



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Ruairi Twomey

Tesco Stores Limited

Heard at: Watford
Before: Employment Judge

On: 9 and 10 December 2021

Appearances

For the Claimant: Ms Banerjee (counsel)

For the Respondent: Mr Purnell (counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

REASONS

Claim

1. By a claim form presented on 8 January 2021, the claimant, Ruairi Twomey, complains of unfair dismissal. The claimant claims that he was dismissed unfairly, following an unfair disciplinary process, on 11 August 2020. The respondent filed a response on 15 February 2021 resisting the claim. The respondent said that the claimant was dismissed fairly after a disciplinary procedure, due to misconduct matters.

Issues

2. No list of issues for the tribunal to determine having been agreed between the parties, counsel agreed at the outset of the hearing that the list would be the standard list for misconduct dismissals:
 - a. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

- b. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent failed to follow a fair process.
- c. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that misconduct as a sufficient reason to dismiss the claimant? In particular the tribunal will consider whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iii. the respondent otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.

Remedy

- d. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed.
- e. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?
- f. Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

The hearing

- 9. I received an agreed bundle of 551 pages. In addition, I received three witness statements: one from the claimant running to 64 pages and two from the respondent (Kevin Tindall and Steven Rigby). All of the witnesses attended the hearing and gave evidence.
- 10. The hearing was listed for two days. Prior to the hearing the claimant sought a postponement because he believed that four days was a more appropriate listing given the amount of documentation and length of time cross examination would take. This was refused by Employment Judge Lewis. Ms Banerjee made a further application for postponement at the commencement of the hearing on 9 December 2021 setting out that cross examination of each of the respondent's witnesses would take three hours. Having heard from both parties I refused the application to postpone. I decided that the witness evidence could be heard within the two days and if necessary, closing submissions could be made in writing and judgment could be reserved. In the event this is what happened. The two days of the hearing were taken up with reading and witness evidence. I reserved

judgment and written closing submissions were provided by counsel on 14 December 2021.

Relevant findings of fact

11. The claimant is a marketing professional and commenced employment with Tesco Ireland Limited on 31 July 2017. On 10 February 2020 he relocated to the UK and took up the position of Brand Director (Food) with Tesco Stores Limited. The claimant had six direct reports.
12. On or after 13 July 2020, the respondent's HR Team drafted a report concerning complaints about the claimant's behaviour. The report concluded that the respondent should *'look to exit Ruari from the business.'* The report is neither dated nor signed and no author is indicated. Mr Purnell said for the respondent at the hearing that the author was Rachael Chard of the respondent's HR Team, and this was not contested by the claimant. At the hearing both Mr Tindall, the Decision Manager, and Mr Rigby, the Appeal Manager, were asked by Ms Banerjee whether they had read the report before they made their decisions in relation to the disciplinary process. Both confirmed that they had not seen the report until it was disclosed in preparation for this hearing. I find that the author of the report was Rachael Chard and that neither Mr Tindall nor Mr Rigby knew about the report at the time they were involved in the claimant's disciplinary hearing and appeal.
13. On 16 July 2020 the respondent's HR team commenced an investigation into the claimant's alleged misconduct. Interviews were conducted with several employees by Rachael Chard and Phil Mahon of the respondent's HR team, all of whom had raised concerns with HR or with Michelle McEttrick, the claimant's line manager. These interviews took place on 16 and 17 July 2020.
14. On 17 July 2020 the claimant was advised by letter that he would be suspended pending the outcome of an investigation into *'various allegations raised by other colleagues into your conduct, primarily relating to bullying, harassment and intimidatory behaviour.'* The claimant's email account was suspended.
15. Michelle McEttrick was interviewed by Phil Mahon on 21 July 2020 and Susan Collingridge, the respondent's Talent and Capability Director, interviewed the claimant on 22 July 2020. Mr Mahon conducted a number of follow up interviews and enquiries after the claimant was interviewed, putting points made by the claimant to Ms Collingridge to Hannah Gunn and Michelle McEttrick, as well as to Simon Threadkell and Jillian Lidgate, the latter two not being among the seven people who had raised concerns.
16. Phil Mahon led on the investigation and produced a report on 27 July 2020 recommending that the matter be referred to a disciplinary hearing as he had found there was significant evidence of a number of serious breaches of the respondent's code of conduct, the bullying and harassment policy and

