



EMPLOYMENT TRIBUNALS

Claimant: Peter Blanchfield

Respondent: Kingston University Services Company Limited

Heard at: London South

On: 23 May 2017

Before: Employment Judge Siddall

Representation

Claimant: In person

Respondent: Ms Ahmad, Counsel.

RESERVED JUDGMENT

It is the decision of the Tribunal that:

1. The Claimant was unfairly dismissed on procedural grounds.
2. Had a fair procedure been followed, there is a one hundred per cent chance that he would have been dismissed.
3. The claim for breach of contract in relation to notice pay succeeds, and the Claimant is entitled to be paid his pay in lieu of notice.

REASONS

1. This is a claim by Mr Blanchfield for unfair and wrongful dismissal arising out of the termination of his employment, without notice, on the 8 August 2016.
2. I heard evidence from the Claimant and from Tracy Dowsen, Dan Lupton, and Michael Blackwell of the Respondent.
3. **The Issues**
4. Turning first to the claim for unfair dismissal, it is not in dispute that the reason for the Claimant's dismissal was misconduct. That is a potentially fair reason under section 98 of the Employment Rights Act 1996. The

Claimant argues that his dismissal was too severe a sanction and that the process was not fair. The test to be applied in misconduct cases is set out in the case of **Burchell v British Home Stores**: did the Respondent have a genuine belief, based on reasonable grounds and following a reasonable investigation, that the misconduct had occurred? and if so whether dismissal was a reasonable sanction in relation to that misconduct?.

5. In relation to the claim for wrongful dismissal I must decide whether the Claimant had in fact committed an act of gross misconduct; that is, an act that went to the root of the employment relationship and amounted to a repudiatory breach of contract.

6. Findings of Fact

7. The facts that I have found and the conclusions I have drawn from them are as follows.
8. The Respondent is owned by Kingston University. It has around 300 members of staff and supplies facilities management services to the University. The Claimant had worked for the Respondent since May 2008, and was a Business Support Assistant. One of his duties was covering reception at the University's Knights Park campus.
9. On 26 April 2016 the Claimant had a telephone conversation with Lorraine Leed, a member of the Respondent's staff who was standing for election to a staff consultative committee, referred to as the EJCC. In an email dated 14 April 2016, Ms Leed had referred to the fact that she was standing for election and had invited staff to contact her if they had any matters that they wanted to discuss. The Claimant made contact with her in response. The Claimant was seated on reception at Knights Park when he had the conversation. Tracy Dowsen, the Claimant's line manager, overheard parts of the conversation. When asked about the conversation during the course of the investigation, Lorraine Leed stated that the Claimant was 'assertive and a little heated' and he shared with her some of his views about the Respondent's management and whether it was a good idea for her to stand for election. Tracy Dowsen described the Claimant's demeanour as "quite direct and purposeful but he kept his voice down".
10. The Claimant was adamant that following this conversation he had a brief discussion with Ms Dowsen in which he asked her whether there was any problem with the conversation and she said there was not. Ms Dowsen says she can't remember what she said during this conversation although she agrees that a short conversation took place. On the balance of probabilities I find that the Claimant did speak to Ms Dowsen after the phone call and that she did not indicate that there was any problem with what he had been saying on the telephone.
11. Following that conversation neither Tracy Dowsen nor Lorraine Leed made a complaint to management about the Claimant's conduct during his telephone conversation that day. The following day Dan Lupton who is Tracy Dowsen's line manager overheard Lorraine Leed telling another member of staff about her conversation with the Claimant. Mr Lupton says at paragraph 10 of his witness statement "I was concerned to hear that

Peter had spoken in this disparaging way about the company and its management in an open area where anyone could overhear what was being said". He referred the matter to human resources who recommended that an investigation be carried out.

