EMPLOYMENT TRIBUNALS

Claimant: Paul Gregory

Respondent: P & O Ferries Limited

Heard at: Croydon

On: 12 & 13 September 2024; 14 & 15 November 2024

Before: Employment Judge Liz Ord

Representation:

Claimant: Frank Macklin (Lay Representative)
Respondent: Matthew Bignell (Counsel)

JUDGMENT having been given orally on 15 November 2024 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

The Complaints and Issues

1. The claimant complains of unfair dismissal.

2. The issues for the tribunal are:

   What was the reason or principal reason for the claimant's dismissal?

   If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? The tribunal will decide, in particular, whether:

   1.1. the respondent genuinely believed that the claimant had committed the misconduct;

   1.2. this belief was based on reasonable grounds;

1.3. at the time the belief was formed, the respondent had carried out a reasonable investigation;

1.4. the respondent followed a reasonably fair procedure;

1.5. the dismissal was within the band of reasonable responses.

Evidence

3. The tribunal had before it a documents bundle (281 pages) and a witness statement bundle (36 pages). During the course of the hearing it was provided with a selection of images of check-in booths, a selection of emails, investigation reports into the claimant.

4. On behalf of the claimant the tribunal heard evidence on oath from the claimant, Sara Carr, Frank Macklin and Davide Jepson.

5. On behalf of the respondent the tribunal heard evidence on oath from Janice Reeves and Jack Steer.

The Law

6. Section 98 of **Employment Rights Act 1996** provides, so far as is relevant:

> (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 such 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
>
> (3) …
>
> (4) whether the dismissal is fair or unfair
>
> (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.

7. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

8. It was held in **Abernethy v Mott, Hay & Anderson** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

9. **British Home Stores Ltd. v Burchell** [1980] ICR 303 held that "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in in all the circumstances of the case."

10. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, EAT.

11. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – (1) **Post Office v Foley** (2) **HSBC Bank plc v Madden** [2000] ICR 1283, CA.

12. In **J Sainsbury plc v. Hitt** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.

13. The tribunal has also had regard to case law referenced in the respondent's closing submissions.

Findings of Fact

14. (numbers in brackets are references to the hearing bundle; references to witness statements are in the form of WS/page/paragraph).

Background

15. The claimant was employed by the respondent since August 1996 as a Customer Services Representative working on the check-in booths. He had trained new starters for 15 years alongside Dave Jepson (Customer Operations Training Officer). The check-in booths consist of small confined spaces where staff work in close proximity to one-another.

16. The claimant was the workplace representative for the GMB union. It was an industrial environment and swearing was commonplace. The claimant had a clean disciplinary record and there was no evidence of any complaints against him.

Allegations

17. On 24 March 2023, not long after his start time of 7.00am, the claimant went to check-in booth 6 to deliver drivers' food vouchers. Karl Randall and Freesia

Pullen were working in the booth when he entered. Ms Pullen's long hair was not tied back contrary to company policy and the claimant reminded her of this. There is a dispute as to exactly what happened and I will return to this. The claimant had trained Ms Pullen and had needed to remind her previously about keeping her hair back.

18. At about 9.05am the claimant was asked to report to Nina Penn (Port Duty Supervisor), who told him Ms Pullen had complained about him tugging her hair. Ms Penn told the claimant to stay away from Ms Pullen and not to talk to her. She told him to go to booth 7 to work with Jolante Grottick and Izabela Pietruszewska.

19. When the claimant arrived at booth 7 with Ms Grottick and Ms Pietruszewska, Ms Pullen was there with Michelle Robinson. There is a dispute over what happened in the booth and I will return to this.

20. Later that day the claimant was called to see Ms Penn again, who told him that Ms Pullen had made an allegation that he entered booth 7 and whispered in her ear "you cock". Ms Penn passed the two allegations (pulling Ms Pullen's hair and whispering "you cock") on to Juliette Medhurst (Customer Services Manager). The claimant was suspended that afternoon.