the equal opportunities and diversity policy. The report set out four specific allegations: 1. Derogatory comments that could constitute a breach of Bullying and Harassment policy and Code of Business Conduct, 2. Threatening or intimidating language that could constitute a breach of the Bullying and Harassment policy and Code of Business Conduct, 3. Controlling/aggressive behaviour that could constitute a breach of the Bullying and Harassment policy and Code of Business Conduct, and 4. Discriminatory and harassing comments that could constitute a breach of the Equal Opportunities and Diversity policy and Code of Business Conduct. Underneath each allegation a list of specific incidents was set out. Mr Mahon found that all four allegations were made out.

17. On 28 July 2020 the claimant was advised by letter that the matter would proceed to a disciplinary hearing to take place on 3 August 2020. The claimant was advised of his right to have a representative at the meeting, that dismissal was a possible outcome, and was provided with copies of the investigation report and all documentation upon which it was based, apart from the notes of the interview with Michelle McEttrick. The four allegations of misconduct were set out in that letter, described exactly as given in the investigation report.
18. The hearing took place on 3 August 2020 with Mr Tindall and the claimant in attendance. The claimant chose not to bring a representative. Mr Tindall put the allegations to the claimant going through the incidents listed in the investigation report and asking for a response.
19. Following the hearing Mr Tindall conducted a number of further interviews with those that had been interviewed as part of the investigation, in order to clarify points raised by the claimant at the hearing. He conducted a second hearing with the claimant on 7 August 2020 having been provided with the notes of Phil Mahon's interview with Michelle McEttrick, which neither he nor the claimant had had sight of when the hearing on 3 August 2020 had been conducted. He also interviewed Michelle McEttrick after his meeting with the claimant on 7 August 2020.
20. On 11 August 2000 the claimant met with Mr Tindall for a third time and Mr Tindall advised that he had upheld all four allegations against the claimant and decided that he should be summarily dismissed. Mr Tindall's findings and decision were set out in a letter dated the same day.
21. The claimant advised the respondent of his intention to appeal the decision on 25 August 2020. He emailed Phil Mahon on 15 September with more detail on his grounds of appeal.
22. Steven Rigby was appointed as the Appeal Manager and contacted the claimant on 30 September 2020 to let him know he would be invited to an appeal hearing. After some conversation the meeting was scheduled to take place by Zoom on 6 October 2020 as the claimant had relocated to the USA.
23. The claimant sent Mr Rigby a 20-page letter setting out his detailed grounds of appeal on 5 October 2020. In the letter he set out contextual issues

including dates of absence, the lockdowns, staffing levels and the past unhappiness of the team he had taken over, before setting out his general criticisms of the decision and then commenting on each incident raised under the four allegations. He provided Whatsapp messages that he felt were relevant to his appeal. He also advised Mr Rigby that he was too unwell to attend a hearing the next day but wanted to proceed with the appeal. He said that Mr Rigby may not feel a meeting was necessary and if he did, the claimant was happy to reschedule.

24. In response to a query from Mr Rigby the claimant sent him a further four pages of information on 13 October 2020 which included a list of emails that he felt were relevant. Mr Rigby sourced a number of those emails with assistance from HR but did not provide copies to the claimant.
25. In a letter dated 23 October 2020 Mr Rigby advised the claimant that he upheld his appeal against allegation four of the four allegations (on discriminatory and harassing comments) but upheld Mr Tindall's decision in relation to the other three allegations and the decision to dismiss the claimant.

