



EMPLOYMENT TRIBUNALS

Claimant: Piotr Stankowski

Respondent: Kuehne + Nagel Limited

HEARD AT: Bedford: 23 & 24 May 2017

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person.
For the Respondent: Ms Alex Newborough (solicitor).

RESERVED JUDGMENT

1. The Claimant's unfair dismissal claim is not well founded, and is dismissed.
2. The remedy hearing currently listed on **14 August 2017** in Cambridge Employment Tribunal is vacated.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent from 1 August 2007 until 2016. On 21 September 2016 ("**EDT**"), he was summarily dismissed for gross misconduct, namely for allegedly racially abusing a co-worker. Following compliance with the Early Conciliation procedure, on 15 January 2017 he presented a claim alleging unfair dismissal.

EVIDENCE

2. I heard oral evidence from the Claimant, and from his witnesses Mr Drius Koltun, Mr Maciej Zadierowski and Mr Cezary Letiewick. The Claimant and all his witnesses are all Polish, and gave evidence with the assistance of a Polish interpreter, albeit they could all speak some English with varying degrees of competence. (Mr Letiewick's English was probably the most proficient.) On behalf of the Respondent, I heard from Mr Darren Taylor (Operations Manager) and Mr Chris Arnold (RDC Manager Central). I was referred to an agreed bundle of documents totalling some 217 pages. I invited the parties to take me to pages they considered relevant, which they duly did. The Respondent also provided me with photographs and measurements of the site. Ms Newborough also helpfully provided written submissions, and both she and the Claimant orally addressed me at the conclusion of the evidence.

ISSUES

3. The parties agreed that I would initially deal with liability issues (and any deductions for contributory fault, or on a **Polkey** basis), leaving remedy for a later date if necessary, and if not capable of agreement between the parties. The issues for me to determine were therefore agreed and refined as follows:

Unfair dismissal

- a. What was the reason for dismissal? As to this:
 - i. The Respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of the Employment Rights Act 1996 ("ERA").
 - ii. The Claimant accepted that misconduct was the principal reason for his dismissal, and that the Respondent believed the Claimant to be guilty of misconduct.
- b. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
 - i. Did the Respondent have reasonable grounds, founded on a reasonable investigation, for its belief that the Claimant was guilty of misconduct?
 - ii. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?
 - iii. Further to this, the Claimant asserted that the Respondent could have done 'something else' other than dismiss him, and that dismissal was too harsh a sanction.
- c. If the dismissal was unfair:
 - i. Should any award be reduced (and if so, by how much) for contributory fault having regard s.122(2) and s.123(1) ERA and/or the principles set out in **Polkey v. AE Dayton Services Ltd?**
 - ii. (Neither party relied on the other's non-compliance with the ACAS Code.)

FACTUAL FINDINGS

4. The Respondent is an international logistics company.
5. The Claimant was employed by the Respondent as a warehouse operative, based at the Respondent's Wellingborough site along with about 160 other workers.
6. The Claimant's job involves shifting stock along two or three aisles, which each measured about 43m by 2.4m. He and other operatives -about 10 workers per shift on nights- wear a headpiece in one ear, which gives them instructions. They move along the aisles, in a one-way pattern. A radio plays music over a tannoy system. Fork lift trucks ("FLT") drive around from time to time, creating more noise. It follows that it would be impossible for every worker to hear what every other worker said at every moment.
7. The Respondent has a diverse workforce -for example, about 40% of the shift on which the Claimant worked was Polish. Several other nationalities were represented, too. The Respondent operates a policy of requiring its operatives to talk with each other in English, to promote inclusion and effective communication. The Respondent's Code of Conduct provides: *"English is the business language employed across the Company... In some instances, conversing in a language other than English, whilst in the company of others within the working environment, can create an atmosphere which is exclusive, potentially disrespectful of others, and may be regarded as a breach of Company policy. All colleagues are therefore expected to converse in English in the course of their working activities"*.
8. On 31 January 2016, a black co-worker, Mr Daryl Chambers, alleged that whilst the Claimant had been on a night shift with him in the Ambient Section the previous morning, he had made offensive comments in Polish about him.
9. A Polish worker, Mr Rafal Nowak, and a Hungarian worker, Mr Norbert Baliga, both warehouse operatives, confirmed to Mr Stuart White (Warehouse Operations Controller) that during that night shift they had heard the Claimant using insulting words in Polish which were apparently directed towards Mr Chambers. Specifically, the Claimant was alleged by both of them to have referred to Mr Chambers in Polish as a something like *"stinking black cunt"*.
10. Mr White nominated Jayne Beirne, Warehouse First Line Manager, to investigate. She spoke that day with various other co-workers, namely:
 - a. Mr Masters. He was not Polish. He said he did not hear any racist comments himself (though he *"heard on good authority"* that remarks had been made at Mr Chambers *"because he is black"*.) he also said that the

Claimant *"gave off a constant feeling of intimidation and causes a general frustration and misery at work"*.

