manner in which they have both presented their respective cases.

4. I have had the benefit of a bundle running to over 400 pages that was agreed between the parties. I have been taken to the important documents in the course of evidence and submissions. References to page numbers in this judgment relate to the said bundle.

5. I have heard evidence from the following witnesses:

   (a) The Claimant.
   (b) Mrs Burland, the dismissing officer.
   (c) Mrs Turner, the appeal officer.

6. The issues for me to determine are as follows:

   (a) What was the principal reason for the dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?
   (b) Was the dismissal fair in accordance with s.98(4) ERA? That involves a consideration of these questions:
      (i) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
      (ii) If so, was that belief based on reasonable grounds?
      (iii) Had the Respondent carried out such investigation into the matter as was reasonable?
      (iv) Did the Respondent follow a reasonably fair procedure?
      (v) If all the above requirements are met, was it within the band of reasonable responses to dismiss the Claimant?

Findings of Fact

7. The Claimant worked for the Respondent as a co-ordinator from 7th March 2013 until the date of his dismissal on 31st March 2023.

8. On around 24th February 2023 the Respondent's attention was drawn to three WhatsApp messages that the Claimant had sent to his colleagues, Stuart Winstone and Lynn Allen. Two of the messages were in respect of the Claimant's line manager, Dominique Ainscow. There was also a third WhatsApp message referencing another colleague, Anthony Moore. I note

at this stage that the Claimant was not disciplined or dismissed for sending this third message.

9. In the message the Claimant sent to Mr Winstone, he referred to Ms Ainscow as a "*dozy bint*". In the message the Claimant sent to Ms Allen, he referred to a colleague as "*dumbo*". The Claimant accepts that the person he was referring to as "*dumbo*" was also Ms Ainscow, though she is not mentioned by name in the second message. Ms Allen forwarded to the Respondent copies of the three messages.

10. The Respondent appointed Sean Moore as the Investigating Officer. He interviewed Ms Allen on 25th Feb 2023. She confirmed that the Claimant had directly sent her the "*dumbo"* message and that Mr Winstone had forwarded her the second message referring to Ms Ainscow as a "*dozy bint*". Ms Allen was asked how the messages made her feel and she replied that the messages showed a lack of respect and that she believed they constituted bullying and harassment. The Claimant says that Ms Allen was not expressing how she felt in this response to Mr Moore but I do not find that to be the case. She was clearly giving her own impression of the messages.

11. The Claimant was invited to attend an investigation meeting on 4th March 2023 with Mr Moore. The Claimant had not been shown the messages at this stage but they were read out to him. He denied sending one of the messages but could not either confirm or deny sending the other. He stated that he would not "*leave himself open*". He also said that he was prepared to discuss the messages and his reasoning and to apologise if he had caused any upset.

12. Mr Moore prepared an investigation report and concluded that the matter should progress to a disciplinary hearing. Sophie Burland was appointed as the Disciplinary Officer, and she invited the Claimant to a meeting that eventually took place on 31st March 2023.

13. Before that meeting, Mrs Burland had spoken to Ms Ainscow, who by that point had seen the Claimant's messages. Ms Ainscow later provided a statement at page 207-208 in which she said that the comments were out of line and that she had lost trust in the Claimant.

14. At the disciplinary meeting, the Claimant admitted that he had sent the messages to Ms Allen and Mr Winstone. He also confirmed that he was referring to Ms Ainscow in the message to Ms Allen when he referred to *"dumbo"*. His defence appeared to be firstly that this was just how people speak, suggesting that the language was commonplace. He referred to

some other messages between himself and Mr Winstone. He also suggested that Ms Ainscow had agitated him to the point that he felt that he had to use such language to properly vent his frustrations.

15. Mrs Burland formed the clear impression that the Claimant did not feel like he had done anything wrong. He was unapologetic. He went into considerable detail in outlining to Mrs Burland the reasons why he felt like he had to use such unprofessional language to describe his manager. Mrs Burland's witness evidence summarises the Claimant's examples of conduct by Ms Ainscow which the Claimant said had agitated him.

16. Mrs Burland concluded that the Claimant's conduct breached the Respondent's bullying and harassment policy and also its equality and diversity policy. The policies themselves outline that breach of those policies can result in dismissal. She was not satisfied by the Claimant's argument in mitigation that he had been forced to vent his anger at Ms Ainscow in this way convincing. She found no evidence that Ms Ainscow was rude or unprofessional to the Claimant. She accepted that the messages that the Claimant highlighted between himself and Mr Winstone were not always appropriate but they were not indicative of derogatory comments being approved by the Respondent, as the Respondent was not aware of them. She considered the Claimant's 10 years of service and his previous record which included a previous dismissal and then re-engagement with a final written warning.