Submissions

26. Following the hearing I received extensive written submissions from counsel. Mr Purnell for the Respondent provided a 21-page submission with two appendices running to 24 pages, Ms Banerjee submitted a 19-page submission with a 41-page appendix. I have very briefly summarised their main arguments below.
27. For the claimant Ms Banerjee said that there is clear and compelling evidence that his dismissal was pre-determined and that neither the investigation nor the disciplinary was fair. She referred to the case of *A v B [2003] IRLR 405* in which the EAT said that *'the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.'*
28. Ms Banerjee said that the dismissal was predetermined as evidenced by the conclusion of the HR report written before the investigation commenced, and this calls into question any assertion that the respondent believed the claimant to be guilty of misconduct. She said that there were not reasonable grounds on which to sustain such a belief because, amongst other things, the matters relied upon were vague and without specifics so the claimant was not in a position to respond; others who had not complained about the claimant should have been interviewed for the purposes of objective verification; the approach of Kevin Tindall and Steven Rigby in looking at the evidence in the round and assessing there to be consistency across the seven witnesses is unsustainable; and there is evidence of collusion between witnesses. Ms Banerjee said that the investigation was fundamentally flawed as: it was carried out by HR who had already said the claimant should be exited from the business, the report was one sided,

details of incidents were not sought, matters raised by the claimant were not investigated and documents were not sourced. Ms Banerjee said that the decision was outwith the band of reasonable responses. She said that Mr Tindall dismissed the claimant for the totality of the allegations but did not look at whether each allegation had been proved, and the reality is that when the factual allegations are considered they cannot support a finding of gross misconduct.

29. For the Respondent Mr Purnell said that the question for the tribunal is whether the nature and quality of the conduct in its totality amounted to a sufficient reason for dismissal, not whether acts of misconduct individually, or cumulatively, amounted to “gross” misconduct (*Beardwood Humanities College Governors v Ham*, UKEAT/0379/13/MC) and that as set out in *Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94* ‘To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.’ Mr Purnell said that an employer is entitled to take into account in a decision to dismiss the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority [1995] IRLR 305 per Beldam LJ*). Mr Purnell said that the claimant’s arguments were flawed because, among other things it was not necessary to scrutinise each example of misconduct severally as is suggested, and it was reasonable to consider whether the claimant’s conduct across the four allegations was sufficient to warrant dismissal. Mr Purnell said that the respondent had met all parts of the Burchell test and noted in relation to whether the decisions to dismiss fell within the band of reasonable responses that the claimant was a very senior director with significant experience and line management responsibility, and quoted Mr Rigby who said that the claimant should not need to be told not to swear or use aggressive and intimidating language to junior team members.

Decision and Reasons

30. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.
31. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the claimant was dismissed for misconduct. Whilst the claimant has called into question whether this was a genuine belief, a matter I will deal with below, there is no evidence that the dismissal was for anything other than misconduct.

32. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.
33. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).
34. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant has argued that the respondent's reliance on the misconduct allegations is superficial, the report of Rachael Chard demonstrates that the respondent believed that the claimant should be exited in any event, and this in combination with what the claimant argues was a flawed investigation calls into question the genuineness of any belief in the misconduct. I do not accept that reasoning. The HR report was written following a number of complaints about the claimant's conduct being brought to HR's attention which support the position that it had a genuine belief in his misconduct. The investigation report was provided to a disciplinary manager who had no knowledge of the HR report and concluded that there was misconduct. The fact that HR had concluded the claimant should leave the business is not indicative of a lack of genuine belief in his misconduct.
35. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.
36. The claimant's position is that there were a number of specific examples of potential misconduct given in the investigation report and that either the incidents are taken out of context, they are uncorroborated, they are untrue, and in some circumstances the result of collusion between two witnesses who had a vendetta against him. The claimant's argument is that if each incident is considered separately and forensically, many are not made out and many do not constitute gross misconduct, so undermining the

respondent's conclusion. The claimant says that the investigation was not reasonable as further investigation was required by interviewing other employees and carrying out a document search. The respondent says that it carried out an extensive investigation and disciplinary process, it acted on concerns raised by seven employees, conducted interviews, follow up interviews, held a lengthy disciplinary hearing and appeal hearing after which both the disciplinary manager and appeal manager carried out follow up actions on the basis of the claimant's evidence before reaching their final decisions.

