EMPLOYMENT TRIBUNALS

Claimant: **Mr L Fitzpatrick**

Respondent: **Adare Sec Limited**

Heard at: **Leeds** **On:** **8 and 9 November 2017**

Before: **Employment Judge Wade**

Representation
Claimant: Mr Healy (counsel)
Respondent: Mr Gosling(counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 9 November 2017, the written record of which was sent to the parties on 20 November. A request for written reasons was received from the Respondent on 9 November 2017. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a Judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 9 November 2017 are repeated below:

JUDGMENT

1 The claimant's unfair dismissal complaint is well founded and succeeds.

2 The Tribunal makes no determination of remedy.

BY CONSENT the parties have agreed that the respondent shall pay to the claimant the sum of £5000 within twenty one days (by 30 November 2017).

REASONS

Introduction

1. Mr Fitzpatrick complains of unfair dismissal in which he asserts that the reason for his dismissal was his trade union activities, namely that he was a representative for Unite at the Respondent's Huddersfield site. Those complaints were subject to case management orders (page 31 of the bundle): it was put front and centre that one of the grounds pursued was in relation to the conduct of the disciplinary investigation.

Evidence

2. I have had a very full bundle of documents and oral evidence of course from Mr Fitzpatrick. On his behalf I also took as read a statement from Mr Daly, a trade union colleague who was involved with an earlier disciplinary matter. I heard on behalf of the Respondent from Ms Sangha, who was involved in the investigation, and from Mrs Taylor who dismissed the claimant and Mr Neary, the General Manager who heard his appeal.

3. I considered both the Claimant and Mrs Taylor to be witnesses of truth. That is, that they were straightforward and honest in their evidence to the Tribunal. That is not the same as regarding everything they say as reliable, because memories are fallible, for whatever reason, but that was my impression and assessment of them, they being the principal witnesses in the case.

4. I made the same assessment of Ms Sangha and Mr Neary generally, but I did not accept Ms Sangha's reason for the suspension of the claimant, in comparison with others suspended. Whether anything turned on that is another matter. I also did not accept Mr Neary's explanation to the Tribunal of the language he used in the February 2016 emails. I do not consider that the words were capable of bearing the meaning that he put on them today, and I consider that at the time he intended something more draconian than "training" for the union. Again, whether that influences my conclusion is another matter.

5. In order to resolve conflicts of fact, which have been fairly few, I have done that which Mr Gosling encouraged me to do, which is to take the relevant documents in full context and to read them. I have taken some time to do that which partially explains why I am later than I had hoped with this Judgment.

6. On specific occasions I have placed much more reliance on the contemporaneous documents than I have on the witnesses' oral evidence: memories are fallible; that does not suggest that anybody has been other than perfectly straight forward about these events.

Findings of fact

7. The finding of fact that I have made, taking these comments into account, are as follows.

8. The Claimant commenced employment in 2005 as a warehouseman. The Respondent has four sites, the largest in Huddersfield with around 300 people with an HR department of some four or so people, and an HR director, Ms McKee.

9. In 2013 the Claimant became a union representative in the workplace for Unite. He wasn't given any training at that time about his role. He attended

meetings with Mr Neary, who was then the Operations Director. Mr Neary was the ultimate boss of the operations in which the Claimant worked. They had no issues with each other and they discussed all manner of things in meetings with the union over that period.

10. In February 2016 Mr Neary and Ms McKee became aware of an allegation from a Mr Qudah, who was a team leader in the warehouse, that the Claimant was allegedly drumming up union business by asking people if they considered Mr Qudah to be a bully. There then followed an investigation by a Mr Davies and that took place on the morning after Mr Davies had sought advice from Ms McKee. (That was a finding I made from the contemporaneous emails that were in the bundle before me rather than the oral evidence).

11. Mr Davies reported to Mr Neary. As a result of his investigation there was evidence that both the Claimant and a colleague had made workplace remarks related to race and religion and that those remarks had been heard by a Miss Smith and a Miss Khaliq.

12. Mr Qudah said (at page 154 about the claimant): "when he made the complaint that he had made as a union representative his actions towards me are unacceptable and I would like to put forward a formal complaint with regards to the above as it is not just affecting me, it is also getting to the girls that he is forcing them to say yes he is bullying, harassing as is the way he is coming across he wants them to say that."