17. However, she decided that dismissal was the appropriate sanction in light of the insulting and discriminatory language. In particular, she considered the word *"bint"* to be a derogatory term for a woman and that it was simply unacceptable for a male employee to speak about a female employee in such a way. She was mindful of the Respondent's desire to recruit more women to the business and a concern that allowing male employees to use such language to describe their female colleagues was the exact opposite of the Respondent's values. She also had regard to the Claimant's lack of remorse.

18. The Claimant appealed against his dismissal. His appeal was dealt with by Mrs Turner. She held a meeting with the Claimant and decided to uphold the decision to dismiss him. She was the same individual who had overturned a decision in 2021 to dismiss the Claimant.

Applicable Law

19. The test for unfair dismissal is set out at section 98 of the ERA. Under section 98(1) it is for the employee to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a reason falling within section 98(2), i.e. conduct, capability, redundancy or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position in question.

20. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of the ERA, the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason. Section 98(4) of the ERA provides:

    "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
    - **(a) Depends on whether in 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."**

21. The test as to whether an employee acted reasonably is an objective one. The Tribunal has to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted: see **Iceland Frozen Foods v Jones [1982] IRLR 439**. The Tribunal must not substitute its view for that of the employer: see **Midland Bank plc v Madden [2000] IRLR 82**.

22. The correct approach to fairness is based on **British Home Stores v Burchell [1980] ICR 303**. The questions for the Tribunal are these:

    (a) Did the Respondent genuinely believe that the claimant was guilty of misconduct?
    (b) If so, was that belief based on reasonable grounds? This involves a consideration of the information available at the time of the dismissal and the appeal decisions.
    (c) Had the employer carried out such investigation into the matter as was reasonable? Relevant are the nature of the allegations, the position of the claimant and the size and resources of the employer.
    (d) Did the employer follow a reasonably fair procedure?
    (e) If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

Application of law to the facts

23. I now apply the law to the facts that I have found. I will deal with each of the issues that I identified at the outset.

What was the principal reason for the dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

24. The Claimant conceded at the start of the hearing that he accepted that the reason for his dismissal was conduct and that is a potentially fair reason. He did not suggest that there was any ulterior motive. I accept that conduct was the reason for the Claimant's dismissal.

Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

25. The second issue for me is whether the Respondent has a genuine belief that the Claimant had committed the gross misconduct. I am satisfied that the two witnesses I have heard from genuinely believed that the Claimant had committed the misconduct alleged. He had admitted to it in the disciplinary hearing. There was no challenge to this element of the case by the Claimant. Mrs Burland and Mrs Turner were both credible witnesses and I accept their evidence that they believed the misconduct had taken place.

If so, was that belief based on reasonable grounds?

26. This involves a consideration of the information available at the time of the disciplinary and appeal hearings. Once again, the Claimant did not raise any real challenge to this before me. The Claimant had admitted to the misconduct at the disciplinary hearing and at the appeal hearing.

Had the Respondent carried out such investigation into the matter as was reasonable?

27. There was an investigation meeting and as I have already indicated the Claimant admitted that he had sent the messages. The appropriate witnesses were all interviewed.

28. The first matter that the Claimant has raised as a challenge to the investigation and procedure is that he says the decision was pre-determined. The only evidential issue he has referred to in support of this is the email from Lise Laycock in HR dated12th April 2023. That email is at

page 327. The Claimant had sent Ms Laycock an email suggesting that he might need to interview the Respondent's customers and suppliers. Ms Laycock replied by expressing her concern about the Claimant contacting external parties and said that she was not sure what impact their evidence could have. The Claimant says this shows that HR was not neutral. I do not find that to be the case. This is no more than a reasonable observation made by one individual who was not making the decision. It is not evidence of pre-determination. Moreover, this email was sent after the Claimant had been dismissed and before the appeal. The Claimant accepted in his evidence that Mrs Turner who conducted the appeal was a fair person as she had overturned his earlier dismissal on an unrelated matter.

29. The Claimant also raises as part of the investigation his belief that Ms Allen had not been sent 1 of the 2 messages by Mr Winstone. He does not think that Mr Winstone would have done that as he was just exposing himself to criticism. Indeed, Mr Winstone was later dismissed for the messages he had sent to the Claimant. I have not seen any evidence to suggest that it was someone else who forwarded the second message to Ms Allen. This may be the Claimant's belief, but he has not substantiated it with any evidence. Even if that were the case, I do not think that it made any difference to the investigation or outcome. The fact remains that Ms Allen received the second message and was offended by it.

If all the above requirements are met, was it within the band of reasonable responses to dismiss the Claimant?

30. Here, my attention is drawn by the Respondent to the fact that the Claimant's conduct falls squarely within the Respondent's policy as a potential gross misconduct offence. The Claimant accepted that in cross examination. Summary dismissal was clearly one of the options open to the Respondent.