37. The test is one of reasonableness. Did the employer carry out a reasonable investigation in the circumstances? I have taken into consideration Mr Purnell's submission, with which I agree, that the investigation is not something that need be akin to a court investigation, and also that the employer is entitled to look at the evidence in the round, but accept also Ms Banerjee's submission re *A v B* that a conscientious investigation of the facts is necessary and potentially exculpatory evidence should be considered, though in my view this does not mean that every suggestion that the claimant puts forward must be actioned in terms of evidence gathering.
38. The claimant says that the matter was predetermined as evidenced by the HR report which predated the investigation. I do not agree. Whilst it is incontrovertible that HR concluded in that report that the claimant should be exited, the investigation carried out subsequently by HR focuses on the complaints raised with HR and Michelle McEttrick and concludes that there is a case to answer. I have accepted the evidence of both of the respondent's witnesses that they did not know about and had not seen the HR report when they were involved in the disciplinary process. I find there is no evidence of predetermination of a misconduct dismissal.
39. The claimant says there was collusion between the two main complainants, Katie Harrison and Hannah Gunn. In his witness statements he said they had a vendetta against him. When I asked what his evidence for collusion was, he said he had none. In submission Ms Banerjee has provided examples of the witnesses having spoken to each other about their discontent with the claimant. I note that over the brief period of the claimant's employment in the role of Brand Director seven employees raised concerns about his behaviour four of whom were colleagues in the claimant's team. I do not accept that evidence that employees who worked with the claimant talked to each other about his behaviour is evidence of collusion.
40. Still on collusion, the claimant suggested in his witness statement that there is evidence of orchestration in that the complaints were made over a period of months but only presented to him in July. I note that the complaints were made to various people in confidence, Ms McEttrick made the point in her interview with Mr Tindall that she could not talk about the matters without breaking multiple confidences. I note also that none of the complaints was made as a formal grievance which would have taken the matter beyond one of strict confidentiality and also note Mr Rigby's response when I questioned him on this matter (i.e. complaints not being raised individually and earlier

with the claimant) that in his view the situation although unusual, arose from the weight of allegations. I find again that there is no evidence of collusion.

41. Ms Banerjee put forward that a number of the incidents referred to in support of the allegations lacked specificity thereby putting the claimant at a disadvantage in his ability to respond to them. It is suggested that in order to respond the claimant needed to know the time and date of the comment, the location, witnesses and medium of delivery. When questioned about this Mr Rigby agreed that there were instances where there were no dates but said the claimant was able to respond without dates. I accept that there was a lack of specificity in some of the incidents relied upon, for example that the claimant had told Hannah Gunn that she had asked a stupid question and that he had said to Katie Harrison 'What, are you stupid?'. In each case the claimant denied making the comment and in his letter of appeal he asked for specifics. I do not accept that the claimant was unable to respond, and he did in fact respond, and I do not accept that context would have assisted either the client or the decision makers. The question was put to the claimant whether he had made those comments and he said no.
42. The claimant suggests that others in the team should have been interviewed as they may have given a different account of meetings to which some of the incidents relate or a different impression of his management abilities. Mr Tindall said he did not feel it necessary to interview others as he felt he had a compelling story from the information he had, and that the cumulative evidence of the witnesses was consistent on the language used by the claimant.
43. Ms Banerjee submitted that further documentation should have been sourced for example a PDP with Tina Moore which showed he gave her positive feedback, and examples of the claimant's daily communications with the team to evidence whether or not his emails were likely to cause upset. Mr Tindall said in relation to the PDP that he did not dispute that the claimant had valued Ms Moore's contribution at times and on emails that he did not need to see them when the claimant had admitted the comment attributed to him in that regard.
44. The evidence of the respondent's witnesses throughout cross examination was consistent on these points- where the claimant put forward that he had a good relationship with some colleagues, he had good feedback from some colleagues including those that had raised concerns, that there were already difficulties in the team and there were added pressures such as the lockdown, they did not feel that they needed to seek corroborative evidence as they accepted what the claimant said. Mr Rigby said that he had sourced a number of the email exchanges suggested by the claimant in his appeal and that these exchanges were not central to the allegations. He said they were emails showing gratitude for the claimant's support, or the claimant reaching out to someone who was ill, and they were what he termed 'business as usual' emails.
45. I find that the evidence gathering process of the respondent throughout the investigation and disciplinary process was reasonable and commensurate

