



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MR SCOTT SINCLAIR

RESPONDENT
V NEATH PORT TALBOT COLLEGE

HELD AT: CARDIFF ON: 19 MAY 2017

BEFORE: EMPLOYMENT JUDGE N W BEARD
(SITTING ALONE)

REPRESENTATION:
FOR THE CLAIMANT:

MR HOWELLS (COUNSEL ELIPS
VOLUNTEER)

FOR THE RESPONDENT:

MR MARTIN (COUNSEL)

PRELIMINARY HEARING JUDGMENT

The claimant's claim of unfair dismissal is dismissed as having no reasonable prospect of success.

REASONS

Preliminaries

1. I indicated at the outset of the hearing that I had children who are current students at the respondent college. I explained the courses that they undertake were not related to the department in which the claimant taught. I allowed the parties time to consider their positions and neither raised any objection to my hearing this matter. I considered that, in all the circumstances, a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that I would be biased. Therefore the grounds did not exist for me to recuse myself from hearing the application.
2. The claimant did not attend in person but provided instructions to Mr Howells of counsel through the claimant's wife attending on his behalf. Mr Howells provided his service voluntarily through the auspices of ELIPS and the tribunal are extremely grateful for the assistance provided to

unrepresented parties by that organization and extend that gratitude to Mr Howells personally on this occasion. The respondent was represented by Mr Martin of counsel.

3. The tribunal was provided with a bundle of documents running to 645 pages, although I was only directed to a minority of those documents. Both parties indicated that this preliminary hearing could be decided without the need for evidence. The matter has been listed to decide whether the claimant's unfair dismissal claim has no or little reasonable prospect of succeeding before a tribunal at a substantive hearing.

The Relevant Matters

4. The claimant was dismissed on the grounds of conduct. There are verbatim transcripts of the investigation meeting and the disciplinary and appeal hearings. There are detailed reports of the investigation results and the disciplinary conclusions and an appeal outcome letter. None of the content in these documents is in dispute.
5. The claimant was disciplined following a complaint made by a colleague. The following facts are salient.
 - 5.1. The claimant had made complaints about this colleague.
 - 5.2. This colleague was reported for a serious matter and mediation was arranged which was wholly unsuccessful. The claimant contends that the complaints raised by this colleague were motivated by the claimant reporting the colleague.
 - 5.3. The colleague had made covert audio recordings of the claimant which were used as part of the disciplinary process.
 - 5.4. At investigation and at the disciplinary hearing the claimant had denied that at least some of the recordings were of his voice and alleged manipulation of the tapes. However, at the appeal hearing, the claimant admitted that he had made the recorded comments and accepted that they were inappropriate.
 - 5.5. The claimant contended before the appeal hearing that his use of some of the derogatory comments were based on a specific colloquial use of words and not the generally attributed meaning of those words.
 - 5.6. In addition, the claimant contended that the equality training that he had received was not such that it dealt with the use of language such as this.
 - 5.7. At the disciplinary hearing the respondent upheld all the allegations against the claimant. At the appeal hearing this was modified, one allegation was not upheld and there was a limited acceptance of the claimant's explanation that he had used language in a specific way in respect of one word.
 - 5.8. The claimant argued at appeal that the recordings used were out of their context. That context was that he was using them in private conversations with those he considered friends (albeit colleagues and whilst on the respondent's premises).
 - 5.9. The claimant had undergone equality training provided by the respondent.

- 5.10. The words used by the claimant were clearly insulting of students, as the claimant accepted. The respondent considered some of the language racist and homophobic. The language is such that the respondent would be entitled to draw that conclusion.
- 5.11. The claimant's contract and the respondent's policies clearly outline that such derogatory language should not be used and specifically indicates that race and homophobic harassment would not be tolerated and might lead to dismissal.
- 5.12. The claimant was dismissed for use of that language.
6. The claimant's contention in the ET1 is that the investigator was biased. However this was explained to be much more nuanced by Mr Howells. His submission was that the claimant was actually indicating that the respondent could not see past the everyday use of the language used by the claimant to his idiosyncratic use. On that basis the bias was in not being able to attribute any other meaning to the words used. I reject this interpretation, at the investigatory and disciplinary hearing stage the claimant was denying the use of the language. At the appeal stage where the respondent heard his submission to that effect they accepted his proposition in part by recognition that at least one phrase used might have had an idiosyncratic meaning specific to the claimant.
7. Mr Howells also contended that the claimant's argument includes an inconsistency of treatment. This could be advanced on the *Hadjiannou v Coral Casinos Ltd: EAT 1981* or on the basis that the decision to dismiss was unreasonable because of an expectation on the part of the claimant related to the generality of treatment of staff in similar circumstances (the claimant was a trade union representative and had represented others in circumstances where insults to students were not met with dismissal). However Mr Howells was not in position to provide any level of detail on the similarities or otherwise of the circumstances of those instances nor was any such detail contained within the ET1.

