EMPLOYMENT TRIBUNALS

Claimant: **Mr J Day**

Respondent: **Alloga UK Limited**

Heard at: **Nottingham**

On: **21st November 2016 and 23 January 2017 (reserved decision making)**

Before: **Employment Judge Britton (sitting alone)**

Representatives

Claimant: **Mr N Clarke, of Counsel**
Respondent: **Mr C Canning, of Counsel**

JUDGMENT

1. This Judge having identified this case as one of constructive unfair dismissal, it is dismissed. For the avoidance of doubt, if it was one of direct unfair dismissal, then it is also dismissed.

REASONS

Introduction including matters of law

1. The claim (ET1) was presented to the Tribunal on 27 July 2016. Set out therein is how the Claimant was employed via a series of TUPE's by the Respondent between 1 September 2003 and 15 July 2016. The Respondent is a substantial medical warehousing logistics operation, now a member of Walgreens Boots Alliance. The Respondent has more than one warehouse. It operates 5 sites with approximately 30 to 40 shift supervisors and some 850 workers.

2. The Claimant had been a supervisor at the Respondent's Amber Park site since March 2015. He had an unblemished disciplinary record.

3. This case relates to events near the start of the shift shortly after 7 am on Monday 27 June 2016. This appears to have been the first day when the Claimant and the other players in this case, so to speak, were back at work post the outcome of the referendum on Brexit, which of course was announced the previous Friday.

4. What the events are all about is as to whether the Claimant told a Polish worker Izabela Witsinska (Izzy) inter alia to "go back to your own country".

5. I will in due course go into more detail about that incident. Following the matter coming to the notice that morning of management the Claimant was suspended. There was thence a disciplinary process starting with an investigation. In the context of that the Claimant attended an investigation interview with a Mr Billy Clark (BC) on 29 June 2016. It was decided that there was a case to answer and therefore the Claimant attended a disciplinary hearing on 1 July 2016. This was chaired by James Day, an Operations Manager. At both of the hearings which I have so far referred to, the Claimant was accompanied by a work colleague. The outcome of the disciplinary hearing was that JD decided that the Claimant had, in terms of the event relating to Izzy, committed an act of gross misconduct and therefore the Claimant was summarily dismissed.

6. The Claimant appealed that decision. He had an appeal hearing chaired by Mr Paul Carter, a General Manager with the Respondent. This took place on 12 and 15 July 2016. The decision of Mr Carter was to uphold the Claimant's appeal in relation to the summary dismissal. By his letter of 19 July, which confirmed the decision he had given on the fifteenth, he decided that the decision to dismiss would be substituted with a final written warning for a period of 52 weeks. The Claimant was informed that he had a right of further appeal should he wish to exercise it to the Operations Director. As it is the Claimant first resigned by e-mail following the appeal hearing and this was on 16 July. He confirmed this by an e-mail of the twentieth. In essence his position was, as to which see first the e-mail of 16 July, (Bp[1] 136-137) that:

> *"I have had a little time to consult family, and to reach a rational decision. I will be declining the offer to reinstate me as a Supervisor. I truly believe my position is untenable in the circumstances. I no longer feel company ethics and values are aligned closely enough to my own to be comfortable… I do however respect the objectivity you showed me on Tuesday and the seriousness with which you are handling this."*

7. And then in the e-mail of 20 July (Bp 144) this extract:

> *"I still feel there has been a breach of policy, specifically relating to disciplinary action being taken without a full investigation. This is stated on page 26, paragraph 2 of the company handbook.*
> *I stated in my points of defence that I felt the investigation had been 1 sided….*
> *As such I can not accept the decision, or the warning. As also stated, working relations would be extremely difficult for me to resolve with some of those involved. I also feel my reputation to be tarnished on the shop floor…"*

8. As to the ET1, albeit it recited the scenario and the shortcomings of the employer relied upon, it was not clear as to whether or not it was a claim for actual or constructive unfair dismissal. What was clear is that the only claim being brought to Tribunal was one of unfair dismissal.