12. The investigation was conducted by Marilyn Redwood who interviewed Lorraine Leed, Tracy Dowsen and the Claimant, and her investigation report dated 13 May 2006 begins at page 249 of the Bundle. Ms Redwood formed the view that there were potential breaches of the Respondents Code of Conduct in that the Claimant may have acted unprofessionally and with a lack of respect and courtesy. She recommended that disciplinary action should be taken.
13. The Respondent sent a letter to the Claimant dated 25th May inviting him to attend a disciplinary hearing on 2 June 2016. They notified him that Dan Lupton would chair the Hearing. The letter identified six potential breaches of the Respondent's Code of Conduct.
14. The email attaching the invitation letter for the disciplinary hearing included a copy of the investigation report with appendices, which I find included notes of the investigatory interview with Ms Dowsen.
15. On Monday 6 June 2016 the Claimant went to speak to Mrs Dowsen towards the end of the working day. He had a document with him which may have been either the full investigation report or a copy of Mrs Dowsen's interview notes.
16. It does not seem to be in dispute that during that conversation the Claimant asked Ms Dowsen to change her statement, and that he said he would leave her to 'think the matter over'. The Claimant is adamant that all he wanted Ms Dowsen to do was to refer to the conversation she had with him immediately following the telephone call with Lorraine Leed on 26 April when she had indicated that there was not a problem. The Claimant states that he was quite specific about that, although Ms Dowsen does not recall that and believed that she was simply being asked to change her statement in general (she said on 15 June that she 'did not know' what the Claimant wanted her to do). Having listened to the evidence of both the Claimant and Ms Dowsen, I prefer the evidence of the Claimant and accept that he asked Ms Dowsen to change her statement to include a reference to the conversation the two of them had on the 26 April. Ms Dowsen was much less clear, in the statement she provided on 15 June and in her evidence to the tribunal, about what the Claimant had actually said when he spoke to her in June. She was obviously very uncomfortable and worried about being approached and it is possible that this has led to her not taking in the specific details of what the Claimant was saying.
17. After that conversation Ms Dowsen went across to the art shop in the same building. Two members of staff confirmed that she appeared distressed but she did not tell them the reason. She says that she broke down in tears on the way home. That evening she discussed what had happened with her partner but she decided to do nothing "hoping that it would all go away".

18. For the rest of that week Ms Dowson was anticipating that the Claimant would speak to her again about the matter, and he was waiting for her to come back to him with her response.
19. On Friday the Claimant spoke to Ms Dowson again and asked her to change her statement. He asked her to speak to Dan Lupton. The Claimant said she was quiet and did not confront him. However on the bus on the way home she again became tearful. She spoke to her partner who insisted she report the matter and she telephoned Mr Lupton at about 6 PM that day.
20. Mr Lupton suspended the Claimant on 13th June and met with Tracy Dowson on 15th June to obtain a statement from her about what had happened. The Claimant was then sent a second letter of invitation to a disciplinary hearing which was now scheduled to take place on Thursday 30th of June. The letter enclosed the notes of the second statement taken from Ms Dowson. In addition to the allegations of breach of the Code of Conduct, this letter made it clear to the Claimant that he would now also face allegations of bullying and intimidating a member of staff, and interfering with disciplinary proceedings by trying to influence a witness.
21. I have noted from the two invitation letters that neither make it clear to the Claimant that he could face dismissal following the disciplinary hearing.
22. The hearing took place on 30 June and was conducted by Mr Lupton with human resources in attendance. Marilyn Redwood attended to present the results of her investigation. The Claimant, by choice, was not accompanied. He denied breaches of the Code of Conduct and was adamant that he had not done anything wrong and that he had simply approached Mrs Dowson asking her to remedy what he saw as an omission from her statement. He also pointed out that he had not been told that he should not speak to other witnesses prior to being suspended on 13 June. (The Claimant had also raised a grievance about the process which was dealt with as a separate matter and concluded).
23. Mr Lupton wrote to the Claimant on 8 August 2016 to set out his decision. He found that the Claimant had acted inappropriately and unprofessionally during his telephone conversation with Lorraine Leed. He rejected some of the allegations made against the Claimant, including an allegation that he had not been courteous and respectful, and the allegation that he had breached trust and confidence.
24. Mr Lupton upheld an allegation that the Claimant had tried to interfere with disciplinary proceedings by trying to influence a witness. He also found that the Claimant had bullied and intimidated Tracy Dowson, in breach of the Respondent's policy on Equal Opportunities and Dignity at Work.
25. Mr Lupton states in the letter that he would have given a written warning in relation to the breaches of the Code of Conduct that had been upheld. However he decided that the Claimant's conduct in approaching Ms Dowson amounted to gross misconduct and that therefore the Claimant would be dismissed without payment in lieu of notice.