13. Mr Neary's management response, seeing the nature of the complaint was: "if this turns out to be true we are going to have a serious issue with the union, I don't mean in a bad way, I mean that I will take them to task in the worst way over this root and branch. The thing is Lee [the claimant] is just about daft enough to fess up..".

14. Those emails were copied in to a Ms North who was then a member of the HR department.

15. Surprisingly in their oral evidence neither Mr Neary nor the Claimant could tell me what had happened as a result of that formal complaint in February 2016.

16. At page 145 of the bundle this matter was discussed during the appeal hearing. There was a point at which the Claimant's union representative said that the Claimant needed to expand and the Claimant was then recorded as saying: "firstly had union meeting with management all talking about bullies. I had a few words with the team. When I went back to the workstation Debbie and Andy commented that there had been "a right do". Two days later Sue North HR came to me with a letter. When I read it I asked if I was representing. Sue said no it is you. I asked what it was about and she said something had been said. I fetched Andy Greaves to the meeting. Somebody had overheard me saying something about being racist, I said no. An investigation occurred. Went on for three weeks with no word. Then Steve came up to me and said he had good news, that the persons making the allegation had dropped it. I went to Sue and she said Steve had told her not to say anything about it".

17. He was then asked in the appeal hearing by Mr Neary whether these events related to "TU activity"? and the Claimant said yes. Ms McKee replied "no information regarding this so difficult to comment". Mr Neary said: "when an individual decides not to pursue can't force them to do anything about it". The Claimant said: "see Stevie just told me when someone was at the side of me".

18. On balance, despite the oral evidence, I have concluded that there was an investigation carried out at that time. It involved HR: Ms McKee had knowledge of it; Ms North had knowledge of it; and it was resolved because at some point the allegations were withdrawn; nothing more was done.

19. Then we come to September 2016 when the Claimant was suspended over an allegation that he had asked pay roll to "clock him in" at 6am, when in fact he had arrived at 6.20am. As a result of disciplinary proceedings his union representative asked for the benefit of the doubt to be given, because he was not usually late and if anything, it was a miscommunication. That is a summary of the hearing that took place. The benefit of the doubt was given and the Claimant was given a verbal warning for failing to follow procedure.

20. In early November 2016 an investigation then took place into a grievance by a female employee, Ms Sykes, who had returned from maternity leave and the gist of that grievance was on the grounds of bullying by Mr Qudah and other issues. Mr Davis did not investigate that grievance although it arose in his operations department, but a manager from Mrs Taylor's customer services department did.

21. Faced with those allegations Mr Qudah was not suspended. Eight or so employees were interviewed as part of the investigation. The outcome to that investigation was given on 18 November to Mr Qudah and to the complainant, Ms Sykes. The grievance of discrimination was not upheld, but there was a finding that Mr Qudah had made inappropriate comments, or certainly one inappropriate comment, and other findings about his management style. The solution to that was said to be that he would undergo training.

22. Before that outcome was delivered Mr Qudah had approached his line manager about the Claimant stirring up Ms Sykes' grievance in the first place, and making comments about his reputation and religion. He wanted to make his grievance formal and Mr Qudah and his manager telephoned Ms Sangha and were given advice about how to present a grievance. It was presented formally on 18 November. Mr Qudah included in that grievance that the Claimant had allegedly told three colleagues about the Sykes grievance, and said that "his [Mr Qudah's] religion allowed him to treat women like shit and make them cry".

23. When interviewed Mr Qudah repeated the information that was in his grievance and on examination of the documents it is apparent he signed the notes of that interview on each page, or initialled them. His evidence was, however, about what others had told him: he had not heard the Claimant make derogatory comments.

24. Shortly after that interview with Mr Qudah the Claimant was suspended (on 2 December 2016) in respect of those allegations.

25. The three colleagues that had been mentioned by Mr Qudah were interviewed later on in December. Ms Smith didn't want her interview to be used and she discussed those reasons with Ms Sangha, but she confirmed in her telephone interview that the alleged comment above had been made to her by the claimant. Ms Khaliq and Ms Kilner were not asked to sign their interview notes, but in the interviews with Ms Sangha they too confirmed that they had heard the alleged comment by the Claimant.