Investigations

21. The two allegations were investigated. Damien Parker-Gorman (Port Duty Manager and the claimant's line manager) was the investigating officer, supported by Simon Goodsell (Port Duty Supervisor). Mr Parke- Gorman wrote three investigation reports, all recording the following pertinent matters from the interviews:

22. **Nina Penn,** who said that Ms Pullen told her Mr Gregory had put his hand on her head and grabbed her hair and pulled it quite hard, causing Ms Pullen some pain and discomfort.

23. Ms Penn then spoke to Mr Gregory, who looked visibly shocked at the accusation, and told her it had been taken out of all context. He told her he reacted to a cheeky comment Ms Pullen had made by gently tugging her hair, but there was nothing in it. He said he thought he had a good rapport with Ms Pullen as he had completed her training and got on with her so well. Ms Penn felt the claimant was very genuine and remorseful, and shocked that he had caused Ms Pullen discomfort and stress by his playful action.

24. With respect to the second matter, Ms Penn said that Ms Pullen told her Mr Gregory had come up close to her, invading her personal space, and lent towards her head and whispered in her ear "You Cock".

25. **Karl Randall,** who was in the booth and positioned in close proximity to the claimant and Ms Pullen at the time of the alleged hair pulling incident, said he did not see or hear anything.

26. **Freesia Pullen** said Mr Gregory was chit chatting with Karl Randall and then he grabbed a handful of her hair in his hand and yanked it downwards.

27. She said that after lunch she was in booth 7 with Michelle Robinson. Izabela Pietruszewska and Jolanta Grottick entered the both and then Mr Gregory entered. He followed her up and down the stairs and approached her very closely and whispered in her ear "what a cock".

28. **Michelle Robinson** said she recalled Mr Gregory walking up and down the stairs a couple of times and he appeared agitated.

29. She did not say that he was following Ms Pullen and she did not say she witnessed him going up close to her or whispering to her.

30. **Victoria Davies s**aid she witnessed Ms Pullen leave booth 6 in a distressed state. She'd heard the claimant calling Ms Pullen a "fucking idiot" and a "cunt" in a joking manner on previous occasions.

31. **Paul Gregory** (accompanied by Frank Macklin - GMB Regional Organiser) said he had jokingly touched/pulled Ms Pullen's hair in a playful manner, which he had done in the past. It was when he was having a playful/banter conversation with her and Karl Randal. Ms Pullen seemed fine and not visibly bothered by his action.

32. He said he had always had a good working relationship with Ms Pullen. He felt Ms Pullen was already on edge that day as she was rostered to work with Izabela Pietruszewski, who she had asked not to work with.

33. He explained that Ms Pullen often had her hair down and not up as it should be. The gesture of pulling it was a joke relating to her hair condition on the day. He said he felt devasted that he had upset her.

34. With respect to booth 7, the claimant said he stayed downstairs whilst Ms Pullen and Ms Robinson walked down the stairs and straight past him with no interaction between him and Ms Pullen. He denied whispering "You cock" and said he would never speak to her that way. He was mindful of the instruction not to speak to her and therefore did not do so.

35. Mr Parker Gorman noted throughout the interview that Mr Gregory was struggling to comprehend the allegations around him and that it seemed he was in shock. Mr Gregory spoke passionately about his working relationships with all staff members, and he was still coming to terms with having upset Ms Pullen by his playful gesture.

36. Izabela Pietruszewska and Jolanta Grottick**,** who were in booth 7 at the time of the alleged incident, were not interviewed.

37. Mr Parker-Gorman produced 3 separate investigation reports.

38. In his first report (56-71) dated 22.4.23 (in the heading) and 23.4.23 (at the bottom) Mr Parker-Gorman concluded:

    1- Paul Gregory had pulled/tugged Freesia Pullen's hair;

    2- With 3 possible witnesses in the booth when the alleged incident took place, no-one heard or saw Paul Gregory approach Freesia Pullen. There was insufficient evidence to conclude the alleged whispering took place.

39. He recommended the issues not be taken forward, but that the claimant attend the company's Equality, Diversity and Inclusion programme and undertake mediation with Ms Pullen.