26. The Claimant appealed against decision to dismiss him. (He had also appealed against the grievance decision and again this was dealt with separately).
27. The appeal hearing was conducted by Michael Blackwell on the 19 September 2016. The Claimant was given a full opportunity to present the grounds of his appeal and he made it clear that when he approached Ms Dowsen he was only seeking to ask her to remedy her statement by including reference to the conversation that had followed the telephone conversation with Ms Leed. Following the appeal hearing Mr Blackwell interviewed Ms Dowsen again and she stated that she could not recall what had been said immediately following that conversation.
28. Mr Blackwell wrote to the Claimant on 18 October 2016 to confirm his decision to uphold the dismissal. He found that the Claimant had attempted to interfere with a witness and that Ms Dowsen had felt threatened and intimidated by his behaviour. Mr Blackwell felt that it was immaterial whether the Claimant had only approached Ms Dowsen to get her to include a reference to their conversation on the 26 April. He found that serious misconduct had taken place and on that basis he did not uphold the Claimants appeal.
29. The Claimant then issued proceedings for unfair and wrongful dismissal.

30. Decision

31. Unfair Dismissal Claim

32. The key issue to decide is whether the Respondent conducted the disciplinary process reasonably, in accordance with the **Burchell** guidelines.
33. The Claimant had only realised when he read the Respondent's witness statements that it was Mr Lupton who had raised the initial complaint against him, having overheard Lorraine Leed talking about the conversation. He put it to Mr Lupton that he had acted as 'judge, jury, and executioner'.
34. It is a matter of concern that the manager who first raised concerns about the Claimant's conduct with human resources was then the person who conducted the disciplinary hearing and took the decision to summarily dismiss the Claimant.
35. I note in particular the wording of paragraph 10 of Mr Lupton's witness statement prepared for this tribunal where he makes it clear that at the point where he brought his concerns about the telephone conversation with Lorraine Leed forward, he had already formed an adverse view about the Claimant's conduct even though he had not overheard the conversation itself and even though neither Lorraine Leed nor Tracy Dowsen had brought any concerns about the conversation to his attention.
36. I recognise that at the disciplinary hearing Mr Lupton sought to deal fairly with the first set of allegations against the Claimant. I have noted that following the outcome of the independent investigation conducted by

Marilyn Redwood, not all the original allegations against the Claimant were upheld and that Mr Lupton viewed these carefully in light of the evidence about the conversation that had been revealed.

37. However the matter was further complicated by the complaint that Tracy Dowsen made to Mr Lupton about the Claimant's conduct on the 6 and 10 June. It made sense for Mr Dowsen to contact her line manager with her concerns. It was also appropriate for concerns about potential interference with the disciplinary process to be referred to the manager who was going to conduct that hearing. However it is of greater concern that Mr Lupton then decided to interview Ms Dowsen himself, and that the Claimant was not interviewed at that stage. Following the meeting with Ms Dowsen on 15 June the disciplinary hearing was rescheduled and the Claimant was notified that he would have to face additional allegations of interference with a witness and bullying and harassment. The Claimant was not warned that at the rescheduled disciplinary hearing he could face dismissal for gross misconduct.
38. Taking these combined circumstances into account I am not satisfied that the overall process was reasonable. As Mr Lupton had been made aware of the telephone conversation on 26th of April and had made the decision to refer it to human resources, it would have been appropriate for the Respondent to ask someone other than Mr Lupton to conduct the disciplinary hearing. The witness statement he has provided suggests a degree of pre-judgement of the allegations against the Claimant and there is a strong possibility that this would have affected his perceptions of the concerns later brought to him by Ms Dowsen. His involvement in the decision to dismiss raises a clear perception of bias even if he sought to review the allegations objectively before making his decision. The Respondent has a large number of staff and no reason has been put forward as to why another manager could not have conducted the hearing.
39. This is evidenced by the attitude towards the Claimant's defence to the allegation of intimidation. During the disciplinary hearing (at page 316) the Claimant stated that he simply approached Ms Dowsen asking her to include a statement about the conversation she had with him immediately after he finished the phone call with Lorraine Leed. This was not something mentioned by Ms Dowsen, but Mr Lupton did not go back to her to clarify this point before making his decision. It was not until Mr Blackwell conducted the appeal that Ms Dowson was re-interviewed, and she agreed that there had been a conversation although she cannot recall what was said.
40. Mr Blackwell therefore clearly considered the point which was of such importance to the Claimant, although he ultimately decided that it was immaterial.
41. I therefore find that the dismissal was procedurally unfair. The procedural flaws in the dismissal process were not cured on appeal as Mr Blackwell made it clear that he did not conduct a complete re-hearing but focussed on the Claimant's grounds of appeal.
42. The Respondent submits that even if the process was flawed, the Claimant would have been fairly dismissed if a fair process was followed,