The Law

8. I am to apply the Employment Tribunal Rules of Procedure 2013 and, in particular, rule 37 which in so far as relevant provide:
- 37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
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9. I begin by reminding myself what function I undertake at this stage. I am required to decide that, in relation to the various statutory requirements, the claimant has either no reasonable prospect of establishing his claims.

I take account of what was said in *Ezsias v North Glamorgan NHS Trust* [2007] 4 All ER 940 by Maurice Kay LJ

"(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success"

That test relates to the question of whether there is "no" reasonable prospect of success it is an indication that there is a very substantial hurdle to cross for strike out to be made, indeed as is often said depriving an individual of an opportunity to present a case in full is a draconian step. In terms therefore any prospect of success which is not "merely fanciful" is sufficient for me to refuse to strike out.

10. I am clear that just because there is a dispute of evidence I am not prevented from deciding in appropriate circumstances that the case has little prospect of success. However, such a case does need to be very clear cut. I am also aware of the caution I should exercise in dealing with a preliminary issue. In this regard I keep in mind the Judgment of Lord Hope in *SCA Packaging Ltd v. Boyle* [2009] UKHL 37; [2009] IRLR 746

It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly..

11. I have to consider therefore whether applying the law related to unfair dismissal no reasonable tribunal could conclude that the claimant was unfairly dismissed. In considering the claimant's claim of unfair dismissal I remind myself of the words of His Honour Judge McMullen QC in *Mitchell v St Joseph's School UKEAT/0506/12* where he made it clear that an Employment Judge, has to be careful to remember that the law remains as it was it is not the subjective view of the employment Judge that is important, what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition is set out very clearly in *Turner v East Midlands Trains [2013] IRLR 107:*

*For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot re-canvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the *Wednesbury* mast.*

12. Guidance has been given to Tribunals in dealing with misconduct cases beginning with that given in *Burchell v British Home Stores [1978] IRLR 379* as updated in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; ICR 17*. Which guides tribunals to consider the following: whether the respondent has a genuine belief in the misconduct; whether that genuine

belief is sustainable on the basis of the evidence that was before the respondent; whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case. Finally I must consider whether, in short, the punishment fits the crime, in other words whether dismissal was a reasonable decision to take given the genuine belief and the evidence upon which it was based. The examination the issue of reasonableness is based on the band of reasonable responses; that range includes the lenient and the harsh but fair employer.


Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also the band of reasonable responses. Therefore, the process a tribunal must engage in is to look at the evidence as it was before the respondent at the time of the decision, and consider whether that evidence is sufficient for a reasonable employer to hold the belief in the claimant's misconduct. Then to ask whether the investigation was reasonable in a ***Sainsbury*** sense.

Analysis

13. The question for me therefore is whether it is merely fanciful to conclude that a tribunal properly instructing itself as to the law could consider this dismissal to be unfair.
14. Could a tribunal conclude there was no genuine belief on the part of the respondent? The tribunal must consider the entirety of the disciplinary process and at the appeal the claimant admitted the conduct in my judgment there is no possibility of such a conclusion.
15. Could the tribunal conclude that insufficient investigation (within the band of reasonableness) had taken place? The respondent gathered the evidence, had the claimant respond to the evidence, interviewed the witnesses requested by the claimant and challenged the complainant on her account. In my judgement no tribunal properly dealing with the matter could conclude that this fell outside the range of reasonable investigations.
16. Could a tribunal conclude that the dismissal was substantively unfair? The only two possible bases advanced is that the claimant was treated inconsistently that others were treated more leniently and that the claimant's mitigation was not properly assessed because the respondent did not listen to him on the specific personal use of language.
17. Dealing with the issue of inconsistency of treatment. I have been taken to no evidence that the claimant raised this as an issue during the disciplinary process. In addition, it is clear that the respondent's policy condemns such conduct as the claimant admitted and considers it to be serious. The claimant has not set out such a difference of treatment in his ET1 complaint, and has had notice of this hearing for some considerable time; no application to amend was made. The first basis for inconsistency is the specific inconsistency, ***Hadjiouannou*** makes it clear that this can only succeed where the circumstances are strikingly similar, no evidence

or even alleged facts have been advanced which would allow me to conclude that this a possible limit on the respondent's decision. In respect of the general culture, again no basis in evidence or alleged specific facts have been drawn to my attention. The only thing I have been told is that in general terms others had not been dismissed for insulting language to students. On either basis for inconsistency advanced by the claimant it appears to me that I could not say that a tribunal, properly instructing itself as to the law, could conclude that a decision to dismiss was outside the band of reasonable responses.

18. On that basis, in my judgment, this is one of those rare cases where a strike out is the appropriate step. The prospect of the claimant succeeding is a fanciful one. To order a deposit would in my judgment be to abdicate my responsibility in a case which is clear cut. On that basis, the claimant's claim is dismissed as having no reasonable prospects of success.



Employment Judge Beard

Judgment sent to Parties on
1 June 2017



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For The Tribunal Office