- b. Mr Letkiewitz. He is a good friend of the Claimant. He said that the night in question was *"a quiet night"*, than there had been no swearing, and that *"every night is just the same"*. He did not seek to assert (as he does in his tribunal witness statement) that Mr Nowak was *"mad about taking revenge"* against the Claimant, or that Mr Chambers had *"paranoiac issues with racism"*.
- c. Mr Rust. He said he did not hear any swearing, but that he did not speak Polish.
- d. Mr Burlac. He said he did not hear any swearing.
- e. Mr Wardzah. He said he was *"too busy working"* to hear swearing.
- f. Mr Bardoz. He was asked if he had heard anything on the night in question which could be described as racist. He said the Claimant had said something in English to him like *"can you smell that?"* which he thought was directed at Mr Chambers.

11. Mr White immediately suspended the Claimant from work on full pay, pending investigations. An investigatory meeting was arranged with him for 5.2.16.

12. Meanwhile, on 1.2.16 Jayne Beirne carried out further interviews. As to this:

- a. Mr Baliga confirmed that the Claimant had said (in Polish) that *"one of the black guys was stinking"*. He said he knew enough Polish to understand what the Claimant had said, and that he thought the remark was aimed at Mr Chambers.
- b. Mr Nowak said he heard the Claimant say *"nigger"* in Polish *"only a few metres from Daryl"*, *"at least 3 times that night all at different times of night"*.
- c. Mr Chambers said that the Claimants had made comments in Polish whilst laughing with Mr. Letkiewicz. Though he could himself understand little of what was said beyond the odd swear word, he said he had asked a Polish colleague the meaning of the words he had heard the Claimant use, which he felt had been directed at him. He said he had been told that the words would be used to describe *"the lowest of the low"* and *"a class of person"*.
- d. He also asserted that, though no one else was present at the time (i.e. some time after 12am but before 3am), the Claimant had later on walked up behind him singing the song 'sweet like chocolate', which Mr Chambers felt was aimed at him because of the colour of his skin.

13. The accounts Mr Baliga and Mr Nowak gave on 1.2.16 still amounted to highly offensive conduct on the Claimant's part. However, the accounts are slightly different from the version of events given by them the previous day. Ms Beirne does not appear to have noticed this fact, or at least to have put the matter – or other potential inconsistencies – to those two witnesses.

14. Similarly, she did not take up with Mr Letkiewicz the allegation made by Mr Chambers that Mr Letkiewicz was a 'willing witness' to the abuse, nor (it seems) identify and question the Polish colleague whom Mr Chambers said he had asked to translate after the event.
15. Ms Beirne interviewed the Claimant on 5.2.16. The Claimant denied any wrongdoing. He also asserted that he spoke English in the warehouse, albeit he spoke Polish to his Polish friends. (In his evidence to me, the Claimant asserted that he only spoke English throughout the shift in question. I reject that assertion, in the light of the variety of witnesses who asserted he spoke in Polish on several occasions.)
16. The interview of the Claimant could have been a lot more focused. Ms Beirne told the Claimant she had "*taken statements from a lot of people*". But she did not identify the people concerned. She asked him, without giving him copies of the statements or details of the allegations, "*why do you think that people have made these statements against you?*" The Claimant said he did not know. She asked the Claimant if he said anything offensive. He said he did not. She also asked what word would be used in Polish to call someone "black" or "nigger". Without seeking clarification as to the meaning of the latter word, he told her. (The Polish word he used -"ciemny"- which he explained is utilised as a pejorative word for 'black person', rather than as describing the colour 'black'. The closest English comparison is 'darky'. This suggests the Claimant was fully aware what 'nigger' meant.)
17. Ms Beirne, unhelpfully, did not actually spell out to the Claimant what he was alleged to have said. Perhaps unsurprisingly, the Claimant said he did not know what was going on.
18. The Claimant also said, in a reconvened meeting some 15 minutes later, that he felt harassed because this was the second grievance against him. (A previous complaint had been made in March 2015, as a result of the Claimant taking off his clothes in the canteen area. Following an investigation, no further action had been taken against him.) When asked why anyone would harass him, he said people may be "*jealous because of my different contract- I don't know why*".
19. The Claimant then was signed off for a protracted period of sick leave with stress/depression, and then had a pre-arranged holiday, from 5 February 2016 to 2 August 2016. In the interim, on 23 February 2016, the Respondent sent him copies of the various witness statements. Having received them, the Claimant did not at that stage alleged that the Respondent ought to speak to further or other witnesses.
20. The names of the statement-givers were redacted. However, it is clear from his later interviews that the Claimant knew their identity. (He did not seek to argue otherwise before me.) It was also clear to him by at least late February 2016, as he