26. The style of the interviews was that Mr Davis, the investigating officer assisted by Ms Sangha, read out Mr Qudah's grievance to the interviewees before

asking them to comment. Ms Sangha then made notes of what was said and the meetings concluded.

27. The result of the Davis/Sangha investigation was that a disciplinary hearing was convened, delayed and then took place eventually on 21 December with Mrs Taylor.

28. On my findings I have accepted Mrs Taylor's evidence that she knew nothing about the February emails/events.

29. The allegations for the hearing before her were summarised for the Claimant in very comprehensive documentation, and it appears that the discussion part of the hearing was recorded and then those notes were typed up.

30. The Claimant, in response to the summary given to him by Mrs Taylor at the start of the hearing, denied making the comment, but he accepted her summary of the investigation. He did not say he had not made comments to Ms Smith (but then he did not know that the Smith interview had taken place and nor did Mrs Taylor) because that was not included in the papers that he had been given for the disciplinary. He did know that Ms Khaliq and Ms Kilner were saying that he had made the comments to them and he denied that.

31. Ms Taylor, having conducted that disciplinary hearing, took a decision to dismiss the Claimant, finding that the comment had been made. Her decision was communicated to the Claimant in a meeting on 3 January 2017 when his union representative, Mr Pratt, was present.

32. The disciplinary hearing had argument from Mr Pratt that the investigation had not been thorough enough, or wide enough in the context at the time which included the Sykes' grievance situation. In response Mrs Taylor said that the individuals had signed their statements. Now she was wrong about that, but I believe that she believed that they had when she said it, which would explain why, when it was shown to her in this Tribunal hearing that signing had not in fact occurred, her honest evidence to the Tribunal was that it should have happened.

33. The Claimant appealed the decision to dismiss him, and the appeal took place before Mr Neary on 18 January. The Claimant, in relation to Mr Davis conducting an investigation, Ms Taylor conducting a disciplinary hearing and/or Mr Neary conducting the appeal, that there was any difficulty with those individuals being involved in the way that they were.

34. The appeal hearing involved a very full discussion of all the issues, although at times the Claimant and his representative were encouraged to move things on. There was a deliberation that followed and Mr Neary communicated his decision to uphold the dismissal on 30 January.

35. The points that were put during the appeal hearing on behalf of the Claimant included the repeated concern about the statements and the taking of them, the breadth of the investigation, the earlier warning and the perception that the Claimant had been targeted because of his union activities, both in the earlier warning concerning clocking, and in this matter, and also the earlier events in February.

36. Mr Pratt also dealt with all points in mitigation on behalf of the Claimant and Mr Pratt suggested that even if the company was against the Claimant in terms of the remark having been made, training could be the right way forward in relation to that finding (as it had been for Mr Qudah it transpired).

37. Those arguments on behalf of the Claimant were rejected by Mr Neary. He expressed some regret in delivering his decision, because this was a situation in which the Claimant's dismissal had occurred because people had come forward to bear witness to what had been said. Implicitly they had not withdrawn statements that discriminatory things had been said. On other occasions there might well not have been evidence, although there had been allegations in the past. Mr Neary also referred to the Respondent's new procedures which had been in place since 1 November 2016 (which was the case - my bundle included the two procedures that were in place before and after 1 November 2016).

38. Mr Neary also made reference to the fact that people needed to raise matters of bullying, if that was being alleged in the workplace, and that the Respondent could and would do things about it if there were evidence. He acknowledged that the Claimant was to some extent unlucky. Other people may well have made inappropriate and discriminatory comments in the workplace but the difference in this case was that there was evidence that that was the case and this has been verified by the two witnesses. Those were his conclusions in upholding the decision to dismiss.

Discussion and Conclusions

39. As for applying the law to those facts I have given myself the directions that the advocates agreed were the relevant statements of principle and law. The first question is what was the principal reason for dismissal? The principal reason is, in short, the beliefs held and facts known to the person which causes her to dismiss, and that applies both at the point of a dismissal and at the point Mr Neary took the decision to maintain that dismissal after an appeal.

