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THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: REGIONAL EMPLOYMENT JUDGE HILDEBRAND
(SITTING ALONE)

BETWEEN: Mr A Patel Claimant

AND

Balfour Beatty Employment Group Limited

Respon

ON: Tuesday, 5th July 2016

Appearances:

For the Claimant: Mr Mark Walker, Consultant
(Claimant not present)

For the Respondent: Mr Benjamin Gray, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal on the Claimant's claim of breach of contract is that the claim fails and it is dismissed.

REASONS

The Claim

1. By a claim presented to the Tribunal on 8 May 2015 the Claimant claimed that he had been wrongfully summarily dismissed from his post as senior project manager with the Respondent, with whom he had been employed from 24 July 2013 to 23 December 2014. In the claim the Claimant recounted that a member of his staff, NS, had taken a grievance against him which resulted in a disciplinary investigation and ultimately led to his dismissal on 23 December 2014. The Claimant then appealed, but his appeal was not successful. The Claimant had insufficient service to claim unfair dismissal but contended the dismissal was wrongful and that he was entitled to three months' notice pay.

The Response

2. The Claim was resisted by the Respondent. The Respondent took a preliminary point on time, which was not pursued when full information was provided to the Respondent regarding the presentation of the claim.
3. The Respondent identified the legal issue. It stated that the Claimant had committed a repudiatory breach of contract entitling the Respondent to terminate the Claimant's employment summarily. The Respondent also took issue that the Claimant had suffered no loss as the result of the unfairness, as it was termed, for which he contended.
4. The Respondent's application for a preliminary hearing to consider the strength of the claim was refused. After consultation with the parties the claim was listed for a two day hearing as opposed to 1 hr hearing.
5. On 6 October 2015 the Claimant's representative notified the Tribunal that he had been informed that morning that his client was serving a prison sentence of 5 years imposed on 29 July 2015. Consequently it was stated that the Claimant would not be in a position to pay the hearing fee or attend the final hearing then listed for 5 and 6 November.
6. The Claimant subsequently sought and received leave from the Tribunal to present his evidence by video link. The hearing was re-listed. The Claimant then indicated that he would not give evidence by video-conference having investigated the cost involved in this process. The Claimant indicated that his representative would attend and make written representations.
7. At the request of the Respondent the Tribunal directed that the parties exchange witness statements no later than on 1 July and that the Respondent was to prepare a bundle of relevant copy documents for use at the hearing.

The Hearing

8. On the hearing I was provided with a bundle of documents comprising a large lever arch file of in excess of 330 pages together a witness statement for the Claimant. On the Respondent's side I received a witness statement for Marie Gilbert, Employee Relations Manager, who had taken notes but was not the decision making manager at the disciplinary hearing. For urgent personal reasons Ms Gilbert did not attend the hearing. I also received a statement from Mr Mick Rayner, the only live witness in the case.
9. Counsel for the Respondent, Mr Gray, helpfully produced an opening note setting out the brief factual background and the issues of law. He has stated the issues of law with commendable clarity and succinctness at

paragraph 14 of his opening note: 'The issue is whether the Claimant committed gross misconduct'.

10. The Claimant's representative agreed with the issue as stated. However, the thrust of the interventions and cross-examinations of the Respondent's witness and indeed the Claimant's submissions is more directed to a consideration of procedural and substantive fairness of the Respondent's actions. This cannot in any sense be a relevant consideration for the purposes of the issue to be determined.

The Findings of Fact

11. I summarise the relevant material received as follows:-
12. The Claimant began working for the Respondent on 24 July 2013 and took on the role in this case on 22 July 2014. A statement of employment particulars was sent to him on 23 July 2014. Paragraph 9 imported the Respondent's grievance and disciplinary procedure and paragraph 15 required compliance with a number of policies and rules, notably for this case the policy covering harassment and bullying. Paragraph 6.12 of the Disciplinary Procedure identified as an example of gross misconduct:

"Victimisation, bullying, use of foul and abusive language towards a colleague or subordinate, abuse of authority, sexual or racial harassment or discrimination."