candidly accepted in his evidence, that neither Mr Koltun nor Mr Zadierowski had yet given a statement. Despite this, he did not at that time ask the Respondent to interview either Mr Koltun nor Mr Zadierowski, or suggest their evidence was relevant.

21. In his evidence to me, the Claimant asserted it was the Respondent's job to identify relevant witnesses. Even if this is right, in my judgment it ought not to have prevented the Claimant from himself raising the issue in his various conversations with HR during his period of absence. Moreover, as the Claimant accepted in his evidence to me, he spoke with Mr Zadierowski in late February 2017 (despite having been told in his suspension letter not to speak to work colleagues without the Respondent's consent).
22. This is relevant in the light of the Claimant's later assertion -which I reject- that the Respondent *deliberately* held back on interviewing 'key witnesses' Mr Koltun and Mr Zadierowski.
23. Following his return to work, a disciplinary hearing took place, chaired by Mr Taylor, on 10 August 2016. The invitation to the disciplinary hearing explained it was to deal with "*alleged racist remarks*". No specifics were given in the letter, albeit as I have said the Claimant had already been sent the various interview notes some months beforehand. The Claimant did not seek to assert to me that he was unaware of the details of the charges against him.
24. The Claimant was accompanied by his union representative, Rachelle Wilkins. Julie Harling attended as note taker.
25. At that hearing, it was put to him that the words used were "*nigger*" and "*black people smell*". Of course, this latter obnoxious comment was not quite what it had been alleged the Claimant had said. However, the overall sense and sentiment was consistent.
26. The Claimant denied knowing what "*nigger*" meant (albeit he had previously told Ms Beirne that the word for "*black*" or "*nigger*" in Polish was "*ciemny*", as explained above).
27. The Claimant at no point suggested that he had said anything (in English or Polish) on the night in question which might have been misunderstood or misheard.
28. The Claimant suggested that the witnesses had made up the allegations, either because they were jealous of his favourable terms and conditions (as a TUPE transferee in 2008) which meant he had "*a better life or something*", or because he had smelled marijuana in the smoking area when Mr Chambers, Mr Nowak and others were present ('the marijuana event'). He again said this was the second complaint made against him in the last 12 months, and thus that there was a conspiracy against him.

29. This was the first time that the Claimant asserted there was some sort of connection between the allegations of racism and the 'marijuana event'. The meeting notes appear to record the Claimant as saying that he had sent the Respondent a statement in March 2017 about marijuana use (the Respondent having received an anonymous complaint in March 2017.) However, even if such a statement was sent by him– the Claimant in his evidence to me denied he ever made a statement, or that he told Mr Taylor he had done so- it post-dated the January 2016 events by several weeks. Moreover, the Claimant at no point asserted that he had accused anyone to their face of smoking marijuana. Thus Mr Taylor considered the 'marijuana event' could not sensibly explain any conspiracy by his co-workers.
30. The Claimant also identified two other witnesses, namely Mr Zabierowski and Mr Koltun, whom he asked to be interviewed. Mr Taylor agreed to do so. Mr Taylor also said he wanted to talk to Mr David Flint, who had supervised the night shift on 30.1.16.
31. Mr Taylor adjourned the meeting. Thereafter, he spoke with Mr Zabierowski and Mr Koltun. Mr Koltun explained that his shift had lasted about 5 hours. As he started at 8pm, this meant he would have left by about 1am. (In fact, in his evidence to me, Mr Koltun said he might have left between 12am and 1pm). Mr Zabierowski confirmed he was working as a FLT driver that shift- which as far as Mr Taylor was concerned would have meant his ability to hear workers' comments would have been limited. They told Mr Taylor they did not hear any racist comments.
32. Neither Mr Koltun nor Mr Zabierowski mentioned at their interview "*Mr Chambers' obsession about his skin colour*" which issues is raised in Mr Koltun's witness statement for this tribunal.
33. Mr Taylor also interviewed Mr Flint. Mr Flint said he did not witness the alleged incident. However, he did say that complaints had been made before about the Claimant making derogatory (though not racist) comments about colleagues and "laughing at the expense of other people". He explained that Mr Nowak had confidentially raised issues with the Claimant's conduct in the past. He identified Mr Letkiewicz as an obvious friend of the Claimant.
34. The disciplinary hearing was reconvened on 9 September 2016.
35. Mr Taylor took time carefully to consider his decision. He decided to summarily dismiss the Claimant, and told him as much at a reconvened meeting on 21 September 2016. He did so for the following reasons:
- a. The words allegedly used by the Claimant were -taken separately or as a whole- completely unacceptable, and manifestly constituted harassment and bullying under the Respondent's policies.
 - b. Mr Nowak and Mr Balinga had clearly said that the Claimant had made racist remarks. Mr Taylor essentially believed them.
 - c. Mr Taylor accepted Mr Chambers' account, as set out above.