in accordance with the **Polkey** decision. I accept that. Had a person other than Mr Lupton conducted the disciplinary hearing it is likely that I would have found the dismissal to have been fair. Ms Redwood had conducted an appropriate investigation to find out what had happened during the telephone conversation on the 26 April. There was sufficient evidence to enable the Respondent to find that the Claimant had sought to persuade a witness to amend her statement, and that bullying and intimidation had taken place. In addition to the evidence of Ms Dowsen, there was supporting evidence from employees working in the Art Shop who had seen Ms Dowsen in a distressed state after her conversations with the Claimant on the 6 and 10 June. The Claimant was adamant that he had not intended to harass or intimidate Mrs Dowson. He says that he approached her calmly and that it was simply his intention to ask her to correct what he saw as a factual omission. Ultimately it was the decision of the Respondent that the Claimant should not have approached Ms Dowsen at all, and that in doing so he had compromised the integrity of the disciplinary process. That was a reasonable conclusion for them to make on the evidence and I note that Mr Blackwell reached the same conclusion on this point independently during the appeal process. The Respondent viewed this matter very seriously. Had a fair process been followed from the outset, dismissal would have been within the reasonable range of responses to the misconduct found.

43. Had I not found, in accordance with **Polkey** principles, that there was a one hundred per cent chance that the Claimant could have been fairly dismissed, I would have found that he had significantly contributed to his dismissal, to a level of at least fifty per cent.

44. **Wrongful Dismissal**

45. Although it is my finding that the dismissal was procedurally unfair, I must also consider the claim for wrongful dismissal.

46. The case of **Western Excavating Ltd v Sharp** [1977] 1QB states that a fundamental breach of contract is one that goes to the root of the contract of employment or which shows that the employee 'no longer intends to be bound by one or more of the essential terms of the contract'. The matter must be viewed objectively and the intention of the Claimant is a relevant factor (**Tullett Prebon plc v BGC Brokers LP** [2011] IRLR 420.)

47. I have started from the position that if the Claimant spoke with Ms Dowsen on either the 6 or 10 of June with the intention of intimidating her to change or withdraw her statement improperly, that would amount to gross misconduct.

48. The Claimant has been described as quite a forceful character. Ms Dowsen must have felt very uncomfortable in the knowledge that she had given evidence to the investigation about his alleged misconduct. It is accepted that she would have become concerned and distressed when he sought to discuss this with her.

49. The Claimant makes the point that Ms Dowsen's reaction to his approach was extreme and that his actions should not be judged solely from the level of distress that she experienced. Although the perception of the

alleged victim of harassment is important and the level of distress caused to her should be taken into account, this should not be the sole determining factor and a degree of objectivity needs to be applied.

50. I have considered carefully the notes of the interview with Ms Dowsen on 15 June 2016, and the evidence she has given today. The notes do not provide unequivocal evidence that Ms Dowsen experienced bullying and intimidatory behaviour from the Claimant. She states that he spoke in a 'pleasant and calm manner'. She says that she was 'shocked and embarrassed'. When asked specifically whether she felt intimidated she stated that 'I am not good at confrontation. I must admit that I get upset and I did, probably even got intimidated'. She is not clear about what the Claimant actually said that intimidated her, although she states that he wanted her to think about it. There is no suggestion of any threat or abuse on his part.
51. The Claimant, however, was adamant that he simply went to see her to ask her to correct a factual inaccuracy in her statement, which he placed enormous importance on. Ms Dowsen has agreed in evidence that some sort of conversation did take place between the two of them on the 26 April. I accept that it was his intention to discuss this with her.
52. Taking all the evidence into account, although I find that the Claimant was most unwise in going to speak to Ms Dowsen about the statement she had provided, I find that he did not speak to her with the intention of coercing her to withdraw her statement or to change it untruthfully. I do not find it to be the case that any discussion between two members of staff involved in an investigation amounts to gross misconduct unless they have been specifically instructed not to discuss the matter, or unless one of them seeks to exert improper pressure upon the other.
53. I accept the Respondent's submission that the Claimant had been told to keep the investigation confidential, but as he pointed out, he saw no breach of confidentiality in speaking to someone who was already aware of the matters at issue.
54. I find that the Claimant's conduct in seeing to rectify what he saw as a factual inaccuracy did not amount to gross misconduct in all these circumstances. He is therefore entitled to his notice pay.
55. A hearing has already been provisionally listed for Wednesday 26 July commencing at 10 AM to determine what remedy should be awarded to the Claimant. As the Claimant will not be entitled to a compensatory award for unfair dismissal and will only be entitled to his notice pay, it is to be hoped that this matter can be resolved without the need for a remedy hearing. If not, that hearing will proceed.

Employment Judge Siddall

Date 1 June 2017