The Bullying and Harassment Policy at page 46 of the bundle the pernicious effect of this conduct. In practical definitions the policy sets out conduct which is intended to undermine humiliate or denigrate. It also explains, in harmony with the legislation, that in harassment the key is that the conduct is viewed as unacceptable and demeaning to the recipient. The policy further makes clear that no incidents of bullying or harassment will be tolerated.

13. The initial complaint by NS is by an e-mail dated 4 November 2014 found at page 51 of the bundle. It is about the Claimant. To summarise she felt intimidated by him. He stood behind her looking over her shoulder and she did not know whether he was there. He belittled and undermined her. He talked down to her. He constantly demanded two minute meetings with her in a meeting room away from the open plan office. This was usually at the end of the day. This resulted in her often missing her train. The meetings always lasted half an hour at least, despite being called 'two minutes'. He called her to these meetings by nodding his head at her. She found him frightening. He stared at her from his chair and she had devised a screen like a wig to stop him watching her. When she requested leave she was told by him she would have to work the weekend or to do overtime to make up. He told one of her colleagues to keep an eye on her. He insisted on seeing her when she was about to leave on Friday night. He scrolled through her e-mails to see what she had been

sending. She said that as result she was not sleeping and she was feeling very stressed. She had constant migraines. Her GP had referred her to a neurologist. She had on occasion left her desk in tears. She said that in a meeting on 3 November the Claimant had been slapping his hands on the table and shouting at her that he was her line manager and she had to do what he said. She said he used the “f” word to her. She said she could not work under the strain and asked to be moved.

14. It should be emphasised that the Claimant had been managing the team in which NS worked only since August 2014. A grievance meeting took place with NS on 13 November 2014. In the meeting she recounted that the previous manager had been replaced by the Claimant at the end of July 2014. She repeated some of the concerns raised in her e-mail. She then said as follows:-

“In the August blockade things were bad, I haven’t said anything up to now, I don’t want to cause trouble, but I can’t take it any more. People in the office were beginning to notice and realising something wasn’t right. He would want to see me on the Friday late, and I said can we do it Monday and AP said No we will do it now. I was fed up of missing my train for his two minutes meetings, I felt sick.”

Blockade means the period when the Respondent has extended possession of the track to undertake significant works.

15. It is clear from the lengthy transcript that NS reiterated her concerns about the Claimant. She described going for a good long cry in the toilets. She also described the Claimant trying to control her outside the work situation. The team had gone one evening for leaving drinks for a colleague and the Claimant was tapping his watch at her to say it was getting late. He asked her: “Shall we go now?” She left with him at his request. She said they stopped to get a kebab. She did not want a kebab. When she went to lunch on another occasion the Claimant followed her around Sainsbury’s and insisted on eating with her in the restaurant. She also repeated something she had mentioned in the e-mail, that the Claimant had been very cross when she was taken of the list for a hotel booking at Christmas.
16. At page 63 is found the Claimant’s statement to the investigation taken on 19 November 2014. The Claimant said he recalled four “one to one” meetings with NS. They were held in a room. She was under a lot of pressure. The meetings were to help him understand her issues. He said he sat down with her to explain the areas where improvements could be made. He was asked when the meetings took place and said they were whenever she was available first thing, or last thing, or at a convenient time during the day. He did not record the meetings and estimated there were four. It was put to him that NS had said she had taken a day of annual leave and the Claimant had called her to come into the office. He did not recall that. He did not recall calling her into the meeting room on many occasions when she was about to leave. He denied that she had