[1] Bp= reference to pages in the joint bundle before me.

9. By its response, the Respondent fully pleaded that if this was a constructive unfair dismissal, then it had not acted such as to mean that the Claimant was constructively unfairly dismissed (paragraph 5.2.13 at Bp 23). And in the following paragraph:

> *"Further or in the alternative to the Respondent's contentions above, should the Tribunal find that the Claimant was dismissed; the Respondent will say that such dismissal was fair in all the circumstances of the case."*

The next section maintained that if it was found there was an unfair dismissal then "contribution would be substantial". I am not dealing at this stage with remedy; only with liability.

10. Having read those pleadings, at the start of this Hearing on 21st November I observed to the parties that this seemed on the pleaded scenario to be a case of constructive unfair dismissal. I had in my mind that if as a consequence of the procedure the Claimant had been reinstated, then how could he bring a claim for direct dismissal, so to speak; thus wasn't this really a claim about his response to the appeal?

11. At that stage I was not aware of the sophistications that either Counsel would seek to deploy in terms of arguments as to matters of law and to which I shall return in due course.

12. The rest of that day was spent hearing the evidence, with it being agreed that Counsel would then send in closing submissions and any replies thereto and that this Employment Judge would then make a reserved decision. The submissions duly came in.

13. The case has become more sophisticated as a result of the written submissions.

14. I have paid the closest possible attention to these including the reply of the Claimant to the Respondent's closing submissions. I have carefully considered the library of jurisprudence so to speak that both Counsel have put before me; and in that respect there are essentially two lines of authority that become engaged. The first issue in that respect is can the Claimant bring a claim of direct unfair dismissal, engaging in that respect all matters up to and including the summary dismissal decision, and thence following on there to the appeal, if he has been reinstated? Mr Clarke, says that he can as the disciplinary policy and procedure used was specifically stated to

> *"not form part of an employee's Contract of Employment."* (Bp36).

Thus it follows that the Claimant is not precluded from bringing such a claim. This would be on the premise that the line of authority encapsulated in **Roberts v West Coast Trains Limited** [2005] ICR p254 CA only precludes the bringing of such a claim where there is a contractual provision which entitles the employer to reinstate on appeal.

15. Mr Canning counters that this was not the ratio of the West Coast Trains case or that which preceded it. He does concede that the disciplinary process in this case is non contractual. However it does provide a full disciplinary

policy which mirrors those that the Tribunal has seen on many occasions, and it provides a right of appeal.

16. So I have to determine as to whether in law the Claimant is precluded from bringing a claim of direct unfair dismissal pursuant to s95(1)(a) of the Employment Rights Act 1996 (the ERA):

> *" (1) For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection 2[2]…. only if) –*
>
> > *(a) the contract under which is employed is terminated by the employer (whether with or without notice),"*

17. The alternative is that if the Claimant cannot bring a claim for unfair dismissal in that way because **Roberts** precludes him from doing so, then can he bring a constructive dismissal claim based upon Section 95 (1) (c)?

> *"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

18. That of course brings in the well known line of authority culminating in **Malik v BCCI (1997) IRLR 462 HL.** Has the Respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust and thus repudiate a fundamental implied term of the contract of employment thus entitling the claimant to treat himself as dismissed, resign and sue for unfair dismissal? But of course the key issue, the first fundamental, is has the employer acted without "reasonable and proper cause"? This is a case where there was no complaint made by the Claimant about the treatment of him prior to the events commencing on 27 June and his suspension, therefore what is in play is the utilisation of the disciplinary procedures and the manner of his dismissal.