40. This report was not disclosed to the claimant.

41. The claimant maintained that when the investigation was concluded, Mr Parker-Gorman and Mr Goodsell met with him and Frank Macklin to discuss the findings. He said that Mr Parker-Gorman assured him, in front of the others, that he had concluded the investigation and that the claimant's job was safe and he would get back to work as soon as possible. Mr Frank Macklin corroborated this evidence. Both came across as credible and reliable witness. Therefore, I accept their evidence and find that this is what happened.

42. During the course of this tribunal hearing, it became apparent that there was relevant correspondence that the respondent had not disclosed and was not in the bundle. I asked for it to be produced and the respondent provided several emails as follows:

- 24.4.23 from Juliette Medhurst sending the report which had two dates 22.4.23 (heading) 23.4.23 (at bottom) to Jozefine Cox.

- 27.4.23 from Juliette Medhurst to Jozefine Cox saying "Damien is in tomorrow so will speak to him then about conducting further interviews".

- 28.4.23 from Juliette Medhurst to Mr Parker-Gorman saying "As discussed these are the points that need further investigation with FP" followed by a list of questions.

- 2.5.23 from Mr Parker-Gorman sending another version of the report that had two dates 22.4.23 (heading) 23.4.23 (bottom) to Juliette Medhurst (Cc Jozefine Cox) and included additional interviews. This time there were three points of conclusion, two as before and a third, namely that Paul Gregory was in booth 7 following the roster Nina Penn had issued. Mr Parker-Gorman made the same recommendations as previously.

- 10.5.23 from Mr Parker-Gorman sending yet another version of the report with the additional interviews to Juliette Medhurst (Cc Jozefine Cox). This report was dated 9.5.23. This time there were four points of conclusion. Point 1 had been expanded to conclude that Mr Gregory had physically assaulted Fresia Pullen on 24.3.23 and on several other occasions. Point 2 had completely changed to conclude that Mr Gregory had intimidated Fresia Pullen. Point 3 was the same as before, and a new point 4 concluded the Paul Gregory had sworn and used offensive language towards Fresia Pullen on occasions in breach of the Dignity in the Workplace policy. There was now a different recommendation, namely, that the issues in the report be taken forward to a disciplinary hearing.

43. With respect to the additional interviews, Mr Parker-Gorman re-interviewed Freesia Pullen, and also interviewed Michelle Clithero (Port Duty Supervisor). The claimant was not re-interviewed and had no opportunity during the investigation to comment on the additional information. He was given no right of reply.

44. Jolante Grottick and Izabela Pietruszewska were not interviewed either.

45. The second and third investigation reports record the two additional interviews. The most relevant points from these interviews are as follows:

- **Freesia Pullen's 2nd interview**

She said Paul Gregory had never touched her hair before but often touched her hands, shoulders, back and arms. She spoke about having independent counselling and now feeling stronger mentally. She referred to Mr Gregory often calling her a "dumb fuck" if she made a mistake. She stated her counselling highlighted that she needed to work with positive people instead of people filled with negativity. Therefore, she asked to be moved away from Izabela Pietruszewska. With respect to the claimant, she said she felt she had been assaulted and this caused her stress and anxiety.

- **Michelle Clithero's interview**

She recalled Fresia Pullen asking not to work with Izabela Pietruszewska on 24.3.24. She remembered Ms Pullen saying her counsellor had told her that working with positive people would help her mental state. She also said that Ms Pullen had spoken to her on a couple of occasions asking not to work with Paul Gregory. She recalled Ms Pullen saying that Mr Gregory reminded her of her dad, who was a trigger point for her mental health issues.

Disciplinary

46. The claimant was invited to a disciplinary hearing on 1.6.23 chaired by Janet Reeves. The claimant's evidence is that Janet Reeves did not like him or the union and he believed she was biased. She had also had some early involvement with the case. Consequently, he asked for a different chair. This was refused.

47. The claimant was only given the third investigation report (dated 9.5.23). He was unaware of the other two reports at this stage.