told him she wanted to go home rather than attend a meeting. He was asked why NS should feel upset as she does. He said he had never seen NS upset for what he had done. She had never been upset by his behaviour. He denied treating her differently from other team members. He denied meeting for a "one-to-one" meeting after work on a Friday. He denied swearing in front of NS. He denied looking her up and down. He denied "hovering" over her. He denied swearing at her in one-to-one meetings. He denied holding onto her leave card, when she asked for a day off for her son's birthday. He denied texting her and asking her to attend a one-to-one meeting in the "war room". He then accepted that he might have texted her while he was in a meeting. He denied threatening her in a meeting. He denied seeing her visibly upset. He denied that NS had ever said she wanted to meet at a round table in the open plan office instead of in the meeting room. He denied looking at her e-mails while he was at her PC. He denied speaking to NS since the allegations were made. He denied asking anyone to spy on NS. He accepted he went for a kebab with NS following leaving drinks. When asked whether he tapped his watch and told NS it was time to go he said that they both just left and she said she wanted a bite to eat. He said that he asked NS who had taken her off the list for Christmas working and a hotel room. He said he understood she was not required over Christmas. He did not know why she had a perception she was treated differently. He denied saying anything inappropriate to NS or saying anything inappropriately to her. He said he was very shocked by the allegations.

17. The Respondent interviewed five witnesses. Their evidence can be summarised as follows. Witness A said that the Claimant would be abrupt with NS and had not been like that with him. He said he had raised early concerns about the Claimant to the line managers. He said NS was treated differently by the Claimant. NS had a text from the Claimant: "Come downstairs now". He saw the text on the day it was sent. He had seen the Claimant take NS into a room alone. He had seen the Claimant hovering over NS and others. He had seen NS quite a few times visibly shaken and teary. He had seen the Claimant tapping his watch at NS between 7 and 9 at the leaving drinks. He saw them leaving together, NS and the Claimant. He said NS was very jittery around the Claimant. He had heard the Claimant tell NS when she asked for time off that she would have to make up the time. When she had asked for a week off he said to her: "Can you come in at the weekend?" Witness A said he would not do that to anyone else in the team.
18. Witness B said that the Claimant was quite abrupt to NS. He only heard this conduct with her and not with anyone else. He said NS had spoken to him a lot, but the whole team was about to crack under the pressure. When asked if NS was treated differently by the Claimant he said the Claimant was "well out of order." NS would get up to go and take a train and say goodbye and the Claimant would take her into a room and make her miss her train. He said this happened quite a lot. It would upset her a lot. He would stop her as she was saying goodbye. It only happened to

her and it was two or three times a week. He felt it was wrong. He had witnessed NS close to tears and she had cried in front of the team. He said that it was the same now she had moved desks and he thought it was job pressure not the Claimant. He said he had been told by another that the Claimant had asked someone to keep an eye on NS as she was easily distracted.

19. Witness C said he had not seen the Claimant talking aggressively to NS but that he could feel that there was tension especially when he was standing over her. He had raised concerns with the line manager about the pressure NS was under in her job. She was being given more and more to do. This was not related to her job. He said that he had seen the Claimant take NS into a room alone. There were continuous (sic) two minute meetings in this room but only with NS. These were not with anyone else. They would always go on much longer than two minutes. She looked drained when she came out and went back to her desk. If the Claimant wanted to talk to the witness he would call him over but he always took NS into a meeting room and this was every other day. He could not comment on NS being kept late as his shift finished at 3 PM. NS would tell him the following day that she had been kept back and missed her train home. He witnessed the Claimant regularly hovering over NS. There was much more hovering over NS than anyone else. The witness confirmed on 3 December that there had been an incident a couple of weeks before where NS had said to the Claimant "Let's have the meeting round the table." She said this a few times. The Claimant said "No we need to go in a room." In the end he insisted. He went in a room and she followed. C did not know what was so secret that it had to take place in a room. He had been asked by the Claimant to keep an eye on NS as she is easily distracted. The witness said he remembered the day when NS and the Claimant went to lunch at Sainsbury's. He said NS really did not want to go with him and she tried to get out of it and said I have work to do and I will be a while. She was desperately trying not to go. When they came back he had said to NS did you have a nice lunch. They knew that she had not wanted to go with the Claimant. The Witness said he did not see the text from the Claimant but NS said that she had a text from him saying "war room now." NS had said what shall do? He advised her to ignore it and not go. He said the text sent fear into her.
20. Witness D recorded that NS had told him on several occasions that she had to make up time from being on annual leave by working on a Saturday and D had told her this was not true. She said that the Claimant used aggressive language and hand gestures in meetings. He raised concerns with the line managers Paul Major and Peter Curson. He said that NS was treated differently to other team members. She came to him and said tearfully that she did not like the way Claimant spoke to her and stared at her. She said she didn't like the way he spoke to her in the "one-to-one" two minute meetings. She said she was frightened. The Witness told her he would see Paul Major again. The Witness gave her words of advice that the next time he demanded a two-minute meeting alone she

