Case Number: 3202418/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Stoneman**

Respondent: **London International Exhibition Centre Plc**

Heard at: **East London Hearing Centre**

On: **18th April 2019**

Before: **Employment Judge Reid**

Representation

Claimant: In person
Respondent: Ms O'Halloran, Counsel (instructed by Trowers & Hamlins LLP)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was not unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. His claim for unfair dismissal is therefore dismissed.

REASONS

Background and issues

1 The Claimant was employed by the Respondent as a credit manager between 8th January 2007 and 14th September 2018 when he was dismissed with immediate effect for gross misconduct because of two incidents involving female colleagues about which they made formal complaints on 10th September 2018 and 11th September 2018.

2 The Claimant presented a claim form on 14th November 2018 claiming unfair dismissal, which claim the Respondent resisted.

3 In his claim form the Claimant claimed his dismissal was unfair for the following reasons:

3.1 There had been no past issues of the type of which he had been accused, in 10 years employment

3.2 The Claimant had had problems integrating in the team and there was a Machiavellian atmosphere within the team

3.3 Although he had been given a previous 6 month warning about another colleague Ms Coleman, that had been due to a personality clash and he had since then been awarded a bonus

3.4 There was a clique of 4 people within the team which he had spoken to the Finance Controller about and who had targeted another colleague Chefon Bell

3.5 The allegations were from two members of the clique; the first was about a claim he had attempted to touch the bottom of a colleague and the second was about him showing a colleague the link to a scientific article

3.6 He felt it was a set up

3.7 There was no investigation at all until after he asked for an appeal

3.8 He had since proved collusion and fabrication.

4 The Claimant was not represented and gave oral evidence. The Respondent's witnesses who gave oral evidence were Ms Darkwa (decision to dismiss) and Mr Smith (appeal). There was an agreed bundle to page 223 and an agreed cast list and chronology.

5 As this was a misconduct dismissal the test in *BHS v Burchell* applied, which test I explained to the Claimant. I also explained the range of reasonable responses test to the Claimant.

6 A restricted reporting order under Rule 50(3)(d) had been made on 12th April 2019 to run until the start of the hearing. The Respondent requested that the order be extended to cover the hearing itself and until judgment was sent to the parties to which the Claimant had no objections. I extended the order until this judgment is sent to the parties.

7 The Respondent also applied for an order under Rule 50(3)(b), requesting annonymisation of the two complainants' names so that they are referred to as X and Y. The Claimant had no objection to this. I made this order and this version of this judgment and reasons reflect this.

Findings of fact

The complaints and the decision to dismiss

8 Ms Darkwa (the Claimant's line manager) received a complaint (page 52, the jeans incident) from Ms Y about the Claimant on 10th September 2018 (DD para 17). The complaint was that the Claimant had peered at her bottom in the office and asked if she

had something on the back of her jeans before bending down close to her, such that she thought he was about to touch her; she said she asked him to move away and that he made a joke of it. Ms Darkwa noticed that Ms Y was still visibly upset by the incident (DD para 18).

9 On 10th September 2018 Ms X informed Mr Smith the Financial Controller of an incident with the Claimant which had occurred the previous week (DD para 19) which she recorded in a formal complaint (page 53, the website incident). The complaint was that the Claimant had called her over to his desk to show her a link on his screen to an article about female ejaculation. Ms Darkwa noticed that Ms X was still visibly upset by the incident when she discussed it with her (DD para 20).

10 Ms Darkwa met with the Claimant on 12th September 2018 and suspended him pending a formal disciplinary hearing about the two incidents (DD para 21-22, page 54). I find based on her oral evidence that she discussed the two allegations with him before issuing the suspension letter. Whilst the Claimant only had one complete working day to prepare for the hearing I find this was reasonable in the circumstances (and in accordance therefore with the Respondent's policy, page 42) because Ms Darkwa had already discussed the two allegations with him, he was at home and there were two short self-explanatory statements to consider of which he was provided copies (page 55) together with the disciplinary policy. The letter told him that it was a disciplinary meeting under the Respondent's disciplinary procedure to discuss allegations which fell within gross misconduct and that disciplinary action including dismissal could be an outcome.