40. The facts known to Mrs Taylor were those that I have described above. She did have a genuine belief that the discriminatory remark had been made by the Claimant, on the basis of the two notes of interviews that she had before her. She also had the Claimant's denials, of course, but she certainly had reasonable grounds to form those beliefs. Most importantly she did not have any knowledge about Mr Neary's prior view expressing a need or a potential need to deal with the union "root and branch" if it were drumming up business. Nor was that of any relevance to her deliberations or conclusions at all.

41. As far as Mr Neary's reasons for maintaining the dismissal on appeal are concerned, having read the notes of the appeal hearing in full, and his delivery of his decision, and the discussion with the union representative Mr Pratt, I consider that his reasons were exactly the same. Mr Neary believed he had two witnesses saying a discriminatory comment had been made. His acknowledgement that other people may have said similar but not been reported, was an honest acknowledgement of the circumstances in which the Claimant found himself. He also expressed regret that that was the case, and that reflected, in my judgment, the fact that there had been no issues between him and the Claimant in all the years they had known each other, and he did not particularly wish to be in the position in which he was, namely maintaining the dismissal of the claimant.

42. It may well be that the past events from February - the allegation of the Claimant drumming up union business - were an influence on Mr Neary's decision to maintain the dismissal on appeal, because of course he had that knowledge, and he could not put it out of his head entirely, but on my findings

it was not the principal reason for his decision. The principal reason was exactly the same as Mrs Taylor's.

43. I must deal briefly with the inferences that I was asked to draw from the primary facts: the February emails, the suspension, the clocking warning. I have given myself a direction that the Tribunal has to exercise great care in drawing inferences, that is it must exercise the same care that it exercises in making any finding of fact. It may well be that where matters appear troubling at first glance, one has to enquire and have an explanation, but when one receives an explanation which one accepts as the most likely, then there is no reason to draw an adverse inference.

44. I have explained why the February emails do not affect the principal reason – this was not Mr Neary carrying out a plan to sort out the Union or any similar suggestion; the clocking warning was exactly as I have described, the respondent giving the claimant the benefit of the doubt and it was not part of a campaign against him which started in February, given when it occurred, and that the February allegations were dropped, which Mr Davis described as "good news"; thirdly, the difference in suspension treatment between the claimant and Mr Qudah, may well give rise to a suggestion of an underlying difference in treatment in comparable circumstances but not, in all likelihood that the claimant's trade union activities were the reason for the difference. The more likely explanation, albeit of itself unattractive, was the difference in status and history (Mr Qudah was a team leader who had made a previous formal complaint of racism), and the fact that the allegations in Ms Sykes' grievance were not considered by management, whether reasonably or unreasonably, to be as serious as the Qudah allegations.

45. On balance, and for all the reasons I have explained, the principal reason for dismissing the Claimant was not his trade union activities, but his conduct in allegedly making a discriminatory remark.

46. That being the case I have to decide whether, pursuant to section 98(4) of the Employment Rights Act 1996, the Respondent acted reasonably in treating its belief that the Claimant had made the remark that he was reported to have made, to be a sufficient reason to dismiss him, taking into account equity and the substantial merits of the case.

47. The challenges to the reasonableness of that decision included that the context in which these matters arose was such that the investigation was not a reasonable investigation.

48. For that reason I have had regard to the ACAS code. I am not sitting with lay members on this case, but the distillation of industrial practice and good industrial practices in that code is very helpful. In particular I have had regard to the need to carry out a reasonable investigation and paragraph 12 which refers to an employee being given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. There should also be given a reasonable opportunity to raise points about any information provided by witnesses. Further where an employer or employee intends to call relevant witnesses, they should give advance notice. The guidance to the Code gives a good deal of advice about the gathering of information. It says this (bullet point 2 in the section Preparing for a Meeting): "where possible arrange for someone who is not involved in the case to take a note of the meeting and to act as a witness to what was said, be careful when dealing with evidence from a person who wishes to remain anonymous. Take witness statements, seek

corroborative evidence and check the person's motives are genuine". That particular matter is also the subject of a footnote.