48. The disciplinary hearing was minuted, although the claimant was not given an adequate opportunity to review the minutes. He was accompanied at the hearing by Frank Macklin.

49. The minutes record (122) the following pertinent points from the claimant's evidence:

- Touching is something that had always been done and it wasn't done in an inappropriate way. He explained that he'd since had a conversation with Dave Jepson and he could see now that he shouldn't be doing it.

- He raised the fact Ms Pullen said he was like her dad and she didn't want to work with him, and that he'd not previously been told there was an issue. He suggested that he and others needed protecting from Ms Pullen.

- When asked about the bad language, Mr Gregory said it was a lie and neither Ms Pullen nor Ms Davies had ever said anything to him about it. He said people use offensive language in the mess room. It wasn't malicious. Ms Pullen and Ms Davies also used that language. There's lots of that language between groups of people. He wouldn't call anyone a "cunt" at work.

- He said he'd been a loyal employee since 1996. He'd never been accused of inappropriate behaviour. He'd been training people for 15 years and never had a complaint. The accusations were devastating for him and he was recovering from heart surgery.

50. Frank Macklin commented (128) that, what came across in buckets was that Freesia Pullen was not well and had mental health issues as she'd been undergoing counselling.

Outcome of disciplinary

51. The disciplinary outcome letter (8.6.23) shows that the claimant's employment was terminated with effect from 9.6.23 for the following reasons:

- Breach of the P&O Dignity at Work policy.
- Inappropriate conduct towards a colleague - Touching a colleague's shoulder and hair.
- Intimidation of a colleague.
- Failure to follow a reasonable management instruction.
- Using offensive language towards a colleague.

Appeal

52. The claimant appealed (188). The appeal hearing was held on 11.7.24 and was heard by Jack Steer (Director of Port Operations) assisted by Phil Hills (People Director).

53. In his appeal letter the claimant complained about Ms Reeves chairing the disciplinary, not having enough time to read and amend the disciplinary minutes before be was dismissed, and the respondent failing in their duty of care towards him by not telling him that Ms Pullen had an issue with him. If he had known he would have been able to adjust how he interacted with her.

54. The appeal meeting was held on 11.7.23 (219). Mr Gregory attended with Frank Macklin.

55. He asked for Damien Parker-Gorman and Simon Goodsell to be present as witnesses so that they could be questioned about Mr Parker-Gorman's previous remarks and assurances. His request was denied.

56. The claimant told Mr Steer that he was interviewed on 20 April by Damien Parker-Gorman, and Mr Parker-Gorman told him the investigation was over and he would get the claimant back to work as soon as possible. He recalled Mr Parker-Gorman saying it was his investigation and it was closed.

57. Mr Steer interviewed Mr Goodsell on 17.7.23. Pertinent parts of the interview record show:

    - He denied that the claimant had been told this. He said Mr Parker-Gorman made a decision and recommended mediation. There was an ongoing conversation with Juliette and Jozefine. Mr Parker-Gorman resubmitted his report after further conversation and speaking with his son. Mr Parker-Gorman initially felt meditation was appropriate and said "let's move on". Then he spoke to others.

58. Mr Steer interviewed Mr Parker-Gorman on 17.7.23 (230). Pertinent parts of the interview record show:

    - When asked about the conversation with the claimant, Mr Parker-Gorman did not answer directly. He said it wasn't in the notes.

    - When asked why he re-interviewed Freesia Pullen, he said it was recommended by Juliette and Jozefine.

    - He confirmed his recommendation was for Mr Gregory to come back to work and have mediation with Ms Pullen.

    - When asked whether he was pressured to change his report he said "By peer pressure, from my son."

59. The disciplinary appeal outcome letter dated 31.7.23 (265-268) shows that the dismissal was upheld.

Discussion and Conclusions

What was the reason for the dismissal?

60. There is no dispute that the reason was conduct.

Did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant?

Procedure

61. The procedure was seriously defective.

62. Initially, the investigating officer, Mr Parker-Gorman, came to a balanced, reasonable decision not to take the matter any further, resulting in a recommendation of mediation and training.