31. The Claimant's case is that his actions did not warrant dismissal for a number of reasons that I will address in turn.

32. Firstly, he says that he did not send the derogatory messages to Ms Ainscow herself but to his work colleagues. He says that this was therefore not bullying because that was not his intention and that if it was bullying it was by accident. Mrs Burland accepted in her evidence that the Claimant's conduct was not as serious as if he sent the messages directly to Ms Ainscow. However, I entirely accept as reasonable her point that Ms Ainscow did not have to be sent the messages by the Claimant for this to

be a breach of the Respondent's policy. The policy does not require the bullying to be done directly. Moreover, the Claimant was clearly undermining his Line Manager to his fellow work colleagues. Ms Allen had seen the message to Mr Winstone and was also sent a message directly from the Claimant. She had been offended which is why the messages were forward to the Respondent in the first place. Ms Ainscow had also seen the messages during the disciplinary process and was offended by them. I accept that the Respondent was reasonable to find that this was a breach of the bullying and harassment policy irrespective of whether the Claimant had intended to bully anyone.

33. Secondly, the Claimant argues that these kind of derogatory comments were commonplace and the words he used were part of everyday language. I found the Claimant's evidence on this point difficult to follow at times and often contradictory. He avoided answering direct questions at this hearing about whether he accepted that he had used derogatory terms to describe Ms Ainscow. For example, when he was asked by the Respondent's solicitor whether "*dozy*" was derogatory he said it was "*not the nicest of terms*". He avoided accepting that "*bint"* was a derogatory term for a woman, calling it a passing phrase and something he had heard used on Coronation Street. He was clearly trying to minimise the acceptance of any wrongdoing by using such phrases to describe his female line manager. However the Claimant tried to characterise his comments, it is my finding that Mrs Burland was entirely reasonable in her finding that the comments were not only offensive but also discriminatory insofar as the "*bint*" comment was directed at the Claimant's sex. There was no evidence that this type of language was acceptable in the Respondent's workplace and indeed Mr Winstone was also dismissed for using derogatory language in his text messages to the Claimant.

34. Thirdly, the Claimant says that another colleague, Mick, had used the "*f word*" towards him number of occasions when venting anger back in 2021 and Mick had not been disciplined. However, that was a different situation in that Mick reported himself and expressed remorse straight away. Mick's comments also did not have any discriminatory undertone. Mrs Turner gave four other recent examples of derogatory comments made by other employees that all resulted in dismissals. I have no reliable evidence that the Respondent's approach to dismissing for bullying/harassing/discriminatory comments is inconsistent. The four recent examples suggest the opposite - a consistent approach of dismissing employees if bullying is proven.

35. Fourthly, the Claimant says that he was justified in making these comments because of Ms Ainscow's actions towards him. He also says that the Respondent was wrong to say that he was not remorseful, as he had said at the investigatory hearing words along the lines of being willing to apologise. I will deal with both of these points as they overlap. The Claimant has tried to argue throughout that Ms Ainscow in effect deserved the criticism he had levied at her because she was incompetent at her job. He has spent much of this hearing (as well as the disciplinary hearing) giving examples of when he felt that Ms Ainscow was wrong in how she had handled a situation at work and/or that she did not know what she was doing. He was looking to blame the victim of his bullying for forcing him to talk about her in this way because she was in effect so incompetent. He did not seem to have any awareness of how highly unattractive an approach that was to the Respondent. My finding is that it is entirely reasonable the Respondent would not take kindly to this approach of blaming Ms Ainscow and see it as evidence of a lack of remorse. The Claimant did not during the disciplinary or appeal process show anything resembling an acceptance that his behaviour was wrong which is the first step the Respondent required before it would be convinced that he would not do it again.

36. Finally, the Claimant says he had never used words like that before and this was not his normal behaviour. It is my finding that such a plea may have had some force in it if the Claimant had shown at the disciplinary or appeal that he was sorry and understood why what he did was wrong. However, his approach at those hearings (very much like at this hearing) has been to dodge personal responsibility. Although the Claimant has referenced him apologising if he had caused offence in the investigatory meeting, he hardly made an unequivocal apology even then. Instead, he wanted to explain his reasons for using those words and apologise *if* he had caused offence. He had not by that point accepted sending one of the messages. His apology was not repeated at the later hearings - instead he launched an attack on his line manager's competency.

37. It is my conclusion that the Respondent's decision that none of these matters mitigated against summary dismissal was entirely within the reasonable band of responses. The decision to dismiss fell squarely within the reasonable range of responses that a reasonable employer in the Respondent's circumstances might adopt. This is conduct which the Respondent takes very seriously and which was very concerning for the Respondent.

Employment Judge Thompson

Date 13th August 2024
SENT TO THE PARTIES ON

Date: 16th August 2024

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/