should insist it was conducted in front of everyone at the round table. He said there are some strong characters and they would say something. He had not witnessed the Claimant hovering or standing up to watch NS or listening to NS phone calls. He said that whenever he got up to speak to NS the Claimant always turned round to stare at him and NS as if D should not be there. He said that when the Claimant's role was not required over Christmas her room had been cancelled by Peter Curson. The Claimant found out and he said to NS: "It is that fucking Peter Ryan that has cancelled it. I am your fucking line manager, not him." When the Claimant was told in early November that a formal grievance had been received the Witness was told by the Claimant to go into a room alone with him and asked about the allegations against the Claimant. The Witness said to the Claimant that if what NS had said was true he was "fucking disgusted" at his behaviour. The Claimant said he felt he was carrying her. The witness said to him that he was aggressive and he should not go into a room swearing at a woman about the Witness (see the reference to hotel booking above). The Claimant did not deny this. The Claimant asked if D believed the allegations and D said everyone is innocent until proved guilty. It was recorded that the Claimant had tried to change the labour supplier shortly after the Claimant was appointed and D had told him that was D's responsibility.

21. Finally witness E, a female, said that she considered the way the Claimant spoke to NS belittled NS. He had not spoken in that way to anyone else. It started 3 to 4 weeks after the Claimant joined. From a very early stage NS told the Witness that she received text messages ordering her to meetings. E had raised her concerns with the line managers about 3 to 4 weeks after the Claimant started. He had disrupted the team. She and others also considered the way he spoke to NS was derogatory and belittling. The following day after the concerns were raised the Claimant tried to take her into an office. After a few minutes of discussion about work the Claimant asked what had been said to the line manager by way of concerns about him. He confronted E. She did not believe he confronted any of the males. She was worried that he would have her sacked. She told him the facts because she felt she had to. She felt extremely uncomfortable. She felt there were strong characters in the team that the Claimant could not dominate. NS was the last to join and was quiet. The Claimant pushed the boundary with her. When NS had to go to the doctors the Claimant told her she would need to work the weekend to make up time. She had seen him take NS into a room alone a couple of times a week. When she had left they were in the meeting room. This was at the end of the day when most people have left. NS was getting ready to go, putting a coat on, and he would call her in. She had offered NS a lift to the station many times and she would say that the Claimant wanted to see her at the end of the day. She described NS as frightened. She said the Claimant was constantly on NS's case and they would always meet on Friday. She said that the Claimant always stood over NS even when she was on the phone just standing and waiting, at least once a day. If he wasn't at his desk, he was next to NS wherever she

was. He would listen to her conversations and ask her who was on the phone, not in a nice way. She witnessed him stand up to watch NS. He spoke to NS as if she was his PA or keeper. The witness said that the Claimant had upset her once about four weeks before the interview on 3 December. She knew NS was upset. They were outside chatting. The Claimant came along the approach road. NS saw him and her expression changed. She said she needed to go in and get back to work. She was scared of being seen having a break by the Claimant. She looked like she had seen a ghost. It upset her to see how scared NS was. At the leaving drinks she said the Claimant had said he was going to leave early but was still there. He followed NS all around the room. She could not shake him off. Every time she moved to talk to someone else he moved across to join her. Other people had noticed this. NS had come over to the Witness before she left. The Witness had asked her to stay and she said no, that the Claimant wanted her to leave now. She said the Claimant had told her she had a lot to do the next day and had to leave.