11 In the gap between the suspension and the disciplinary hearing Ms Darkwa spoke to Darren Bosman (DD para 23) who confirmed that the Claimant had asked Ms X to view the article, though Ms Darkwa did not receive Mr Bosman's written statement until after the disciplinary hearing. It was not however in dispute when it came to the disciplinary hearing that the Claimant had called her over to view the link – see findings below – such that no unfairness arose to the Claimant because of the absence of any statement from Mr Bosman at the time of the disciplinary hearing. In any event the statement was available by the time of the appeal – see findings below – such that had there been any unfairness because of the absence of this statement this was put right on appeal.

12 She also spoke to Tamzil Ahmed (DD para 24) who had not seen the website incident itself but saw the tail end of something when people were joking. He therefore could not add anything significant to an incident the Claimant accepted had happened.

13 Ms Darkwa also spoke to Elizabeth Coleman (para 25) who confirmed that she had seen the Claimant call Ms X over to his computer. Again the Claimant did not dispute that he had done so, so a statement from Ms Coleman would not have added anything to what he accepted had happened. In any event a statement had been obtained from her by the time of the appeal – see findings below.

14 The other possible witness to the website incident was Asha Barwell who was on sick leave (DD para 26) but she at most would have confirmed an incident the Claimant admitted had occurred. In any event a statement had been obtained from her by the time of the appeal – see findings below.

15 At the disciplinary hearing (page 57) the Claimant accepted that he had asked Ms X over to his computer to read a headline about female ejaculation (page 57). He said the link had been on the company Bing homepage (page 58). The Clamant referred to it as a 'scientific article' from which I find it was apparent to Ms Darkwa that he either did not understand how inappropriate showing such a headline to a female colleague was or that he was trying to gloss over the incident.

16 The Claimant sought to contextualise Ms X's complaint as arising following an incident around three weeks before when the Claimant had told Ms X that she had been making a racist comment when saying that mixed race babies were beautiful; the Claimant said that Ms X had taken offence to the website incident because of this issue some three weeks before (page 58) and that his motivation to call her over had been to help with that past altercation (page 58). I find that Ms Darkwa reasonably considered that whether or not there was this past discussion was not relevant (DD para 29) because what was in issue was the serious complaint on an unrelated matter.

17 The Claimant said that with hindsight he saw that it had not been appropriate judgment call to make (page 58) and that he could see why she had reported it. Notwithstanding this he still sought to argue that it was not somehow inappropriate because he had not gone looking for the article (page 59). He said he had not intended to embarrass her (page 59).

18 The Claimant therefore accepted (consistent with his oral evidence at the hearing) that he had called Ms X over and showed her a headline/link to an article about female ejaculation. Whether or not he sought to justify or explain his actions did not affect these events he accepted had occurred. He said in his oral evidence that this was not a 'good call' but that he had had no ulterior motive but that did not detract from the events he accepted had occurred.

19 As regards the jeans incident, the Claimant accepted that he had told Ms Y that there was something on the back of her jeans and that Ms Y had asked him not to touch it (page 60) and that he had replied that she should be so lucky. He said in that type of situation he may bend closer to show them the problem. He said he had not got close to her but was about 2m away (page 61). He said that he didn't think there had been anyone else present (page 60) and was not therefore alerting Ms Darkwa to other possible witnesses she could speak to.

20 Harassment of fellow employees and discrimination on the grounds of gender are examples of gross misconduct under the Respondent's disciplinary policy (page 44).

21 The Claimant also raised that he felt that certain colleagues (including the two complainants) were in a 'clique' (pages 59,61) and referred to them bad mouthing another colleague Chefon Bell, overheard by Darren Bosman, which the Claimant had been vocal about. He said that the incidents had been embellished (page 61) because of this. However, I find that Ms Darkwa reasonably concluded (DD para 31) that this was not relevant in relation to the two incidents. This was reasonable because the two complainants had not orchestrated or 'set up' the two incidents which had arisen; they arose of the Claimant's own actions which he largely accepted had factually occurred (except for the getting close to Ms Y part of her complaint). In addition, the Claimant had

said that he wanted to speak to HR about the clique (page 59). The clique in any event on his own account related to adverse feelings which had been overheard towards Chefon Bell and not towards the Claimant.

22 Ms Darkwa took the decision to dismiss (DD para 33) for the two complaints (page 63).

The appeal

23 The Claimant appealed the decision to dismiss (page 65). Mr Smith was appointed to hear the appeal (SS 4) and the first appeal hearing was fixed for 28th September 2018, though subsequently re-arranged at the Claimant's request to 11th October 2018 (page 105). I find that this was plenty of time to prepare, even if (which I have not accepted) the disciplinary hearing had been held on relatively short notice. The Claimant provided further grounds of appeal for that meeting (page 103).

24 Mr Smith went through the various points the Claimant had raised. In response to his complaint that the Respondent's policy had not been followed (point 1) the Claimant replied he had been advised not to comment. From this I find it was reasonable for the Respondent not to explore this issue further, because it did not know the basis on which the Claimant said the policy hadn't been followed. As regards his complaint about the notification of the disciplinary hearing (point 2) I have found that the letter did make it clear what the nature of the meeting was. In any event when this was explained to the Claimant at the appeal meeting he could not identify (again replying 'no comment') what difference it would have made if the letter had been any clearer than it already was (page 106) from which I find that there was nothing further the Respondent could do about this issue.

25 As regards the website incident (point 3) the Claimant now appeared to be saying that it was relevant that it was only a link not a picture but he had already accepted in the disciplinary hearing that he had shown her the link about female ejaculation. He also seemed to be saying that he had not encouraged her to come over but he had accepted in the disciplinary hearing that he had asked her to come over and look at the link. He again sought to justify the link as a 'scientific article'. He was asked (page 107) as regards point 5 what the relevance was of the claimed inaccuracy of the dismissal letter but said that the point he had made which had not been accurately recorded was that he had said that he would in fact have shown the article to anyone, then referring to it being on the Bing homepage. I find from all this the Claimant still did not appear to grasp the inappropriateness of his behaviour and was still trying to gloss over it.

26 As regards the jeans incident, the Claimant (page 107) challenged the extent to which he had been in Ms Y's personal space (point 5). He wrongly said that his recent meeting about his performance plan had not indicated any issues when in fact Ms Darkwa had previously raised outstanding improvements needing to be made about inappropriate and foul language at work and maintaining discretions in conversations about which the outcome of the meeting was that foul language was still being used. Whilst the use of foul language was a different issue, it was not the case, as presented by the Claimant, that there were no ongoing attitude and behaviour issues. Ultimately the Claimant was saying that he had not invaded Ms Y's personal space although Ms Y was saying he had done so.

27 Mr Smith asked the Claimant to explain why he felt there was a clique (page 108). The Claimant's response was that he had been asked not to comment on that. There was therefore nothing the Respondent could do to investigate that issue based on information from the Claimant but Mr Smith nonetheless went on to investigate it – see below. He said he was not prepared to discuss any past discussions with Ms Darkwa and said that the issue was two brief office interactions (page 109). He said he was sorry for the impact he had on others (page 109) and had not intended to harass anyone.

28 Mr Smith then undertook further thorough and extensive investigations. He re-interviewed Ms X (page 114) and Ms Y (page 121). He also interviewed Ms Darkwa (page 126), Ms Coleman (page 133), Mr Bosman (page 138), Mr McCabe (page 141), Ms Barwell (page 145) and Ms Edwards (page 147). These statements were all provided to the Claimant (page 150). The Claimant had also provided some additional appeal grounds dated 16th October 2018 (page 111). Mr Smith was therefore not 'rubber stamping' Ms Darkwa's decision to dismiss but was reconsidering the whole matter in the light of new evidence as well as the existing evidence by doing his own investigations and holding two appeal meetings with the Claimant.

29 As regards the website incident Ms X said that her colleague Liz (Ms Coleman) had said the situation had been inappropriate (page 115) and confirmed what the Claimant had said about not showing her an image but the text of the link with the words 'female ejaculation'. Mr Smith explored the issue the Claimant had raised about the previous comment about baby photos even though this was not relevant to the website incident. Ms X also referred to the Claimant sitting unnecessarily close to Ms Coleman (page 118) and touching Ms Y's arms at an audit dinner (page 118). Mr Smith also interviewed Ms Coleman (page 133) who confirmed the Claimant had called Ms X over to his desk to look at something and mentioned female ejaculation. He also interviewed Mr Bosman who confirmed that the Claimant had shown Ms X the text of the headline about female ejaculation (page 138). He also interviewed Ms Edwards who said that the Claimant had asked Ms X over to look at something (page 147) though she wasn't then aware what it was about.

30 As regards the jeans incident Ms Y (page 121) said that there had been two witnesses, Tanzil Ahmed and Asha Barwell. Mr Smith duly spoke to Ms Barwell as well (pages 145) who said that although she had not seen the incident clearly she had seen Ms Y immediately very upset (page 145), consistent with the upset Ms Darkwa had observed when she reported the incident. I find that Mr Smith reasonably did not interview Mr Ahmed because he had already told Ms Darkwa that he had not seen anything (page 126). Whilst the Claimant in submissions referred to Tanzil's evidence (as recorded on page 126 by Ms Darkwa) as showing that it was clearly a joke this was inconsistent with Ms Barwell's evidence of immediate apparent upset, which was more likely.

31 I find that Mr Smith also explored with those he interviewed the existence of the possible clique and what relationships were like within the team even though even if there was a clique that clique could not have orchestrated or brought about the two incidents which the Claimant had broadly had accepted had happened (even though he disputed invading Ms Y's personal space/ getting too close to her and even though he disputed he had done anything wrong or intended to upset anyone). He asked Ms Coleman (page 136), Mr Bosman (page 139) and Ms Barwell (page 146). Taking into account his oral

evidence that he considered that the team worked well he reasonably concluded there was no clique and that in any event to initiate a conversation about female ejaculation was an appalling thing to do.

32 The appeal hearing was resumed on 2nd November 2018 (page 199). The Claimant by now had also provided his additional appeal notes at page 195. He said he had had enough time to prepare (page 199).

33 As regards the website incident, the Claimant accepted he had called over Ms X to look at the headline (page 200) though he said it was not a pre-empted plan. When asked why he had done this his response was that the link hadn't been accessed. He still said it was a 'scientific article' and that it was an article of interest (page 207). He accepted it was an error of judgment (page 207) but also said (page 209) that there was nothing he deemed inappropriate or unacceptable to discuss at work which demonstrated a degree of arrogance given the situation he was in and an inability or unwillingness to acknowledge that what he had accepted he had done was wrong.

34 As regards the jeans incident the Claimant said that he was a naturally tactile person (page 201) and said he did not recall a past incident of also tucking in her dress label (as opposed to saying it did not happen). His stance was that if he had upset people or made them feel uncomfortable he apologised (page 202, 205).

35 Mr Smith asked the Claimant if there was anything further which made the Claimant feel the matter had not been fully investigated (page 220P) and the Claimant said that Mr Smith had done all he needed to do to make a decision. I therefore find that the Claimant was given a clear opportunity to raise anything further but did not do so. Mr Smith also explored how relationships might be repaired if the Claimant returned to work (page 219) showing that he was not ruling that out, but the Claimant's response that it was for others to come to terms with it, showing either a further lack of insight into what had happened or an ongoing unwillingness to address his behaviour, relevant to Mr Smith's loss of confidence in him.

36 Mr Smith upheld the decision to dismiss (page 221).

37 Taking the above findings into account I find that what Mr Smith had before him following his own investigations into the website incident was a situation where the Claimant accepted that he had called over a female colleague to view a link/headline about female ejaculation. Although the Claimant said he was sorry he had upset anyone, he had sought to justify the article as 'scientific' and his account was that there was nothing he would think was unacceptable to show a colleague, having previously accepted at the dismissal stage that it was a bad judgement call and that she was right to report it and at the appeal stage that it was an error of judgement. I find Mr Smith's conclusion that she had been singled out (SS para 58) to be reasonable based on the Claimant accepting he had called her over to look at something specifically involving female ejaculation which is what two other witnesses had also confirmed. The fact that the Claimant also showed the link to Mr Bosman does not mean he was not singling Ms X out because it was a subject matter likely to cause her, as a woman, distress or embarrassment. Although the Claimant had said he was sorry about it and that he had not intended to upset anyone I find that these actions reasonably appeared to Mr Smith to be sexual harassment taking

into account the upset and distress they caused to Ms X. Although Mr Smith had duly investigated it, the existence or otherwise of a clique did not explain or excuse this incident because it arose from the way the Claimant chose to behave.

38 Taking the above findings into account I find that what Mr Smith had before him following his own investigations into the jeans incident was the Claimant accepting he had spoken to Ms Y about the label on the rear of her jeans but not accepting he had got too close so as to make her feel uncomfortable or invading her personal space. On the other hand Mr Smith had a statement from Ms Barwell consistent with Ms Y's account to the extent that Ms Barwell had seen that something had really upset Ms Y. Mr Smith also had before him evidence that the Claimant had a habit of touching people at work and getting too close to them which made an incident about peering at Ms Y's bottom more likely. I find it was therefore reasonable for him to conclude (SS para 59) that the Claimant had peered at her bottom. Mr Smith did not conclude that the Claimant had invaded Ms Y's personal space or tried to touch her but that he had peered at her bottom and was not therefore relying on disputed evidence as to how close the Claimant had been to her.

39 I find that Mr Smith reasonably took into account that the Claimant had been warned on a number of occasions in the past about his behaviour towards colleagues in the office and had been told what behaviour was unacceptable. He had received a final written warning in August 2017 (page 45) in relation to behaviour towards Ms Coleman, which although had by now expired was not irrelevant to the decision to dismiss. That final written warning made it clear to the Claimant that it was the individual's perception which was relevant to bullying and harassment. More recently, matters as regards behaviour had been raised as part of the performance improvement plan (page 46B) including inappropriate language and unappreciated office 'banter'. Although there had been some improvement (page 50) there was still foul language. The fact that the Claimant had improved on other areas in his work as regards work quality, dependability, strategic awareness/thinking and communication was not relevant to the two complaints because they arose shortly thereafter and were not a performance issue. Ms Darkwa had also spoken informally to the Claimant about incidents of inappropriate behaviour (page 127). It was also, taking into account the above findings of fact, reasonable for Mr Smith to have lost confidence in the Claimant (SS para 62).

Relevant law

40 The relevant law as regards the unfair dismissal claim is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation. The range of reasonable responses test applied as set out in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt* [2003] IRLR 23. It is not for me to substitute my own view but to consider what a reasonable employer might do, within that range.

41 If there is a procedural defect in an initial investigation that can be cured if the later investigations are enough to put right the previous unfairness (*Taylor v OCS Group Ltd* [2006] IRLR 613).

42 An employer is not required to ignore an expired prior warning when considering whether or not to dismiss. The taking into account of an expired warning is an objective circumstance relevant to whether the employer acted reasonably or unreasonably under s98(4) Employment Rights Act 1996 and it is not the case that an expired warning could never be taken into account (*Airbus UK Ltd v Webb* [2008] IRLR 309).

Reasons

43 Taking into account the above findings of fact the Respondent had a genuine belief that the two acts complained of had happened and that these matters constituted gross misconduct.

44 The Claimant accepted that he had asked Ms X over to view a link/headline about female ejaculation at dismissal stage and I find that the decision to dismiss on this allegation alone without further investigation would have been fair. However, Mr Smith nonetheless investigated the website incident further after the first appeal meeting, obtaining multiple detailed statements (provided to the Claimant) and in particular investigated the suggestion of a clique or problems within the team even though the existence of a clique could not have caused the Claimant to ask a female colleague to look at a link/headline about female ejaculation, which the Claimant accepted he had done.

45 Mr Smith also undertook further investigations into the jeans incident speaking to those who might have seen /heard anything.

46 I find therefore that any inadequacies in the initial investigation into the jeans incident at the dismissal stage were put right on appeal.

47 Overall, the investigation undertaken by Mr Smith at the appeal stage was thorough and followed up on issues raised by the Claimant in the disciplinary process. The Claimant accepted that it had been thorough (page 220P). Whilst the Claimant said that this meant the process was done 'back to front' with investigations being only done at the appeal stage it means that in any event any gaps in investigation into the Ms Y incident was put right on appeal. The further investigations by Mr Smith also show that he was not 'rubber stamping' Ms Darkwa's decision to dismiss and did not dismiss the claimed clique as irrelevant to the incidents, even though the Claimant had largely accepted the facts of the two complaints.

48 The Respondent therefore had reasonable grounds to decide that the misconduct had occurred and the decision to dismiss was taken following a reasonable investigation. The three character statements attached to the Claimant's witness statement were not provided to the Respondent until this witness statement was provided so could not have been taken into account by the Respondent at the time of dismissal. In any event they did not add anything as to whether the two incidents had occurred or not.

49 The Respondent complied with its disciplinary procedure.

50 The decision to dismiss was reasonable in any event as regards the website

incident even if taken on its own given the nature of the incident. The decision not to uphold the appeal on both incidents was also reasonable and the taking into account that the Claimant knew what behaviour was expected of him (and not just that covered by the 2017 expired warning but also more recently as discussed with him) was also overall reasonable, given the two new incidents were also about behaviour towards colleagues. If the Claimant had improved his interaction with Ms Coleman (C para 5) he had not managed to do so with these two other colleagues. The Claimant veered between saying he knew the website comment was inappropriate and showed a lack of judgment to saying that nothing in the workplace was inappropriate and exercising the right to remain silent by answering no comment in the first appeal meeting. He either did not understand something quite basic in terms of how not to behave at work or if he did, carried on regardless. Mr Smith therefore reasonably lost confidence in him.

51 Although the Claimant had been given a bonus in April 2018 this was before the two incidents so was not relevant. The fact that the Claimant had been asked to be a 'good to great' ambassador was not relevant to whether or not these incidents occurred (C para 6). The issue about the alleged clique and Chefon Bell was also not relevant to whether these two incidents occurred, given the Claimant accepted that they had occurred (save to the extent of invading Ms Y's personal space/ getting too close to her). The fact that the Claimant had improved in some areas of his work (C para 4) was not relevant to whether these two incidents occurred because they were on their own serious matters and he was not dismissed for poor performance but because of the two serious incidents. Although he had raised Angela Lakeman and Sarah Dixon as possible witnesses at the time about the clique (page 195, C para 7) the Respondent had undertaken a reasonable investigation into the clique bearing in mind it was ultimately of little relevance given what the Claimant had admitted had occurred, instigated by himself. The Respondent spoke to the other employees identified during the disciplinary process as potentially relevant but did not unreasonably 'pick' witnesses as claimed. The Claimant in submissions said that there had been lying and collusion between witnesses to get their stories straight, but the statements reflected events which the Claimant largely accepted had happened.

52 The Respondent reasonably concluded that these two complaints were so serious that mitigating factors such as length of service did not apply. Whether or not the Claimant intended to distress or upset Ms X and Ms Y did not mean that acts of sexual harassment had not occurred. The fact that he may not have intended to upset them does not make his dismissal unfair.

53 The dismissal was therefore within the band or range of reasonable responses and was fair under s98(4) Employment Rights Act 1996.

Employment Judge Reid

30 April 2019