19. Thus says Mr Canning the Claimant cannot bring a claim of constructive unfair dismissal because it is within the "Johnson exclusion zone" as per the jurisprudence of their Lordships in first **Johnson v Unisys Limited** [2001] UK HL 13 as reported at [2001] ICR P48 onward and thence in **Eastwood and another v Magnox Electric Plc** [2001] AC 503 HL, all of which is comprehensively revisited by his Honour Judge Jeffrey Burke QC in **Gebremarim v Ethiopian Airlines Enterprise T/A Ethiopian Airlines** UKEAT/0439/12/GE. Is Mr Canning correct in saying that therefore once the Claimant has been reinstated by means of the appeal, even if the appeal outcome might be unfair, as fairness is irrelevant to the reasonable and proper cause test, that is to say breach of contract, applying the exclusion zone, the Claimant has no recourse at that stage? I would detect a caveat thereto which is of course that if the Claimant did remain in the employment post the first final written warning and subsequently was penalised by way of it in some way such as breaching trust and confidence about keeping the warning confidential, then of course he could at that stage, it seems to me, resign and bring a claim of constructive unfair dismissal at that stage.

[2] Not engaged.

20. Mr Clarke counters that upon consideration of **Grebremarim** and also via way of consideration of **Thompson v Barnett Primary Care Trust** UK EAT 0247/12/SM, there is no such preclusion. And I observe that a midway of course might be that if at law the Claimant is precluded as per **Roberts** from revisiting the handling of the matter by the Respondent, up to and including the appeal outcome insofar as it relates to reinstatement, that nevertheless surely that would not preclude something which is not the reinstatement but the imposition of an alternative penalty as part of the reinstatement? If the latter was imposed in an arbitrary fashion and was still far too severe, why could not an employee be entitled in the context of what had gone on before to resign on the basis that there had now therefore been a final fatal breach of trust and confidence not covered by the reinstatement and which was imposed without reasonable and proper cause? The alternative would be that the employee might well have to suffer the ordeal of remaining in the employment with the sword of Damocles, so to speak, hanging over his head by way of a final written warning in circumstances where it was not warranted, and whereby that employee could not face working in the employment with such an FWW it having been imposed without reasonable and proper cause? If it is factually engaged, why can that scenario not engage thus meaning that a claim of constructive unfair dismissal following the employee having resigned as a consequence is permitted by the section applying such as **Malik v BCCI**?

21. Suffice it to say that having considered both Counsels' competing submissions and in particular having regard to **Thompson** and **Grebremarim**, I am not persuaded by Mr Canning that the Claimant cannot bring a claim for constructive unfair dismissal deploying Section 95(1) (c). What that would mean is that at the first stage I will need to determine and make findings of fact, and in particular including the appeal process, to conclude whether in particular the decision of Mr Carter at the appeal to impose the final written warning, and what he said by way of reassurance as to confidentiality in relation to it, means that he did not act without reasonable and proper cause. If I found that to be the case then I would of course go to the next stage of the process which would be that therefore the resignation would constitute a dismissal. The employer would then have to show a reason for the dismissal, which would be presumably some other substantial reason and then I would need to go to determine whether the deemed dismissal was within the range of reasonable responses. Of course in addressing matters in that way I remind myself that if there are shortcomings in a disciplinary process up to and including the decision to dismiss, that can be redressed by the employer in terms of the unfair dismissal statutory framework by the appeal, as to which see **Taylor v OCS Group Limited** [2006] IRLR 613 CA.

22. Reverting back to whether or not **Roberts** means that the Claimant is not reinstated by the decision of Mr Carter, I prefer the submissions of Mr Canning. Irrespective of whether or not the disciplinary procedure including the right to have an appeal was contractual, the Claimant by his letter of appeal clearly entered into the process. And that there should be the right of an appeal is an implicit part of good employment practices, recognised as such in the ACAS code of practice. Furthermore if a Respondent other than in exceptional circumstances fails to provide a right of appeal, then there is a financial penalty that a Tribunal can impose pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Additionally the statutory construction relating to the right not to be unfairly dismissed, being as it is separate from the common law as to breach of contract, is in determining whether or not there has been an unfair

dismissal pursuant to Section 98(4) requiring the Tribunal to look in determining whether the dismissal is fair or unfair, at all the circumstances of the case; and it "shall determine the issue in accordance with equity and the substantial merits of the case". So in that respect the appeal is an inherent part of the process made plain in the line of authority ending with **OCS.**