with the nature of the exercise. Interviews were carried out with seven people who had raised concerns with HR or within their line management chain. The claims made by those people were put to the claimant and in light of his responses further investigations and enquiries were made. Mr Tindall made further enquiries following the disciplinary hearing to clarify with the interviewees points the claimant had put to him. Mr Rigby sourced the further documentation suggested by the claimant.

46. Whilst I do not suggest that the claimant should carry out his own investigation, I note that although he did not have access to work emails, he was not denied access to colleagues he may have wanted to speak to in terms of evidence he thought was important and there is no evidence that had he asked for copies of specific emails the respondent would have refused this.
47. Where the respondent did not source information or speak to extra witnesses it was because on its view this was not necessary or would not assist in the decision-making process. It is not the place of the tribunal to substitute its own view of how the investigation should have been carried out and which particular enquiries the respondent should have made but only to assess whether the respondent met the standard of the reasonable employer in its investigation, and I find that it did. The investigation carried out was reasonable and the explanations given by the respondent's two witnesses as to why they did not source certain documents or speak to particular people are reasonable.
48. For the avoidance of doubt, I find also that the process was reasonable. The allegations were put to the claimant at an investigation meeting. He was given the opportunity to amend the notes of that meeting which he did extensively. He was provided with all of the investigation evidence and the investigation report ahead of the disciplinary hearing. He had the opportunity to state his case at the disciplinary meeting and points he raised were followed up by Mr Tindall. He was given the opportunity to appeal which he utilised, and his 24 pages of appeal notes and evidence were considered by the Appeal Manager. The process was conducted in a timely manner.
49. I must then consider whether the decision to dismiss was within the range of reasonable responses. The decision maker found on the evidence before him that all four allegations were made out. He was consistent in his evidence to the tribunal that the exercise he undertook was to understand whether the examples of misconduct given were credible, not that each was proven. He said that the seven people interviewed gave lots of examples of inappropriate behaviour from the claimant that aligned and noted that a number of individuals had said that the claimant made them feel uncomfortable or distressed. He said his approach was to look at the evidence given by the seven alongside the evidence given by the claimant. Mr Rigby said that there were a number of allegations that added up, some of which were more important than others. He said that he did not go through each but took a balanced view and found that Mr Tindall's view was reasonable.

50. It was submitted by Ms Banerjee that a number of the incidents relied upon could not have amounted to gross misconduct. It may be the case that looked at severally some of the incidents fell short of that bar, but the respondent is clear that the evidence was considered in total and that the weight of evidence and the similarities between accounts of the claimant's actions and language was persuasive, and, despite having taken mitigation into account, led to a finding of gross misconduct. This was a decision open to the respondent on the facts, as was the decision to dismiss him.
51. I conclude that the dismissal of the claimant by the respondent 11 August 2021 was fair, and the claimant's claim is dismissed.

Employment Judge Anderson

Date: 7 January 2022

Sent to the parties on:

11 January 2022

For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.