63. Although he conveyed this decision to the claimant, he then went back on it.

64. He succumbed to unreasonable peer pressure to obtain more evidence and change his recommendation to one of disciplinary action. He let others decide for him what the outcome should be. Others, who were not directly involved in the investigation and had not heard the evidence. That was totally unreasonable on both parts and rendered his conclusions unreliable and unsafe. It was a grave mistake to go forward with this amended report.

65. Furthermore, it is concerning that the respondent did not disclose the emails and enclosures demonstrating the pressure Mr Parker-Gorman was put under to change his report. They disregarded their obligations to disclose and only produced this evidence when ordered to do so by the tribunal.

66. Moving on, Mr Parker-Gorman obtained new evidence and did not afford the claimant an opportunity to comment on it.

67. Potentially important witnesses were not interviewed.

68. This was not an investigation which could be said to be within the bands of reasonableness. On the contrary, the procedure it followed was unreasonable.

69. The flawed investigation, in turn, caused the disciplinary to be flawed. Ms Reeves' decision was influenced by the amended investigation report, which had been fatally subjected to peer interference. Consequently, the error was compounded.

70. Furthermore, there was a perception that Ms Reeves was biased. Whether or not this was the case, it would have been reasonable to have somebody else chair the disciplinary. The respondent is a large company and would have been able to draw on others who were more independent.

71. The appeal process did not rectify the mistake.

72. Despite the claimant reasonably requesting that Mr Parker-Gorman and Mr Goodsell be called to the hearing to give evidence and be questioned, this was denied. Calling them would have given Mr Steer a better insight into the situation. Simply interviewing them outside the hearing, without giving the claimant the opportunity to question them, provided a lesser quality of evidence.

73. Therefore, taking the whole of the process into account, it was not within the band of reasonable responses.

Substantive matters

74. The evidence demonstrates that nobody witnessed either of the alleged incidents.

75. With respect to the first allegation, if the hair pulling had occurred as suggested by Freesia Pullen, Karl Randall would have remembered something. It appears, however, that it was so inconsequential that he remembered nothing. There is nobody else who could have seen the incident besides Freesia Pullen, and the claimant who was honest and open about his actions.

76. As regards the second allegation relating to booth 7, the only third party evidence was from Michelle Robinson, who said the claimant went up and down the stairs in an agitated manner. This is very flimsy evidence from which to draw any conclusions.

77. With respect to the new 3rd allegation about approaching Fresia Pullen, the evidence demonstrates that the claimant went to booth 7 on the instruction of Nina Penn. The respondent sent him there themselves. He did not go on his own volition. In any event, there is no 3rd party evidence to suggest that he spoke to Ms Pullen.

78. With respect to the new 4th allegation about swearing, it was common knowledge that the culture of the workplace was one of an industrial environment where swearing was commonplace amongst staff, including managers. If the claimant swore, he was only doing as others did on an ongoing basis.

79. The claimant was a loyal employee, who had worked for the respondent for around 28 years with a clean disciplinary record and no evidence of complaints.

80. It was known that the complainant, Ms Pullen, had mental health issues, as evidenced by reference to her counselling sessions. It was also known that she disliked the claimant because he reminded her of her father, who she had problems with. This ought to have raised alarm bells with the respondent.

81. However, it appears that the respondent gave undue weight to what a complainant with mental health issues and a bias against the claimant, alleged. They failed to give proper weight to the claimant's account, which was supported by his openness, and a clean record spanning many years. They went to great lengths to persuade the investigating officer to overturn his perfectly reasonable findings to produce a report that better suited their purpose.

82. Under these circumstances, the respondent's finding of gross misconduct cannot be said to be based on reasonable grounds.

Conclusion

83. The dismissal, both substantively and procedurally, was not within the band of reasonable responses. The respondent did not act reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss. The dismissal was unfair.

_____

Employment Judge Liz Ord

Date 4 December 2024

Notes

Public access to employment tribunal decisions
Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.