23. This is not a case, and which in itself would be highly unusual, where there is an express contractual provision to the contrary effect, in other words that no appeal will be allowed and the appeal will not enable reinstatement. Therefore I am with Mr Canning and his interpretation of the authorities at his paragraphs 5-15 that the fact that a disciplinary process may be stated to be none contractual does not preclude the dismissal from vanishing if the employee is reinstated. In particular I am with him that if the Claimant's interpretation was to be correct "it would defy the commonsense of employment law and labour relations". So what it means as I proceed is that the decision of Mr Carter to overturn the summary dismissal decision and reinstate the Claimant means that the dismissal vanishes.

24. However, reverting to what I concluded at paragraph 20 above, it does not thereby shut out the Claimant's right to resign and claim constructive unfair dismissal in terms of the imposition of the final written warning. Thus the first focus of my decision once I have made my findings of fact will be as per the line of authority as to constructive dismissal commencing with **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27 CA and culminating in terms of highest authority in **Malik v BCCI**. It is best encapsulated in an earlier authority which was reaffirmed in the subsequent jurisprudence including **Malik.** It is **Woods v WM Car Services (Peterborough) Limited** [1981] IRLR 347 EAT:

> "It is clearly established that there is implied in a contract of employment the term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it was such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. ."

25. The test as to whether the employer has acted with or without reasonable and proper cause is an objective one. Fairness in that respect is not engaged, unlike the application in terms of the range of reasonable responses test to unfair dismissal as per s98(4) of the ERA: see **Bournemouth University Higher Education Corporation v Buckland** [2010] EWCA civ 121.

26. Thus I proceed on the basis that this is a claim of constructive unfair with the focus once I have made findings of fact on whether in the context the imposition of the final written warning was a repudiatory act.

Findings of Fact

27. The Respondent employs a very significant number of eastern European EU nationals. It has equality and diversity policies. I have no doubt that it

applies them from all the evidence that I have heard. Its supervisors attend training courses on a regular basis and the record of the Claimant's training is at Bp51. He had attended an equality and diversity course during his employment and indeed a follow up course only the week before the events. Interalia the policies define harassment (Bp32):

> *"Harassment which can also be a form of discrimination occurs where unwanted conduct affects the dignity of men and women in the workplace…"*

28. This is reiterated at Bp33; and there is a requirement to undertake an investigation by a Manager or Supervisor if a complaint based upon this comes to his attention; and thus there is then a disciplinary policy which in terms of the process adopted in this case was complied with. The issue in that respect is whether there were deficiencies in the investigation apropos the well known authority relating to gross misconduct cases of **British Home Stores v Burchell(1978) IRLR 379 EAT**. Otherwise, he was made aware of the matters that he would be facing at the disciplinary hearing; provided with copies of the evidence relied upon; given the right to be accompanied etc. As to the disciplinary policy not surprisingly the definition of gross misconduct (Bp37), as per many such policies was described as not being exhaustive but a guide: however included was "verbal or physical abuse or harassment of a staff member." As already stated the policy provides an appeals procedure.

28. In the run up to the events on 27 June 2016, and in the context of the referendum on whether or not to remain in the European Union, of course this Judge is aware that it occasioned the most widespread of interest amongst the populus and a very high turn out at the referendum; the result was close: 52/48 in favour of Brexit. Not surprisingly this debate also occurred amongst the workplace where the Claimant worked. The Claimant was clear in his belief that we should remain in the European Union. He has a Latvian partner and they have a child. It follows that in terms of the working relationships I therefore have no doubt that he had affinity with in particular the eastern European workers. Thus before the incident on 27 June 2016 I have no doubt, and there is no evidence to dispute my finding, that he had an excellent working relationship with Izebela Witusinska (Izzy),who is Polish, and also the witness to what occurred: Santa Avotniece (Santa) who is Latvian. Thus on Facebook he inter alia stated how much value we should place upon the contribution made by European workers: *"the economy and industry.. is already propped up by immigration from Europe..".* Others held differing opinions such as Billy Clarke, who chaired the disciplinary investigation. But that of course is illustrative of the nationwide debate that took place.