49. The relevance of these provisions is that it was known by the time of the appeal, and certainly known to the Respondent's HR department throughout, that the context was such that there had been earlier complaints in February which had been investigated and withdrawn, that the original gist of the complaint from Mr Qudah was the stirring up of grievances in the claimant's capacity of trade union representative, and Mr Qudah expressly referred to having been "put through a grievance" and "a difficult time for him", and he attributed that to the conduct of the Claimant.

50. Mr Qudah did sign his witness statement, as I have indicated in my findings of fact. That was the basis on which the Claimant was suspended. The nature of his allegations, however, were fairly described as "Chinese Whispers"; and at both the disciplinary hearing and the appeal hearing it was made very clear that there was a lot of "chatter" on the shop floor about these events. That is inevitable where eight or so witnesses have been interviewed as part of the Sykes grievance, when the alleged perpetrator team leader remained in place and unsuspended.

51. In that context, and indeed all the context that I have described in my findings of fact, a reasonable employer has to take great care in its conduct of an investigation. It was not put to Ms Sangha as to why Mr Qudah had signed his statement, and the other two witnesses had not, but Mrs Taylor fairly accepted that it should have been done. I also take into account that there were a number of concerns, not just a failure to obtain a signature in dealing with the witnesses, but including the reading of the allegations at the beginning of an interview, which reminds witnesses straight away what it is they are alleged to have reported, rather than asking them to give their account of the relevant events unassisted by the prompt of the complaint.

52. I have also taken account the fact that Mrs Taylor believed that the witness evidence had been signed, when it had not. I also take into account that these issues were raised by the union at both the disciplinary and appeal hearings, and on appeal the Claimant's case was becoming clearer, whereas at the disciplinary hearing he was in the dark about the unused Smith statement, and therefore his evidence was affected accordingly.

53. The appeal response to concerns about the reliability of the witnesses was: "if you want us to ask questions of the witnesses we will, but we are not going to let you ask questions of them directly. That is not our process."

54. That may very well be a process within the band of reasonable responses in some circumstances. When one looks at these events in the round, standing back and looking at the entire process from an investigatory interview right through to the hearing of the appeal, the context is such that the reasonable employer asks the questions: is this evidence safe? can I rely on it? A reasonable employer acting within the band of reasonable responses in all these circumstances would have dealt with the concerns about the investigation and the safety of the witness evidence.

55. I note that the witnesses in the Sykes' grievance were interviewed with Mr Qudah in place as a team leader, whereas the witnesses in the grievance against the Claimant were being interviewed with the Claimant having been suspended. That may affect evidence.

56. I also note that witnesses in the Qudah investigation were similarly not asked to sign their interview notes.

57. One of the many distinctions between the two situations was that the investigation into the Qudah grievance against the claimant was also used as the investigation for a disciplinary charge, as opposed to simply a grievance outcome.

58. It may well be that it is within the band of reasonable investigations in some circumstances to simply take a note of what people say, and not to check with them by asking them to sign their statement to say that it is true or they stand by it; or to ask questions to test their account: are they sure that they were there at the relevant time? when was the incident? and so on: the sorts of questions that Mr Gosling put to the Claimant about what he could remember about when and where remarks had allegedly been made.

59. Those are exactly the sorts of questions that when the context is as complex as it was in this case, and the matters and allegations are so serious and potentially employment ending for an individual, the reasonable employer acting within the band of reasonable responses, in my judgment does take action to address the concerns that were expressed by the union again and again in relation to that witness evidence.

60. For all these reasons, in my judgment, the investigation was not within the band of reasonable investigations, standing back and taking it as a whole from the outset, right through to the conduct of the appeal.

61. I ask myself looking at this matter in the round, did the Respondent act reasonably in treating its belief that the remark had been made as sufficient reason to dismiss the Claimant? I consider that given the investigation it carried out, a Claimant who had, apart from the verbal warning, unblemished service with the Respondent over many years, the resources of this employer and particularly an established HR department, the course of events as a whole and in the round as I have described them, the Respondent acted outside that band and for that reason the complaint is well founded and succeeds.

62. By way of post script, after I had delivered Judgment the parties were able to agree a Remedy Judgment by consent, and were able to agree that there was no challenge to be made on the basis that I had sat alone on this case, where the allegation was of a dismissal for trade union reasons, a matter which I had raised with the advocates of my own motion.

Employment Judge Wade

Dated: 29 November 2017