22. Those are the primary witnesses interviewed for the grievance. Following the grievance of NS the Respondent instituted disciplinary proceedings against the Claimant.
23. The Claimant was invited to a disciplinary hearing. His input to the grievance process had been denial. Similarly in the disciplinary hearing on 18 December 2014 the Claimant offered nothing of substance in response to these accounts of his conduct. The accounts of the witnesses against him provide extensive corroboration to each other. Notable is the fact that when asked in the disciplinary if NS talked in the meetings the Claimant said as recorded at page 105 "No not really." Earlier in the meeting he had been asked why he took NS into a private room for the meetings and replied: "To allow her to talk about things, to be comfortable that she can say things..."
24. The disciplinary hearing resulted in dismissal by letter dated 24 December 2014. The finding was gross misconduct. The Claimant was found to have intimidated, belittled and undermined NS. He was also found to have stood over her shoulder without her knowledge. He was found to have talked down to her and demanded meetings at the end of the working day. He was found to have cause fear to her. The allegations of constant micro management and of asking another member of staff to keep an eye on her were determined as not founded.
25. The Claimant appealed and before the appeal further investigation was undertaken and further witnesses were interviewed at the request of the Claimant.
26. Michael Bell indicated he felt NS was treated differently to others and that made him feel uncomfortable. He described her as being browbeaten by the Claimant. He said she told him of the Claimant taking her into an office and asking her to confirm she worked for him not Peter Ryan. She told

him that she was working to 7 or 8 in the evening and weekends and this made her very upset and was affecting her home life. The Claimant was constantly on her back.

27. Stuart Plumstead did not add significantly to the enquiry but confirmed NS was happier after she was moved away from the Claimant. The Claimant had asked NS to stay late and come in on a day off, he reported.
28. Peter Carter was interviewed but could add nothing of substance.
29. The appeal was held by Mr Mick Rayner on 5 February 2015. He set out his detailed findings in an appendix where he dealt in a table with the points raised by the Claimant.
30. Mr Rayner rejected the appeal and provided the appendix to the Claimant on 20 February 2015.
31. The Claimant did not give evidence at the hearing in the Employment tribunal. He did not therefore challenge what the witnesses said in the grievance and disciplinary internal process other than to the extent he had challenged what they said in those processes. His statement adopts his submission in the appeal, his notes responding to the matters in his letter of dismissal, his response to the employee grievance hearing minutes, and his conclusion.
32. The Claimant summarises his position that that he did not behave with the intention of bullying or harassing NS, and she required particular attention because she was finding it difficult to fully perform her role. Because she was given particular attention she may have felt that she was unfairly focussed on, micromanaged, bullied or harassed, but that was her subjective view. If his management was perceived as bullying or harassing he was not given an opportunity to modify his style before being disciplined and dismissed. He did not he said unfairly focus upon, micromanage, bully or harass the employee nor did he behave in such a way as to justify summary dismissal.
33. Those are the relevant findings.

The Submissions of the Parties: Respondents

34. The Respondent submitted there were 7 witnesses to bullying and it was lawful to dismiss. The effect on NS was dramatic. She was physically sick and put up a wig to stop the Claimant looking at her. She could not sleep. The witnesses were internally consistent and two further witnesses corroborated on the appeal. Not all witnesses saw everything. There was nothing to suggest collusion. The Claimant had demonstrated abuse of power, aggression and swearing. He looked at NS' body, caused her to miss trains and tapped his watch. This was bullying not a matter of

perception. The whole office saw this and the perception of those who saw the behaviour was that it was bullying. NS never talked in the meetings. The real reason for them was as NS recounted so that the claimant could shout and bang the desk. This was bullying in private. Fear was created by a single text. This was the same behaviour as demonstrated in the criminal proceedings referred to in the bundle. This was manipulative concealment. NS had not threatened tribunal proceedings or demonstrated a financial motive.