29. This Judge is also very much aware, as it was widely publicised, and from my own knowledge as an Employment Judge, that many European Union workers in this country were fearful for their continued employment in the United Kingdom should the outcome be Brexit. Would they have to return to their country of origin?

30. The logistics warehouse in which the three of them worked is a busy and noisy place. At about 7:50 am on Monday 27 June Izzy came to the window of the office in which the Claimant as a supervisor and Santa were working. She was anxious to receive the documentation she needed for the purposes of then going about the loading of orders for Tescos. In the context there is no doubt that the Claimant said something to her which caused her to become very upset indeed. Immediately after the incident she complained to a Manager. Shortly thereafter it was recorded what she was alleging. It was taken down as her complaint (Bp58) at 11:17 by Tammy Johnston. Izzy signed it as a true record.

31. Having referred to going to the Supervisor's window, she said:

> *"I asked Santa how long invoices will be for Tesco orders I was waiting to load.*
>
> *Santa said Supervisors were having a walk round. Therefore I had to wait until they returned, however James was still in the office and that's when he waved his hand at me to tell me to go away then that's when he said "GO BACK TO YOUR OWN COUNTRY".*
>
> *I then responded by saying you cannot talk to me like that and James went all red in the face and just sat there.*
>
> *I was not happy with his comments or behaviour so I reported this straight to my manager.*
>
> *This made me feel very upset I don't want to come to work to feel like i should not be in this country i just want to do my job and provide for my family."*

32. Santa also made a statement (Bp 57) and signed it as correct. I am not sure whether it was the same day, but bearing in mind how swiftly the disciplinary investigation got underway it cannot have been later than before the Claimant was interviewed at 15:30 on the following day and because he was shown at the start both these statements Bp61). So it is contemporaneous. Santa recounted that:

> *" On 27/6/ 2016 around 7:30 Izabela Witusinska came on an order admin window to ask me when ASN's will be done for a Tesco order. I told her that all the Supervisors and manager are on a supervisors' morning walk around and then ASN's will be done as soon as they come back.*

> *James Day was in office and he was talking about England leaving EU and he told Izabela that she should be going back to her own country, the words he said was (you should go back to your own country). After what he said, he went to label up pallets and Izabela came in office and she said that she is really upset about what James said."*

33. The matter having been bought to the attention of management the Claimant was very shortly seen after the incident by a Shift Manager, Steve Bradshaw. What he had to say is recorded at Bp 56 and formed part of the disciplinary pack. He signed his statement as correct. It was shown to the Claimant first at the investigatory meeting on the 28th:

> *After finding out the situation with the aledged comments, I went and pulled James out of the Supervisor office to a discreet area. I said that I have been told that a accusation has gone in against him toward Izzy when she was at the window and could he remember what was said. He replied:"I may have said something but I can't remember what I actually said.*
> *In turn I said to him "did you say anything about "going back home"? He replied "yes I think I may have said something along those words but I can't remember exactly what I said"."*

34. It is to be noted that in none of those three records of events did the Claimant ever say that at the material time he had apologised to Izzy.

35. The decision was made to suspend the Claimant. The suspension letter is at Bp 59. The suspension was on full pay and it was specifically said that it was "in no way a form of disciplinary action against you". He was informed that he would be required to attend an initial investigation meeting the following day at 3:30 with Billy Clarke, an Assistant Manager, and "myself as a witness". This is Erica Petts, HR Officer. Was the suspension without reasonable and proper cause? Of course a suspension should not be taken lightly. It is likely to have at least a stressing and upsetting impact on the employee. But in the context of events, and given the Claimant's supervisory role, this was a matter of considerable seriousness: at first blush it was capable of being construed as discriminatory. It would be important to remove the Claimant from the work place whilst a swift investigation was undertaken and which in this case was the case as was indeed the disciplinary process from start to finish. I have no hesitation in therefore concluding that the employer did not act without reasonable and proper cause in suspending the Claimant.

36. The Claimant duly attended the investigation meeting. He was accompanied by Mr Morgan Davies as his workplace colleague. Morgan also assisted him at the appeal against his dismissal.

37. There is no evidence before me that this was an intimidating interview on the 28th. From the record of the interview it appears to have been fairly conducted. He was told what the case was that he had to meet.

He was shown all three statements and a copy of the disciplinary policy to which I have now referred. As to the incident his explanation was:

> *"In morning Izzy stressed. Getting guns ready[3]- come to window- I said "Don't be so stressed at work Izzy, you could be packing your bags and going home." I believe it was off the cuff- Nothing meant by it.*
>
> *…*
>
> *She said: "Don't James". Made a gesture as in not today.*
>
> *Realised I have offended her which was not my intention. I said "not really Izzy, Don't mean it".*

38. Then summarising the account and thus piecing events together, Izzy went away and as is clear reported what had happened. In the interim the Claimant seems to have gone with Santa to get some guns from the stationery cupboard upstairs in another part of the warehouse. She must have then learnt what Izzy had done and because, taking up the Claimant's account, on the way back to the office:

> *" Santa on the way back down told me Izzy had gone to Manager to raise a grievance. At that point I thought I would find her to apologise but Tommy had come over. With Tommy there didn't think I would come over sincere …"*

39. So he did not get an opportunity to apologise before he was suspended. He repeated that these were the words he had used to Izzy (Bp 63) and he said the following:

> *"I say stupid things – don't engage my brain at times. Say things when I'm comfortable with people. Not meant for offend anyone.*
> *…*
>
> *I'm sorry, can only apologise. It was meant as banter."*

40. He then gave a lot more detail about his close associations with members of the eastern European community and how he bore them no animosity and indeed was very sympathetic to them in relation to Brexit.

41. Following the investigative meeting, the next day he received a letter (Bp67) inviting him to a disciplinary hearing. The letter complies with ACAS CP best practice. Inter alia he was told of the charge; that if made out he potentially could face dismissal; his right to be accompanied; and that the hearing would be chaired by Dale Robinson, Operations Manager, with Carla Marshall from HR in attendance as a witness and note taker.

42. It is submitted for the Claimant that this disciplinary hearing took place too swiftly. It is essentially because the Claimant says that he was not able to put forward mitigation that he wanted in relation to what I shall now deal with which is primarily his sense of humour. This was a swift disciplinary hearing in terms of timing, but I do not come out of it concluding the Claimant was actually prejudiced. He had with him a colleague Craig Coup. He had the minutes of the

[3] Presumably a reference to bar coding guns.

investigatory hearing. He knew fully the case he had to meet and was able to give his explanation in detail. The shortcoming is that he was not able to put in the two statements which were before the appeal. These are from Ilze Jirjena (Bp 83) who is Latvian, and Morgan (Bp81) to whom I have already referred.

43. Ilze said, having worked with the Claimant for two years:

> *" I have been working with in the same department and never had any issues.*
> *In my opinion…is friendly, positive, intelligent, and open minded person who loves to communicate with colleagues. In my experience he never had any conflicts with other employees. His humor might be a bit confusing, but personally I have not found his jokes to be malicious or offensive."*

44. As to Morgan, having worked alongside the Claimant for 4 plus years:

> *"….he is a person with a good moral character and an extremely witty and also a very dry sense of humour. There are times when his sense of humour comes very close to the wire but people who know James understand this and realise there is no malice whatsoever in the things he says..."*

45. I will return to the significance of that evidence in terms of the appeal.

46. The disciplinary hearing (Bp68-77) lasted an hour. It was chaired by Dale Robinson, the Operations Manager. He gave evidence before me, as did the Claimant and Paul Carter, who heard the appeal. In passing I read all their witness statements before they gave their live evidence. I thought that did his best but was not perhaps that competent to undertake a disciplinary hearing. From time he stumbled when being questioned really because he could not understand the sophistications of what he was being asked. Furthermore, in his handling of matters he did not go back and talk to Izzy, Santa or Mr Bradshaw about what the Claimant had to say. Mr Day had also failed to do this and thus it is least a procedural shortcoming. However it was sufficiently squared at the appeal as will become plain and which engages **OCS v Taylor**. Finally in any event this is not a case of unfair dismissal per se for the reasons I have now given.

47. But the following emerges from the disciplinary hearing and which is relevant in terms of the final written warning and thus whether or not Mr Carter acted without reasonable and proper cause in substituting it for the dismissal.

48. As to whether the meeting itself was poorly conducted by Ms Marshall or in a bullying and harassing way by Mr Robinson and her, the position I take from all I have read and heard and observing as I do Mr Robinson as well as the Claimant is as follows. Albeit the Claimant realised he had spoken out of turn he could not really understand as to how this might have impacted upon Izzy and injured her feelings and from her perception could constitute harassment. He was quite strident in his defensiveness as he was to be before Mr Carter, making reference to that he foresaw that the matter could end up in a Tribunal. Referring to his unfortunate tendency to banter that might be taken the wrong way he said: "I will learn from this". He did not specifically say "I apologise". He said much else, much of it upon the lines of repeating his position and stressing his lack of any antipathy to eastern Europeans.

49. I did explore in my questioning of Mr Robinson that rather than dismiss him or impose a final written warning perhaps he should have considered a lesser penalty together with a programme of counselling for the Claimant addressing his obvious supervisory shortcomings in terms of communication. But the more I thought about this and reflected on my observations of the Claimant, and particularly when I came to considering the evidence of Mr Carter, I was more persuaded by the latter in terms of the lack of insight of the Claimant, in particular in terms of what was a serious act of misjudgement in the way he spoke to Izzy particularly given the context.

50. The decision of Mr Robinson was to summarily dismiss the Claimant for verbal abuse or harassment of a staff member. This was confirmed in the letter of

1st July Bp78) to the Claimant signed by Erica Petts. He was given the right of appeal, and provided with the notes of the disciplinary hearing taken by Carla Marshall.

51. Given that the Claimant had an excellent disciplinary record, should he have therefore have been dismissed by Mr Robinson? I am not dealing with that issue at the first stage in terms of range of the reasonable responses and because of the fact that the Claimant was reinstated by reason of the appeal. But was the decision made without reasonable and proper cause?

52. Leaving aside the shortcoming by Mr Robinson to have not gone back and put to particularly Izzy and Santa the Claimant's version of events, was the dismissal a fair one, given it was a first offence? In that respect my view would have been that it was not within the range of reasonable responses. It was too draconian a step. But on the other hand in terms of acting without reasonable and proper cause, then I would conclude objectively that whatever was said, it was in the context of Monday 27 June and just post Brexit, a serious error of judgment by the Claimant, doubtless because of his sense of humour which he accepted before me can "come very close to the wire" in ever saying anything at all that could be misconstrued by Santa and Izzy as meaning Izzy should go back to her own country. However he may have meant it is irrelevant to how it genuinely impacted upon Izzy greatly upsetting her as becomes even clearer from the next chapter of events. And therefore what it means is that to dismiss the Claimant given his role as a supervisor was objectively made with reasonable and proper cause. It does not matter at that stage as to whether it was fair or unfair. That of course is the test to be applied in relation to the fairness or otherwise of the dismissal, pursuant to Section 98(4) of the ERA and applying the band of reasonable responses test.