- d. Mr Taylor considered that the evidence of those who asserted no inappropriate words had been used by the Claimant was not sufficiently persuasive, or not sufficiently impartial, to undermine his belief in the Claimant's misconduct.
- e. Some support was given to the 'case' by Mr Flint's evidence that the Claimant had been loud and rude to others before -albeit not in racist terms. (This was partially corroborated by Mr Masters, too.)
- f. There was no obvious reason why Mr Chambers, Mr Nowak or Mr Baliga would lie about so serious a matter.
- g. Mr Taylor discounted the Claimant's conspiracy theory, because:
 - i. Other members of staff (including Mr Zabierowski) had similar more advantageous terms of employment, as a result of the TUPE transfer in about 2008. There was no sign they had been targeted as a result.
 - ii. He considered there was no evidence to suggest the Claimant's terms of employment were in any way material. Otherwise, why had he not been targeted earlier?
 - iii. The Claimant had not reported or threatened to report anyone regarding the 'marijuana event' by (at least) February 2016. Also, the Claimant had not raised the possibility with Mr Nowak or anyone else that they may have been smoking marijuana.
 - iv. The previous allegations against the Claimant in 2015 had been by entirely different staff members, for entirely different reasons. Moreover, no action had been taken by the Respondent- which strongly militated against the theory of a conspiracy on its part.

36. Mr Taylor's 26.9.16 letter sets out his reasoning.

37. The Claimant appealed his dismissal, by a letter dated 29.9.16. In it, he asserted that the sanction was "too harsh", and that "there were more witnesses in my favour than against regarding the allegations of racism"

38. The appeal was heard by Mr Arnold on 24.10.16. Mr Arnold was not taken by the Claimant to the various evidential discrepancies I have outlined above. Nor did he spot any of them himself, despite having (he said) "*reviewed the statements in detail*". The Claimant asserted that there had been undue delay on interviewing Mr Zabierowski and Mr Koltun. However, it was pointed out to him (and I accept) that, had the Claimant asked for them to have been interviewed earlier, this would have been done.

39. Mr Arnold dismissed the appeal by a letter dated 28 November 2016.

THE LAW

40. The following principles are material:

- a. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small** [2009] IRLR 563, CA, para 43 *per* Mummery LJ.
- b. The same ‘band of reasonable responses’ test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. See **Sainsbury’s Supermarkets Ltd v. Hitt**, [2003] IRLR 23, CA, to which Ms Newborough referred me.
- c. As regards that process:
 - i. It is incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as information which points towards guilt.
 - ii. Section 98 of ERA does not require an employer to be satisfied on the balance of probabilities that the employee whose conduct is in question had actually done what he or she was alleged to have done. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer’s capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd** [2003] IRLR 273, *per* Wall J, at paras 35 & 36.
 - iii. It does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably unfair. A “forensic or quasi-judicial investigation” is not required. **Santamera**.
 - iv. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94.
- d. As long as the principal reason for dismissal is a potentially fair one (e.g. misconduct), it does not matter if the employer is relieved or pleased to be rid of the employee in any event. Opportunism does not *per se* render a dismissal unfair. See **ASLEF v Brady** [2006] IRLR 576, EAT, *per* Elias J, Para 78:

“An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords... The fact that the employers are glad to see the back of him does not render the dismissal unfair. What causes the dismissal is still the misconduct; but for that, the employee would not have been dismissed”.
- e. In the event of a finding of unfair dismissal:
 - iii. If the dismissal was ‘procedurally unfair’ but the tribunal is satisfied that the employee would or could nevertheless have been fairly

dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction of up to 100% to any compensatory award under s.123(1) of ERA.