The Submissions of the Parties: Claimant

35. The Representative for the Claimant submitted that the subsequent conviction of the Claimant was irrelevant. The claimant had not demonstrated in any context propensity or lack of remorse. The Claimant was a new manager with a different style. The Claimant accepted that the witnesses interviewed in the appeal were interviewed at the request of the Claimant. NS required extra support and supervision and had found the treatment uncomfortable in light of her previous history with her husband. The Claimant was a supportive manager. There had been no suggestion of suspension when the allegations were made. Although NS had changed line management she remained in the same office. The view taken of the allegations was not consistent with gross misconduct. The emotional reaction of NS was the result of pressure of work and whatever issue she had with her husband. The witnesses had not all completely supported NS. Some of the allegations were not found proven. Reference was made to **Laws v The London Chronicle 1959 WLR 698**. To find gross misconduct the conduct must be deliberate and wilful contradiction of contractual terms. Here there was no contradiction of the contract or the Respondent's policies.

The Law

36. Both at common law, and in interpretation of the contract of the claimant, conduct which is wilful or deliberately negligent conduct will justify the employer in summary dismissal. An employee who is guilty of repudiatory breach of the contract of employment may be summarily dismissed. There is no rigid definition of gross misconduct. Dishonesty and failure to comply with lawful instructions are clear examples. Repeated misconduct or conduct that is otherwise particularly flagrant will justify summary dismissal. Contractual terms may specify what will be considered as gross misconduct as in the present case.
37. By Rule 41 of the Rules of procedure the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

Conclusion

38. I bear in mind the tribunal is not bound by the rules of evidence. On the material of the witnesses who observed the conduct of the Claimant towards NS I am satisfied he acted in wilful breach of normal standards of behaviour of a manager towards an employee. He caused her personal inconvenience and fear. He held lengthy meetings which were not for her to express her difficulties but for him to exhort NS in relation to her performance and to dominate her. He was possessive towards her, and upset to the point of profanity when her hotel booking was cancelled. This disproportionate reaction indicates frustration at the thwarting of an opportunity to put further pressure on her. The sexual context is unspoken but clear.
39. The claimant makes in reality one point in his defence. That is his lack of awareness of the effect his actions had on the Claimant. If that is correct the concern of the Respondent was that his lack of insight into the effect of his actions made him a liability as a manager. The Claimant does not in substance dispute the actions identified by the witnesses. It is difficult to see how he could. He contends there has been embellishment and that NS has over emphasised the effect of the actions on her. He says that is because of the difficulties she had in the past experienced in her married life. It is difficult to see how significance can be attributed to that. There is nothing of substance to suggest she was unduly vulnerable. If indeed she was vulnerable then the duty on the Claimant not to harass her was heightened. I do not accept what he states in this context. A great deal is generally required before a large group of colleagues collectively identify inappropriate conduct on the part of the manager as happened here.
40. The Respondent made clear in the Disciplinary procedure that abuse of authority in the context of bullying was grounds for summary dismissal.
41. The primary case here is one of straightforward bullying through abuse of authority. I am clear that the Claimant's actions amounted to the offences of which he was charged and found guilty and consequently he committed acts of gross misconduct. His claim of wrongful dismissal consequently fails. Insofar as he was not deliberate in his actions he was negligent for the wellbeing of another employee. The Claimant was guilty of gross misconduct.

Regional Employment Judge Hildebrand

Date: 12 .viii.2016

Judgment sent to the parties and entered in the Register on: 17 August 2016:
: .

_by _____ for the Tribunal Office