52. That brings me to the appeal. The Claimant raised his appeal on 1 September by e-mail (Bp 81):

> *"My grounds of appeal are as follows.*
> *Extreme punishment given previous employment record.*
> *More severe punishment than those in other cases.*
> *Reason to believe decision was predetermined.*
> *Reason for decision not substantiated by evidence.*
> *Investigation and disciplinary not held in accordance with company handbook guidelines or ACAS guidelines."*

53. The appeal was heard by Paul Carter, General Manager on 12 and 15 July. The Claimant attended with Morgan. Mr Carter was assisted by Erica Petts. In contrast to Mr Robinson I found Mr Carter a most impressive witness. He came to this matter not knowing the Claimant, and I have no doubt that he approached it in an open minded way. It is to me clear that from more or less the start he had concluded that the penalty of dismissal was too harsh; thus he was more focussed upon whether he could justify overturning it inter alia dependent upon gaining insight in relation to the Claimant. This was the most thorough of appeal hearings. That is obvious from its length and the notes that are before me which commence at Bp92 and run all the way through, as there were two hearings, to Bp 135.

54. As to the disparity of treatment appeal point this particularly focused on the treatment of a Mr Johnson who was not dismissed. It is clear from what I have read and heard that the facts in that matter were clearly different and I have no other evidence before me to contradict that finding. The case of Mr Johnson was not about a supervisor making prima facie discriminatory remarks at work such as in this case.

55. As to the key focus of the appeal and the remark made to Izzy and its context, again the Claimant did not deny that he could have said something at least to the extent of "could be packing your bags and going home". During the period of the adjournment before Mr Carter came back to report on his investigation and then give a decision on 15 July he spoke to Izzy. He wanted to speak to Santa but she was on leave. Suffice it to say that Izzy was still very upset indeed about what had been said. He accepted there might be a conflict as to what was said in terms of "go back home" or what the Claimant had said and which of course was midway from Santa; but his conclusion was it really didn't make any difference to the fundamental that the Claimant should never had said it in the first place. What the Claimant said was clearly insensitive; horribly misjudged in terms of Brexit; he had crossed the line and "he needed to understand". He concluded that he would not dismiss the Claimant, albeit he could see justification for it. He concluded that in the circumstances justice could be served and "the punishment fit the crime" by reducing that dismissal to a final written warning. So, reverting to **OCS v Taylor**, shortcomings up to the end of the disciplinary hearing had now been sufficiently rectified to render the process overall fair. More important the imposing of the written warning meant at law for reasons I have previously given that there was now no dismissal.

56. The Claimant expressed concern as to how he would be able to remain in the employ with a final written warning of one year hanging over his head and in the context that others would find out and it would undermine his position. But Mr Carter made it abundantly clear that they had several sites and that therefore the Claimant could be easily moved to another site in the locale. Furthermore the warning would be kept confidential. I have no reason to disbelieve Mr Carter, and the Claimant never stayed around to test that promise.

57. So the next question is this; did Mr Carter act without reasonable and proper cause in the context of events in imposing the final written warning? Again it is an objective test. I am not dealing with fairness or unfairness at this stage. Mr Carter had clear evidence that the Claimant had said something that could be interpreted as relating to Brexit and Izzy being a non British citizen having to leave the country. In the context of events Mr Carter was objectively justified in concluding that to say that, particularly as a supervisor, was a serious error of judgment. Thus I conclude that on a balance of probabilities and with the burden of proof at this stage of course upon the Claimant to show otherwise, that Mr Carter did act with reasonable and proper cause.

Conclusion

58. It therefore follows that Mr Carter did not repudiate the reinstated contract of employment by imposing the final written warning. Therefore the Claimant by resigning was not constructively dismissed. Thus the claim fails and is dismissed.

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Employment Judge Britton

Date: 9 February 2017

JUDGMENT SENT TO THE PARTIES ON

13 February 2017

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FOR THE TRIBUNAL OFFICE