- iv. The tribunal must consider and determine whether or not there was a quantifiable chance that the claimant would have been fairly dismissed at some material point. See further **Software 2000 Ltd v. Andrews and others** [2007] IRLR 568. There, the EAT held:

"...there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise".

- v. As was more recently explained by the EAT in **Hill v. Governing Body of Great Tey Primary School** [2013] IRLR 274 (per Langstaff P):

"...the assessment ... is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? A Tribunal... is not answering the question what it would have done... The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

- vi. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.
- vii. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

APPLICATION TO THE FACTS

41. For the purposes of the unfair dismissal claim, I do not need to decide if the Claimant in fact made any of the unacceptable racist remarks alleged of him. Nor do I need to decide what I would have done by way of outcome, if in the Respondent's position.

42. Similarly, I do not need to decide whether or not I would have adopted a different investigatory process. Rather, as explained above, the question for me is whether the process adopted was reasonable.
43. As to this latter issue, Mr Newborough candidly accepted in her oral submissions that the conduct of the investigation was “*not ideal*”. I agree. I consider there was some weaknesses in the procedure adopted, from which the Respondent would do well to -and doubtless, will- learn. Ms Beirne’s questioning of (in particular) the Claimant in February 2016 could have been clearer and more focused on the specific allegations. It would probably have been sensible for her to pick up with Mr Nowak and Mr Baliga the wording used by them on 31.1.17 and 1.2.16, and test for any potential inconsistencies. See also para 14 above.
44. It would have been prudent for Mr Taylor and Mr Arnold themselves to try and speak with Mr Nowak¹/Mr Baliga on this point -albeit I appreciate the Claimant (though represented at the time) did not himself seek to rely on any such inconsistencies at his disciplinary or appeal hearings.
45. I also expressed some disquiet when Mr Arnold, in his evidence to me, appeared to misunderstand the provenance of the initial complaint (ie Mr Chambers, not Mr Nowak or Baliga). He also asserted that Mr Nowak/Baliga had been upset and offended by the Claimant’s words- and hence raised the complaint- whereas Mr Nowak (when asked why he had not himself reported the matter) said he “*didn’t take it serious*”. This suggests that Mr Arnold is -at least, now- not as clear about the core facts as he should have been at the time.
46. However, looked at in the round, and bearing in mind what I have said at paragraphs 40(b)&(c) above, I consider that the Respondent’s belief in the Claimant’s misconduct was founded on a reasonable (if imperfect) investigation. Mr Taylor clearly had sufficient grounds for believing that the Claimant had behaved in a thoroughly unacceptable way, which was well deserving of summary dismissal regardless of the Claimant’s long service and clean disciplinary record (which I accept Mr Taylor duly took into account). Summary dismissal was well within the range of reasonable responses open to the Respondent.
47. Mr Taylor was in my view fully justified in rejecting the Claimant’s three ‘conspiracy theories’, for the reasons I have set out above. Moreover, I accept his evidence that the simple fact more members of staff said they did not (rather than did) hear the Claimant making racist comments did not outweigh, at least for ‘reasonable belief’ purposes, the damning evidence on which he founded his decision. I say this especially given what I have said about the work environment at paragraph 6 above.

¹ Mr Nowak had left the Respondent by September 2016.

48. Even if I am wrong in my assessment as to the fairness of the dismissal, I do not think that any of the Respondent's procedural failings made any difference to the inevitable final outcome. For that reason, a 100% **Polkey** reduction would apply.
49. I also think, having heard the evidence, that on the balance of probabilities it is likely that the Claimant made at least some of the racist comments attributed to him. For that reason, and for contributory fault purposes, even if the dismissal had been unfair I would have considered it just and equitable for a 100% deduction to be made pursuant to both s.123(6) and s. 122(2) of ERA.
50. **To conclude:** The claim is dismissed. The remedies hearing which was provisionally set for **14 August 2017** can be vacated.

Employment Judge Michell, Bedford
30 May 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS

