



EMPLOYMENT TRIBUNALS

Claimant: Mr. Gordon Keighley

Respondent: Tesco Stores Ltd

Heard at: Hull Tribunal

On: 28, 29, 30 September 2020
1 October 2020

Before: EJ Rogerson
Mrs. S Scott
Mr. K Lannaman

Representation

Claimant: Mr. Lee Bronze (counsel)

Respondent: Ms. Aysha Ahmed (counsel)

RESERVED JUDGMENT

The complaints of unfair dismissal and disability discrimination fail and are dismissed

Complaints and Issues

1. By a claim form presented on 4 September 2019, the claimant brought complaints of unfair dismissal and discrimination arising from disability.
2. At a preliminary hearing before EJ Shepherd, on 22 October 2019, the complaints and issues were identified. The record of that hearing is at pages 35-36 in the bundle. Both parties were legally represented at that hearing and have been throughout these proceedings.
3. The claimant accepted that he was dismissed for the following 3 acts of misconduct:
 - 3.1 behaving aggressively and inappropriately towards another colleague at a handover meeting,
 - 3.2 intimidating behavior, in the form of using a grievance as a threat towards another colleague,
 - 3.3 making homophobic comments about the colleague.

Although 'conduct' is a potentially fair reason for dismissal, the claimant complains his dismissal was unfair because the employer acted unreasonably in treating the misconduct as a sufficient reason for

dismissal and the sanction was too harsh given the claimant's 26 years of service with no prior disciplinary record.

4. For the disability discrimination complaint, the claimant alleges that his dismissal was unfavourable treatment arising from his disability of 'anxiety and depression'. The 'something arising' (identified at paragraph 4.4.2 in the list of issues at page 36) was that the claimant can be "*irritable and experience emotions of anger, episodic exacerbations of depression or anxiety that can adversely impact his performance. These exacerbations are likely to be unpredictable, infrequent, not planned or directed towards any individual*". This information comes from the Occupational Health report commissioned by the respondent prior to the claimant's dismissal advising the respondent about the claimant's anxiety and depression. The claimant relies on this to link his symptoms of anxiety/depression to his aggressive conduct at the handover meeting, to try to explain or excuse that admitted misconduct. He was not saying that the 'something arising' from his anxiety/depression explained or excused the other misconduct (using a grievance as a threat, or making of homophobic comments), because that conduct was denied.
5. At this hearing Mr. Bronze raised a second condition of 'sleep apnoea' which was not identified in the list of issues, which the claimant now relies upon to support his disability discrimination complaint. Mr. Bronze suggested that that sleep apnoea could cause the same symptoms of 'anger and irritability' the 'something arising' relied upon for the anxiety and depression impairment, to explain the claimant's aggressive behavior at the handover meeting. No medical evidence was provided to support the connection suggested by Mr. Bronze.

The Disability Issue

6. To decide the disability discrimination complaint the claimant must first prove he has the protected characteristic of 'disability' and was a disabled person at the material time (dismissal). The issue for the tribunal to decide was "*whether the claimant's anxiety and depression amounted to a mental impairment that had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities of a disabled person*".
7. On 11 December 2019, after the claimant's medical evidence and disability impact statement had been considered by the respondent, 'disability' was still disputed. While the respondent accepted that the claimant had the mental impairment of anxiety/depression and it was long-term (had lasted longer than 12 months) it was not accepted that the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. From December 2019, the claimant/his legal representatives were put on notice that the claimant was required to prove, that his anxiety/depression had a substantial adverse effect on his ability to carry out normal day-to-day activities and that the respondent had actual or constructive knowledge of those effects at the time the claimant was dismissed.
8. The burden of proof rests with the claimant to prove that his impairment of anxiety/depression meets all the requirements of Section 6 of the Equality Act 2010, that it was a mental impairment and the impairment had substantial and long term adverse effect on his ability to carry out normal day to day activities.

9. The 'Guidance relating to the Definition of Disability (2011)' at B12 provides that "*where the impairment is subject to treatment or correction the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction the impairment is likely to have that effect*". The practical effect of this provision is that the impairment should be treated as having the effect that it would have, without the corrective measure. Mr. Bronze was asked to direct the tribunal to the evidence the claimant relied upon to prove the substantial adverse effects of his anxiety/depression on his ability to carry out normal day to day activities, without medication. He referred to paragraph 8 of the claimant's impact statement which states as follows:

"I have been able to continue work with no absences due to my depression. I believe I have only been able to do this because of the medication. If I was not on the medication my symptoms would be far worse and it is unlikely I would have been able to provide effect work for Tesco's"

10. The Guidance at B1 addresses the meaning of 'substantial adverse effect' and identifies some of the factors to consider. For example, the time taken to carry out an activity. The tribunal can consider how long it took the claimant to complete a work activity, compared with someone who does not have the impairment. We did not have that evidence. Also, the way in which a work activity is carried out. How did the claimant carry out a work task compared with someone who does not have the impairment? We did not have that evidence.
11. At B7 the guidance provides that account should be taken of how far a person can reasonably be expected to modify his or her behavior, for example, by use of a coping or avoidance strategy, to prevent or reduce the effects of impairment on normal day-to-day activities. Ms. Ahmed took the claimant to his medical records which showed that the claimant was offered counselling but did not take it up. He said he already had coping strategies in place. Many people who suffer with depression/anxiety can manage their symptoms without any substantial adverse effects. It was put to the claimant (and he agreed) that from the respondent's perspective they would have had no reason to consider that the claimant's ability to perform his work was in any way impacted by his anxiety/depression.
12. 'Work' is a normal day-to-day activity (see the guidance at D3) but it for the claimant to prove his depression had a substantial adverse effect on his work activity and the employer knew or ought to have known that. There were no absences from work and no performance concerns. The claimant was a private person and says he would not have discussed the effects of his depression with anyone other than his GP. The claimant accepted he never told his employer about the effects and they would have had no reason to know his depression was having any substantial adverse effect on his work at the time of his dismissal.
13. The respondent did obtain Occupational Health advice prior to dismissal. A report dated 1 July 2019, confirmed to the respondent that the depression had '**no impact on the claimant's ability to perform his role**' (page 269). The claimant had '**good insight into his condition**'. The report advises the respondent that "**the claimant was not likely to meet the criteria for disability under the Equality Act 2010**". (All highlighted text is our emphasis)

14. The assessment made by Occupational Health in July 2019, was consistent with the evidence that was before this tribunal. The depression had no impact on the claimant's ability to work/perform his role. The claimant has not provided evidence of any substantial adverse effects on his ability to carry out normal day to day activities. He knew that his impact statement had not adequately addressed the issue. He could have provided a better impact statement properly addressing the **'likely' effects** on work without medication, as the activity relied upon to satisfy the burden of proof. He could have applied the guidance that we have referred to above. Instead he chose to rely on an impact statement that was lengthy, unfocussed and inadequate. At its highest his evidence was that without medication "*his symptoms would be far worse and it is **unlikely** he would have been able to provide effective work for Tesco's*". We also found that the claimant presented to Occupational Health in July 2019, in the same way that he presented to this Tribunal. His depression did not impact on his ability to perform his role, because he did not consider that it had that effect. The respondent did not have actual or constructive knowledge of any substantial adverse effect on the claimant's ability to carry out work. The claimant has not proved his anxiety/depression had a long term substantial adverse effect on his ability to carry out normal day to day activities. The claimant was not a disabled person at the material time. His complaint of discrimination arising from disability therefore fails and is dismissed.
15. For completeness, we will deal with the impairment of 'sleep apnoea' and whether the claimant has proved he was a disabled person for that impairment. In the claimant's impact statement, he says he was diagnosed with sleep apnoea in March 2018. He was provided with a CPAP machine to treat this condition. We saw a report dated 6 June 2019, from Hull Teaching Hospital in which the claimant's sleep scores were reviewed over a long period of time showing the claimant was having 7.4 hours sleep per night. This was a 'good' sleep score and it was decided that no further treatment was required. As at July 2019, 'poor sleep' was not an issue affecting the claimant. The claimant has not identified any normal day to day activity that was substantially adversely affected by his sleep apnoea. If it was having any adverse effect he had the perfect opportunity to inform his employer, when he was assessed by Occupational Health in July 2019. The respondent did not have actual or constructive knowledge of the impairment, or of how long the claimant had the impairment or any substantial adverse effect on normal day to day activities. The claimant has not provided any evidence that his sleep apnoea has any long term substantial adverse effects on his ability to carry out normal day to day activities. The claimant was not a disabled person at the material time by reason of sleep apnoea. The claimant's complaint of discrimination arising from disability therefore fails and is dismissed.

The Unfair Dismissal Complaint

Evidence

16. For the respondent, we heard evidence from, Mr. Nicolas John Carolan (Store Manager), Miss Nicola Jane Tomlinson (Investigating Officer/ People/HR Partner), Mr. Paul Graham Best (Dismissing Officer/Store Manager) and Mr. Gavin James O'Neill (Appeals officer/ Director). For the

claimant, we heard evidence from the claimant. We also saw documents from an agreed bundle of documents. From the evidence we saw and heard we made the following findings of fact.

Findings of fact

17. The claimant was employed by the respondent from 16 March 1993 until his summary dismissal on 17 July 2019. He was employed as a Senior Night Manager. He was part of the senior management team at the respondent's Tesco store, based in Hull.
18. The claimant had 26 years of service and no prior disciplinary record.
19. The Hull store employs 350 employees and at the time of the claimant's dismissal, was under the day to day management of the store manager, Mr. Nicolas Carolan. The respondent has 3400 stores nationally with over 300,000 employees. It is a large employer. It has a dedicated in-house Human Resource team. It has detailed policies and procedures. They are carefully drafted not only to explain the standards of behavior expected but also why those standards are important for employees and for the company.
20. The respondent provides 'on line' resources and attended training to all managers so that they can understand and correctly apply the policies, procedures and codes of conduct. Over the last five years extensive training has been provided to managers on the company values and expected leadership behaviors. Training was provided to help managers identify personality traits/characteristics and to provide practical skills and techniques to help them be better managers and better deal with difficult /conflict situations.
21. The claimant confirmed he was assessed as 'red' on the 'Belbin Scale' which uses different colours to identify different personality traits. 'Red' describes a person who is 'fiery' 'direct' 'driven'. In difficult situations the training encouraged managers to identify (based on their personality traits) what the likely emotional responses to difficult work situations would be, to then help them identify, alternative better responses, using the skills and techniques provided in the training.
22. The respondent has a code of conduct (pages 394-399) which provide that the respondent *"does not accept any discriminatory practices or behaviours, as these makes colleagues feel unwelcome and excluded, damage our reputation and may result in legal action against the business"*. The policy explains the impact of discriminatory behaviour on the individual and why the company would not tolerate any form of discrimination. It warns employees that if they engage in that type of behaviour they can *"face serious consequences including dismissal and potential legal action"*.
23. The respondent also has in place a "Supporting Sexual Orientation Policy" which was implemented in August 2018. That policy (page 50) also makes it clear that *"any form of discrimination or harassment will not be tolerated. This form of behaviour is considered to be gross misconduct and may result in disciplinary action being taken against you up to and including dismissal"*. There is a specific section on 'banter' which provides that *"any homophobic or biphobic references are not to be tolerated"*. A genuine and legitimate aim of the business was to protect employees from bullying harassment and discrimination in the workplace.

24. The claimant is an experienced and long serving manager. He was taken to each of these policies and confirmed that they applied to him and he understood them. He confirmed that as part of his conflict resolution training one technique was 'taking yourself out of the situation' to deal with difficult situations in a non-confrontational manner. He also understood the grievance policy, and the steps a manager could take to resolve issues informally. He agreed grievances should not be used to achieve operational outcomes. They should not be used to achieve/influence a desired outcome by "telling someone that if they don't do a particular thing a grievance would be raised". He agreed using a grievance in that way may be perceived as a threat.

Background to Disciplinary Process

25. On 10 May 2019, an employee (A) raised a formal grievance against the claimant alleging bullying humiliating and homophobic behavior. The timeline of the events (A) gives starts from Christmas Eve 2012 to the 7 May 2019. (A) also provided the names of witnesses and supporting documents. He describes how the last straw was the claimant's 'intimidating onslaught' at a handover meeting on 7 May 2019, which was witnessed by colleagues, identified by (A). It is a detailed grievance letter (17 pages) in which (A) provides a very detailed recollection of most events based on his diary. Detailed accounts were provided for the following events:

- Christmas Eve 2012 (homophobic comments),
- 14 April 2017(1stgrievancethreat/intimidating behaviour),
- 26 October2017 (2ndgrievancethreat/intimidating behaviour),
- 7 May 2019 (3rd grievance threat/intimidating behaviour, verbal attack aggressive and threatening behavior).

26. The claimant is correct that for some of the alleged homophobic comments (A) did not provide the dates of the comments. In the grievance (A) states:

*"over the years I've been subject to **much torment from Gordon with his relentless comments about my sexuality and jokes at my expense.** Comments that often get repeated and have particularly stuck in my mind are:*

- *Backs against the wall.*
- *Don't come near, I don't want to get bummed.*
- *Don't touch me I might get something.*
- *Saying I look like a Paedo.*

I've often wondered what it is I've done to be singled out and every late shift I work I dread seeing Gordon with fear of what I'm to experience. However, I have found over the last few months that I've actually felt relieved if Gordon is cracking jokes at my expense because then, I find he is jovial which means I'm less likely to be in an aggressive/threatening predicament. I understand now that this sounds absolutely ridiculous, it's no way for anyone to

*behave in our forward-thinking company and doesn't sit within our values which I'm sure many reasonable folk would agree, **to put it simply enough is enough**" (highlighted text is our emphasis).*

27. It was put to the claimant that on a fair reading of the grievance it was clear that (A) was raising serious concerns of 'targeted' aggressive, bullying and homophobic behavior against the claimant which were said to have had a significant impact on him. The claimant did not agree, in his view (A) was a 'weak' manager who was making false accusations.

The Investigation

28. Ms. Tomlinson carried out the investigation of the grievance. She is an experienced HR officer and has conducted over 300 investigations. She used the respondent's template investigation checklist. She interviewed 26 employees, interviewing all the witnesses identified by (A) and by the claimant. She interviewed the claimant twice. From the record of the interviews, it was clear that, Ms. Tomlinson asked probing questions. She used questioning techniques from the checklist which gives examples of good questioning and provides helpful tips, which she followed. She used the same format for all the interviews she conducted. She would use general open questions and then ask more specific questions. All the employees interviewed checked the record of interview to confirm it was accurate. The claimant was provided with all the grievance documentation and the interview records. It was not put to Miss Tomlinson that any additional steps could have been taken by her as part of her investigation. We found that Ms. Tomlinson asked appropriate questions and had conducted a full, comprehensive and reasonable investigation.
29. Ms. Tomlinson upheld A's grievance. She divided the grievance allegations into 4:

Allegation 1: homophobic comment made by the claimant to employee (A) on 24 December 2012.

The claimant admitted he had said: *"enjoy your Christmas it will be your last, you'll be dead because of aids next year"*. It was agreed the comment had been made in 2012. It was dealt with informally and the claimant apologised at the time. Ms. Tomlinson decided that she would not reinvestigate this further or 'retrospectively resurrect it'. She treated it as part of the background to the other allegations.

Allegation 2: Verbal attack at handover meeting on 7 May 2019. Other employees had witnessed the claimant being verbally aggressive and intimidating towards (A) during the handover meeting on 7 May 2019. This was confirmed by 7 other witnesses.

Allegation 3: Intimidation through the threat of a grievance on three occasions.

The claimant admitted that at the meeting on 7 May 2019 he had told (A), that his managers had discussed putting in a grievance against him. However, the night managers confirmed that they had not discussed putting in a grievance against (A). She found the claimant's account was not credible. She concluded that the claimant had used the threat of a grievance to intimidate (A) on this occasion and previously. To support this view, she also had the unsolicited

evidence from another employee(DW), that a favourite term used by the claimant was “*if you don’t do this I’ll put in a grievance against you*”.

Allegation 4: homophobic and inappropriate comments.

The claimant had admitted that he had made comments to (A), about his sexuality in a “jokey or banter way”. He denied making the four homophobic comments. Three witnesses confirmed that they had heard the alleged homophobic comments being made by the claimant. Other witnesses denied hearing any comments.

30. Ms. Tomlinson shared her findings with the claimant and decided there was a disciplinary case for the claimant to answer. On 8 June 2020, she invited the claimant to a disciplinary hearing to be held on 18 June 2020 with Mr. Paul Best, Store Manager. The letter identifies the three allegations which were to be considered as:

- Aggressive and inappropriate behaviour towards another colleague at a handover meeting.
- Intimidating behaviour in the form of you using a grievance as a threat towards another colleague.
- Making homophobic comments about another colleague.

31. The claimant was warned that a potential outcome was dismissal and of his right to union representation. The claimant complains that the allegations had changed from the four identified in the grievance to the three identified in the letter. Miss Tomlinson had explained the position to the claimant at the time and he accepts that he understood that the allegations he was facing at the disciplinary hearing were the 3 identified in the letter. In closing submissions Mr. Bronze puts the claimant’s case in a completely different way to the claimant. He suggests that the allegations changed mid-disciplinary to add a new allegation of a ‘*failure to prevent banter*’. There was no evidence of a new allegation being added mid-disciplinary. The claimant and respondent proceeded on the basis that they were dealing with the 3 allegations identified in the invitation letter and nothing more.

The Disciplinary Hearing

32. On 18 June 2019, the claimant attended the disciplinary hearing with his union representative. For guidance, Mr. Best used the respondent’s disciplinary template. In advance of the hearing he read all the investigation gathered in the investigation and the 3 allegations. He prepared questions to remind him of the key points that he wanted to cover during the hearing. For example, he wanted to explore the context in which the claimant might use the term ‘grievance’. What the claimant understood by the admitted ‘jokey banter of a sexual nature’. He identified health issues as a topic he wanted to explore with the claimant to see if any health issues came into play. He wanted to identify any mitigating circumstances the claimant might rely upon. It was clear from Mr. Best’s preparation and conduct of the hearing that he approached his role conscientiously, carefully and with an open mind. He understood there were factual disputes that he would have to resolve and he was very careful to ensure that the claimant had every opportunity to put his case.

33. After the hearing, Mr. Best considered the evidence for and against each allegation. His rationale and his conclusions are contemporaneously recorded in his notes at pages 229-232. He found all three allegations were proven. He found for each allegation the investigation had been reasonable and detailed. He found that the handover meeting on 7 May 2019 was very toxic, and was in the main led by the claimant, who was the most senior manager. The claimant had made no attempt to diffuse the situation or take the point 'off' line and walkaway. He had made no attempt to follow-up, reconcile, communicate or record actions. He had not considered the impact of his behavior on others at the time or subsequently. If he had acted in the heat of the moment he did not later reflect and try to remedy the situation. Other colleagues that had witnessed the meeting corroborated (A)'s account of the meeting. He concluded that the claimant had behaved aggressively and inappropriately and that the claimant's conduct was sufficiently serious to be treated as gross misconduct. For the second allegation of intimidation by using a grievance as a threat towards a colleague, he found there were three occasions when the claimant used the threat of a grievance. In addition, there was the evidence of DW that the claimant had previously used grievances in the way alleged. The claimant accepted that for 2 of the occasions he had made references to grievances being raised in his discussions with (A). The claimant had also said that other managers wanted to put in a grievance against (A) on 7 May 2019, when that was not true. Mr. Bird believed that when a situation "*is not to the claimant's liking he can and does refer to grievances as a tool to strike fear*". The claimant viewed (A) as a weak manager and had used the threat of grievance to intimidate (A). He concluded this was also gross misconduct. For the final allegation of homophobic comments made to (A), Mr. Bird acknowledged that the claimant denied making the comments but he had accepted during interview that he had engaged in homophobic banter of a jokey nature about (A)'s sexuality. Mr. Bird found that the homophobic comments alleged by (A) had been made by the claimant and he found this was also gross misconduct.
34. At this stage, Mr. Bird was unable to make a final decision because he wanted to explore whether there were any health issues that he needed to consider. He made the referral asking a series of questions answered by Occupational Health on 11 July 2019. The questions included: whether the claimant's performance was significantly affected by ill-health, whether his ill-health was work-related, whether the claimant had a health condition which was considered a disability under the remit of the Equality Act 2010, whether the claimant was in control and aware of his behaviour and the impact it had on others. These were sensible and appropriate questions. Mr. Bird was not rushing his decision, he wanted to make all reasonable enquiries.
35. The answer to the question of whether the claimant's performance was significantly affected by ill-health was as follows:

"I am not aware of any performance issues due to mental ill health over the last five years and Mr. Keighley stated he has managed his condition reasonably well prior to his suspension. He reported that he has always been direct in his communication and that since his diagnosis of depression and anxiety, he is more prone to irritability and flushed cheeks when he feels frustrated or

angry but that this has not impacted his ability to perform his role and has not been raised as an issue at work by any colleagues or during his annual appraisals to the best of my knowledge. As he is receiving appropriate treatment for his symptoms, performance should remain in line with expectations in my view, noting that they can be episodic exacerbations of depression or anxiety or both, as explained above which could adversely impact performance at those times. I would expect such exacerbations to be mostly unpredictable infrequent and not planned or directed towards any individual based on my understanding of his condition”

36. At the reconvened disciplinary hearing on 16 July 2019, Mr. Best confirmed his decision to summarily dismiss the claimant. He reached his decision independently having carefully assessed all the evidence. He had no evidence before him to suggest that the claimant’s targeted, aggressive, intimidating and homophobic behavior towards (A) was explained or excused by his anxiety or depression.
37. On the same date, a letter was sent to the claimant confirming that he was dismissed for the 3 acts of proven misconduct treated as gross misconduct. The claimant was also informed of his right of appeal. Mr. Best considered the claimant’s long service and prior record but believed the claimant’s misconduct was so serious that dismissal was the only appropriate sanction. His “*worry and overriding thought*” was that he could not risk the claimant repeating the behavior with colleagues or customers if he returned to work.
38. In his closing submissions, for the first time, Mr. Bronze suggested that Mr. Bird and Mr. Coralan had jointly made the decision to dismiss. That was not put to Mr. Coralan or to Mr. Bird, during cross examination. We found the decision to dismiss was made solely by Mr. Bird.

Appeal

39. On 18 July 2019, the claimant appealed, listing 26 points of appeal. Mr. Gavin O’Neill, Store Director, heard the appeal. He reviewed all the documents to ensure that he understood the reasons for dismissal and the evidence upon which the decision was made. The claimant attended an appeal hearing on 30 August 2019, accompanied by his union representative. Mr. O’Neill use the ‘appeal checklist’ which provides a template structure for conducting appeal hearings. He discussed each of the 26 points of appeal with the claimant. The claimant suggested that witnesses had cooperated with each other and that Miss Tomlinson had asked leading questions. Mr. O’Neill explored that ‘corroboration’ allegation with the claimant who was unable to provide anything to support that allegation. He subsequently questioned Miss Tomlinson about her style of questioning to satisfy himself that the responses from witnesses were not forced and the questions asked were appropriate. The claimant suggested there was a ‘culture of this type of behavior’ at the Hull store. Mr. O’Neill instructed HR to conduct a review of the workplace culture to explore the claimant’s allegations. The review found no evidence to support the claimants’ assertion. The claimant alleged that (A) was “using his sexuality as a gay man” to make false and unsubstantiated allegations. He alleged that (A) was harassing him by keeping a diary of events over 7 years. He complained that (A) was using the ‘sexual orientation card’ to his ‘advantage’. Mr. O’Neill thoroughly explored each point made by the

claimant. Where further investigations were required to answer a point raised, he carried out that investigation. He spoke to Paul Best, Nicki Tomlinson and Nick Carolan. Mr. O'Neill conducted a thorough and comprehensive appeal process.

40. Mr. O'Neill considered whether dismissal was too harsh a sanction. He considered the claimant's length of service and his disciplinary record. He considered the seriousness of the intimidating, aggressive and homophobic conduct found to have been committed by a senior manager and whether there was any likelihood of recurrence. The claimant had not offered any apology, or shown remorse. His responses at the appeal (sexual orientation card) demonstrated a lack of insight, or understanding of why the behavior was unacceptable. He had not acknowledged the impact of his behavior on others including (A). Mr. O'Neill believed there was a real risk of repetition, a risk he was not prepared to take to protect the business and other employees. The respondent had made it clear that homophobic behavior was discriminatory behavior and it would not be tolerated and could result in dismissal. For those reasons Mr. O'Neill confirmed the dismissal decision and rejected the appeal.
41. The claimant complains that during an adjournment Mr. O'Neill raised with him some notes that were found relating to an earlier grievance made against the claimant by another employee (JP). In his witness statement the claimant complains that it was unfair and completely inappropriate for this to be brought up and that by this action he questions Mr. O'Neill's approach to the appeal. We have made our findings about how Mr. O'Neill's approached the appeal and there was nothing improper about his approach/conduct of the appeal. He answered questions about this matter openly and honestly. This was paperwork relating to another employee, JP whose grievance came to his attention during an adjournment. He told the claimant about it, but also explained he would not be considering it because it was not relevant. Having had sight of it himself, he thought it was only fair that he shared it with the claimant. In closing submissions Mr. Bronze submits that the appeal introduced a '*whole new raft of allegations which were not shared with the claimant*'. Again, there was no evidence to support the suggestion made which was not supported by the claimant's evidence on this point. It was clearly not a new allegation (the claimant says it was Mr. O'Neill raising some notes). Those notes were the information that had come to Mr. O'Neill's attention which he disclosed to the claimant in the interests of fairness and transparency.

Submissions

42. Both counsel provided written submissions which we considered before making our findings of fact and reaching our conclusions.

Applicable Law: Unfair Dismissal

43. First the tribunal must identify the reason for dismissal. As per Cairns LJ in *Abernethy v Mott Hay and Anderson [1974] ICR 323*: "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*". A potentially fair reason for dismissal relates to conduct (section 98(2)(b). Employment Rights Act 1996 ('ERA'). The employer must, at the stage at which it forms the belief that the employee has committed the misconduct, have a genuine belief on reasonable grounds after carrying out a

reasonable investigation.

44. If the employer has shown that was the reason for dismissal was a potentially fair reason section 98(4) ERA applies and provides as follows:

“the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- b) *shall be determined in accordance with equity and the substantial merits of the case.*

45. It is not for the tribunal to substitute its view for the employer but to review the reasonableness of the employer’s decision. The question for the Employment Tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal (*Iceland Frozen Foods-v- Jones 1983 IRLR 439 EAT*).

Conclusions

46. The set of facts known to Mr. Best and his beliefs when he dismissed the claimant were that the claimant was guilty of 3 acts of gross (serious) misconduct. He was guilty of aggressive and inappropriate behaviour towards a colleague at a handover meeting, of intimidating behaviour using a grievance as a threat towards a colleague and of making homophobic comments about another colleague. Mr. Best formed a genuine belief that the claimant had committed all 3 acts of misconduct (see paragraph 33 of our findings of fact).

47. Was a reasonable investigation carried out by the respondent? Mr. Bronze contends that the investigation was wide ranging, but not probing. He describes it as *“a mile wide but barely an inch deep”*. There was nothing to support this very critical description of the investigation. The claimant has failed to identify any shortcomings in the investigation process or any further line of enquiry Miss Tomlinson could have pursued. Mr. Bronze suggests the investigation adopted a ‘muddled’ approach. Miss Tomlinson’s approach was not muddled. She initially identified 4 allegations arising out of the grievance investigation. She reasonably narrowed the disciplinary allegations down to 3. Miss Tomlinson carried out a comprehensive, careful and extensive investigation. She interviewed all relevant witnesses in an appropriate manner to establish the facts. The interview records were checked by each witness to ensure their accuracy. At the disciplinary stage and at the appeal stage, whenever any further investigation was required, it was undertaken by Mr. Best and Mr. O’Neill. The respondent has shown that Miss Tomlinson, Mr. Best and Mr. O’Neill carried out a reasonable investigation, at all stages of the disciplinary process.

48. Did the respondent have reasonable grounds to believe the claimant was guilty of misconduct? In his closing submissions, Mr. Bronze suggests inferences should be drawn from the ‘repeated resurfacing’ of the Christmas Eve 2012 allegations. That suggestion was clearly not

supported by our findings of fact. The claimant understood there were 3 misconduct allegations. Christmas Eve 2012 was not treated as a disciplinary allegation. It was part of the undisputed historical background and it was not 'resurrected' by the respondent in the claimant's dismissal. Mr. Bronze also now seeks to 'justify' the claimant's behaviour at the handover meeting, by suggesting the claimant was 'provoked' to behave in the way he did because (A) had 'been sarcastic and was annoying'. That point is not helpful to the claimant's case and supports the view the respondent reached at the time of dismissal, that the claimant had shown a lack of insight into his own behavior which for the employer meant there was a real risk of repetition. We agreed with Ms. Ahmed that Mr. Bronze has attempted to reconstruct a case at this hearing which was not the case before the employer at the time. It is not the role of the tribunal to step into the shoes of the employer and substitute our view for that of the employer. The right question for the Tribunal was whether Mr. Bird had reasonable grounds to believe the claimant had committed 3 acts of serious misconduct. At paragraph 33 of our findings of fact we have set out his detailed rationale for reaching his decision. He reviewed the evidence for/against each allegation and reasonably concluded that the allegations were proven. His rationale was supported by his contemporaneous notes which were not challenged in cross examination.

49. Mr. Best at the stage of dismissal had found that the claimant, as a senior manager had committed 3 serious acts of misconduct. He found the claimant's behavior was aggressive, intimidating and homophobic towards another colleague. Mr. Best was entitled to treat that conduct as serious misconduct sufficient to warrant dismissal. Individually he viewed each act as sufficiently serious. Here, Mr. Best was considering 3 acts of proven serious misconduct. The claimant understood from the outset that these were allegations of serious misconduct which could result in dismissal. He knew this type of behavior was not tolerated by the employer. While Mr. Bronze now seeks to justify the claimant's behavior by suggesting the claimant was provoked by sarcasm or because he was 'annoyed' by (A), the claimant had been trained to handle difficult situations in a different non-aggressive non-intimidating way. He also knew the company did not tolerate homophobic behavior. Mr. Best reasonably concluded that the claimant could have handled things differently at the time. Mr. Best investigated whether there were any ill health issues that came into play, before making his decision. He did not rush to dismissal. He approached his role conscientiously and carefully. He considered the claimant's long service and prior disciplinary record. He decided he could not risk putting the claimant back into the business because of the risk of repetition. The respondent had a duty to ensure that all employees are protected from discrimination, aggression and intimidation at work. Mr. Best had no confidence, that the conduct would not be repeated. His "*worry and overriding thought*" was that he could not risk the claimant repeating the behavior with colleagues or customers, if he were to return to work. The claimant had not shown any remorse for his actions. He did not offer an apology or show any insight into his behavior or the effects of his behavior. Mr. Bronze contends that "*it is bordering on the incredible for the respondent to allege that there was a risk of repetition of the claimant 'going over the top in a difficult situation' he had worked for 26 years without incident*". As the decision maker, Mr. Bird, was entitled to evaluate the risk of repetition in the way he did. Mr. Bronze suggests it was

'nowhere near the band' of reasonable responses for this type of misconduct to dismiss. He contends a 'low' level warning was more appropriate. It is not for Tribunal to substitute its view for the employer. Most employers would reasonably treat aggression intimidation and homophobic behavior as serious misconduct. Mr. Bird's decision to dismiss falls within the band of responses open to a reasonable employer faced with these circumstances.

50. At the appeal hearing, Mr. O'Neill carried out further investigations before he rejected the claimant's appeal. He carefully considered all 26 points made by the claimant and did not simply rubberstamp the dismissal decision. He interviewed Miss Tomlinson, Mr. Best and Mr. Coralan before making his decision. Mr. O'Neill considered the appropriateness of the sanction. He considered the claimant's lack of remorse and lack of insight. This was clear to him at the appeal when the claimant accused (A) of using the 'sexual orientation card'. The claimant seemed to ignore the evidence given by other colleagues which was unsolicited and corroborated the allegations made by (A). Based on our findings of fact we found respondent followed a fair procedure. The dismissal was procedurally and substantively fair. The complaint of unfair dismissal fails and is dismissed.

Employment Judge **Rogerson**

Date 12 October 2020