



EMPLOYMENT TRIBUNALS

Claimant
Mr C Laing

v

Respondent
Bristol City Council

Heard at: Bristol (by video)

On: 27-29 May 2020

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: Mr Johns - counsel

For the Respondent: Mr Small - counsel

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant had been employed by the Respondent as a social worker, within its Youth Offending Team (YOT), for approximately seventeen years, until his dismissal, with effect 5 October 2018, for alleged gross misconduct.
2. As a consequence, the Claimant brings claims of unfair dismissal and race discrimination (direct and victimisation). He is of black Caribbean heritage. He also claims breach of contract in respect of notice pay.
3. The issues in these claims were set out in detail in a case management summary of Regional Employment Judge Pirani dated 23 September 2019 [pleadings bundle 51-59] and I summarise them here, as follows, taking into account some narrowing of those issues at this hearing.
4. Unfair Dismissal
 - a. While the Claimant accepts that the reason advanced by the Respondent was conduct, he considers that either conscious or unconscious racial bias tainted the decision to dismiss him.
 - b. The Claimant contends that there had been failures of investigation, thus affecting whether or not the Respondent could have a reasonable

belief that he had carried out the alleged conduct and again considers that either conscious or unconscious racial bias tainted any such belief.

- c. Apart from asserting that the disciplinary process took too long, there were no assertions that a fair procedure (in terms of invitation letters sent, conduct of hearings and ability to be accompanied etc.) had not been followed.
- d. The Claimant contends that dismissal was outside the range of reasonable responses, when compared with others who had committed similar or worse offences and was, again, tainted by conscious or unconscious racial bias.
- e. In the event of a finding of unfair dismissal, the Respondent contends that the Claimant was 100% liable for his dismissal, which the Claimant does not accept.
- f. The Respondent would seek to rely on the Polkey principle, in the event of a finding of procedural unfairness.

5. Direct Race Discrimination.

- a. There is no dispute that the Claimant suffered the detriment of being dismissed.
- b. The Claimant states that that is less favourable treatment than, primarily, a hypothetical white comparator who was accused of the same misconduct would have received and, to a lesser extent, on two actual white comparators, involved in making homophobic or racist comments. It was accepted that a third, named, white comparator who was accused of serious criminal offences and who was not dismissed, was not in fact a valid comparator, as that person had been found not guilty following a criminal trial and subsequently was awarded damages against the police force who carried out the investigation.
- c. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?
- d. If so, what is the Respondent's explanation? The Respondent states that the only reason for the Claimant's dismissal was his alleged gross misconduct and that his race played no part in it.

6. Victimisation.

- a. There is no dispute that the Claimant did a protected act, in or about January 2018, when he complained in relation to rota duties, raising the matter as a potential act of race discrimination.
- b. Did the Respondent dismiss him because of that protected act?

7. Breach of Contract. It was accepted that this issue would hinge on the outcome of the unfair dismissal claim.
8. Judge Sitting Alone. The parties had agreed, at a telephone case management hearing of 11 May 2020, in accordance with the requirements of s.4(3)(e) of the Employment Tribunals Act 1996, to this claim being heard by a judge sitting alone and by video.

The Law

9. I reminded myself of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (**Iceland Frozen Foods –v- Jones [1983] ICR 17 EAT**) and the way in which the investigation was conducted (**J Sainsbury Plc –v- Hitt [2003] ICR111 CA**) fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, I am guided by the case of **British Home Stores –v- Burchell [1980] ICR303 EAT** which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.
10. I also reminded myself as to ss.13 and 27 of the Equality Act 2010.
11. Mr Small referred me to the case of **Salter v Chief Constable of Dorset [2012] EWCA Civ 1047**, as to the importance of the maintenance of operational integrity by, in that case, a police officer.

The Facts

12. I heard evidence from the Claimant and on behalf of the Respondent, from Mr Daniel Hazell-Smart, the Claimant's line manager, Ms Justine Leyland, the YOT manager, Mr Gary Davies, a service head, who conducted the disciplinary hearing and Ms Maddy Tyler, an HR manager who was involved in advising the appeal panel.
13. The Respondent is, self-evidently, a large employer with considerable managerial and administrative resources.
14. Undisputed Facts and Chronology. The parties agreed the following:
 - a. The YOT is a multi-agency organisation, to include police officers seconded from the local force. It deals with all aspects of youth offending, to include writing reports for the police and for use at trial.

The Team is based in a secure office, with its own reception/security entrance.

- b. On 12 April 2018 (unless otherwise stated, all dates hereafter 2018), one of the Team's police officers mislaid her police phone, a Nokia, in the office. Another team member found the phone and handed it into the reception/security officer, Mr Griffiths. He then sent an email to all staff reporting that a Nokia phone, on the O2 network had been found and that it was in reception [42]. The Claimant subsequently agreed in a police statement that he had seen this email [71].
- c. On Friday 13 April, the Claimant, early in the morning, while in the office on his own (he routinely started work early, before others arrived) took the phone from a drawer in Mr Griffiths' desk. The Claimant subsequently stated that he had mislaid his own phone, also a Nokia and thought this phone might be his.
- d. On Monday 16 April, on his return to work, Mr Griffiths discovered the phone missing. He established that the police officer had not recovered it (having subsequently discovered, having seen messages on it that it belonged to her) and following a search in the office, it was not found.
- e. On 17 April, Mr Griffiths examined CCTV footage of the reception area and it shows the Claimant taking the phone.
- f. On 18 April, Mr Griffiths sent a further email to all staff (including the Claimant) asking if '*anyone removed the mobile phone that Mandy handed in, from the top drawer of the pedestal in reception? If so, where have you put it? The phone belongs to Louise.*' [46]. The Claimant did not respond to that email. He accepted, in his witness statement that he had seen, or at least been aware of both emails (28 & 31).
- g. On 19 April, the police officer emailed all staff, stating that the phone was still missing and asking that '*everyone check their desks to see if it's mistakenly been picked up and put down somewhere. This is a police phone so I will have to report it later today.*' [47] Again, despite seeing the email, the Claimant does not respond to it.
- h. On 24 April Ms Leyland informs the police officer of the CCTV footage, who in turn reports the matter to her superiors.
- i. On 26 April, the police search the Claimant's home, in his presence. No phone is found and he is suspended from work. He was interviewed by the police, providing a statement in which he said that he owned a similar phone, but had mislaid it and thought therefore that the phone reported as found might be his [71]. On realising, shortly afterwards however that it was not his phone, he placed it in the 'drop box' of another police officer, not that of the officer who had lost it. (A 'drop box' is a hanging file holder provided to each member of staff,

effectively as a pigeon hole). He said that he had no reason to steal the phone and when asked why he had not returned it to the desk, said that the *'drops had been fine before'*. When asked why he had not said anything about the phone, he said he *'didn't know, he felt guilty' ... 'everyone was going on about stealing, thought it might be a prank, knew the CCTV would have been seen, it didn't feel right. Everyone would think I nicked it. I knew this was coming.'* He was also asked about a conversation he had had in the reception area on 19 April, with Mr Griffiths and it is recorded that *'also asked about suggesting the contract cleaners – he did say that'*. He said that he thought there would be CCTV footage of the drop boxes, thus corroborating his account. The Claimant was not charged with any offence at that time and subsequently, when the phone was found, the police confirmed that no charges would be brought.

- j. In the same police record (in a note of 16 May), it is recorded that the CCTV overlooking the drop boxes was checked after the interview, but the footage had expired. It is also stated that following a police search that day, of all the drop boxes, the phone was found, minus its simcard.
- k. On 27 April, the Claimant resigned by email [55], in which he says he was *'extremely upset that I feel that I have to do this but I feel it would place me in an impossible situation with this allegation held over my head. Plus the fact that I was discriminated against recently when it came to my duty rota. I believe that working at the YOT includes trust amongst staff and if I have lost this I would feel then I see little point in continuing.'* Ms Leyland, however, persuaded him to put that resignation 'on hold'.
- l. On 2 May, the Claimant was formally suspended, pending investigation.
- m. He was interviewed on 31 July and an investigation report was finalised on 18 September.
- n. He was invited to a disciplinary hearing on 4 October and dismissed for gross misconduct that day. He subsequently appealed against that decision and that was heard on 10 January 2019, but was not upheld.

15. The Claimant's Account of Events. Based on the Claimant's statements provided at the time, his statement for this hearing and his evidence in cross-examination, I summarise his account and my findings in respect of it as follows:

- a. The Claimant accepted in cross examination that his role included the provision of accurate and honest information for use by the justice system. He also accepted that offenders were expected to be honest in court and were given credit for doing so. He acknowledged that the Respondent placed considerable trust in him, as he worked

independently and met with young, possibly vulnerable people, writing reports on them, without direct supervision.

- b. As stated to the police, he had mislaid his personal phone, of a similar model to the police officer's phone and hence thought that the one that had been found might be his.
- c. On taking the phone from the desk, he said that he did not immediately check it, to establish, for example that it was in fact his and if so, whether he'd missed calls or messages, but took it back to his desk, where he completed some work, only checking the phone twenty minutes or so later and only then realising that it was not his. However, the still from the video footage clearly shows the phone screen illuminated [39-40] and it is, I find, deeply implausible that a person, having mislaid a phone, would not, on finding it, immediately check that it was in fact theirs and whether they had missed calls. It was not disputed that the phone was pin number and password protected and therefore the Claimant will have been immediately aware of that fact and also that it was not therefore his phone, thus immediately affording him the opportunity to return the phone to the desk, but for an unknown reason, he did not.
- d. He stated then that on that realisation, he decided to deposit the phone in the drop box of a police colleague, not the officer who had lost it, but another officer, a PC Runley, because he said, while he had heard that a police officer had lost a phone, he couldn't remember her name and that it was a more secure location than the reception desk. When the phone was finally located, following the police search on 16 May, it was in fact found in another colleague's drop box. This colleague, it was not disputed, happened to be on maternity leave and it seems entirely plausible therefore that whoever placed it there chose that drop box for the reason that it would not be routinely checked by anybody.
- e. At the point that the phone was found, on 16 May, it was missing its simcard. The Claimant said that he was unaware of that fact until he was interviewed in the internal investigation. He agreed therefore that unless it was he who had placed the phone in the drop box in which it was eventually found and removed the simcard, there must have been '*apparently*' another person in the Team who had found the phone in PC Runley's drop box, sometime after he had placed it there, removed the simcard and moved it to its final location. When asked about how he felt about the probability that there was somebody else in the Team who was a thief, he said '*I don't know. They're not necessarily a thief. It seems like a set up. If I do one thing, I get blamed for everything.*' He agreed that the incident could '*put a cloud over the team*' in respect of its relationship with the police. He agreed that had he offered the Respondent assistance with what he states is his true account of events that might have assisted them in identifying this other person.

- f. When asked why he had not responded to the two emails reporting the phone missing from the drawer, particularly when he believed that there was CCTV footage showing him placing it in the drop box, he said, firstly that he *'got loads of emails and needed to prioritise'*, implying that he may have not have seen them or, if he did, did not think them important. This is clearly untrue, as he accepted, both at the time and in his witness statement that he had seen these emails and which therefore reflects poorly on his credibility. Secondly, he said that he didn't think any response to the emails relevant anymore, as PC Runley would eventually find the phone. He said that he felt panicked at this point, fearing that he would not be believed. He agreed that he *'had no problem'* with other supervisors in the team, or the police officer who had lost the phone (his past concerns having been purely with his line manager, Mr Hazell-Smart). It was also suggested that he could have contacted the BAME rep in the Council, for advice or representation, as he had done before on other matters. When asked, therefore, as to why he had not reported the truth to the Respondent, he said that he panicked and was not acting logically and did not trust the management team and didn't think he would be believed. He said that that level of mistrust was such that he would rather have been investigated by the police than by the Respondent, as he considered that they would treat him more equably. He agreed that his failure to tell the truth was a dishonest omission on his part. It was suggested by Mr Johns that the Respondent's delay in confronting him with their knowledge of what he had done was tainted by racial bias and in effect an attempt to escalate the matter into a police investigation, with him being given no benefit of the doubt. The Respondent argues that the emails went to the entire team, so as not to target the Claimant and to give him an opportunity to come forward. As he did not and the police officer was obliged to report the loss of her phone (as she stated in her email), it quickly became a police matter, overtaking the internal investigation.
- g. The Claimant was asked about the conversation he had with Mr Griffiths on the 19 April, when the phone was discussed. Mr Griffiths, in a statement for the investigation [82], stated that the Claimant said, in front of others, *'something like, where was the phone anyway? And I said that I had placed in the top drawer. He then said 'well the petty cash is there and there were some new contract cleaners in on Friday'*. The Claimant said in cross-examination that he couldn't remember this conversation, or that he didn't believe he'd said it and that in any event, he didn't view such a comment, if he'd said it, as attempting to shift blame to the cleaners. However, it's clear to me that he did have such a conversation, as, firstly, the police officer who had lost the phone referred to a similar comment from him, in which he said *'Haven't you found your phone? I hate it when these things happen as you start suspecting someone has taken it.'* [80] and secondly, as recorded above (14.i), he accepted, when interviewed by the police that he did suggest the contract cleaners. He was, therefore, clearly and dishonestly attempting to shift blame to the cleaners. He accepted in

cross examination that had that inference by him been taken up by the Respondent, or the police, it could have resulted in entirely innocent people being investigated or even being falsely accused, but thought that by then a solution would have been reached, as somebody would have found the phone.

- h. He agreed that he was not dismissed simply for stealing the phone, but also for general dishonesty and that his actions had seriously undermined his employer's trust in him. He did not accept, however that that necessarily meant that he could not be retained in employment, or that his actions had damaged the team's reputation with the police.
- i. In respect of his complaint that the disciplinary process took too long, he accepted, after some questioning that it made sense for the Respondent to await the outcome of the police investigation, in mid-June, before commencing the internal procedure.
- j. He chose to be unaccompanied at the disciplinary and appeal meetings and said that he was unaware that he could ask for witnesses to be called and that he had the opportunity to do so. However, the letter inviting him to the disciplinary hearing stated '*you also have the right to call witnesses to support your case...*' [114], so this assertion cannot be correct. I also note, in this respect that the Claimant is a very experienced social worker, with no doubt long years of interviews and involvement in formal processes and was in his late fifties at the time. He also had experience of raising complaints and bringing at least one grievance, so cannot be, in my view, somebody unaware of, or unable to assert their rights in such a process.
- k. In these proceedings, the Claimant sought to compare the decision to dismiss him, with the Respondent's decision not to dismiss others who had committed serious offences, reliant on details contained on a spreadsheet provided by the Respondent [184 a-c]. Reference was made in cross-examination to item 6343, an employee who had failed to report a driving ban, but was not dismissed. The brief notes to that decision indicate that the decision-maker took into account exceptional personal circumstances in deciding not to dismiss and I note that the person was of BAME heritage. Mr Davies stated in re-examination that this person was not operating at such a level of trust as the Claimant. In 7084, another BAME employee, who had been convicted of assaulting a social worker had been given a final written warning. I note, by way of contrast, for example that at item 7071, a white employee, who was clearly working as some form of cleaner, had taken property (cleaning materials) from the Council and was using them in a business offering similar services to that of the Council and was dismissed. Similarly, at 7508, a white employee was dismissed for theft and misuse of their professional position. In any event, it is, in general, very difficult to compare such cases with that of the Claimant's, as the circumstances are (to the extent they can be known

from the brief references on the spreadsheet) likely to be unique to each case. Also, there's no indication that any of these cases established any kind of 'precedent' excusing the Claimant from his behaviour.

- l. In respect of his claim of victimisation, he was asked if he really considered that despite the disciplining officer, Mr Davies, having nothing to do directly with the Team and having had no previous dealings with him and that the grievance he brought was against Mr Hazell-Smart only, he nonetheless considered that Mr Davies was part of a conspiracy to dismiss him, because of his protected act. He said that *'it felt like that at the time'*. When asked therefore why he had not brought this matter up in the appeal, he said he had. However, in the appeal [125 & 127], he did not in fact draw a connection between his protected act and his dismissal, instead merely broadly mentioning race issues. When it was suggested to him by the Tribunal that if he really believed that he had been conspired against and had his dismissal engineered, because of his protected act then that would have been 'front and centre' in his appeal, he said that this matter was something that he had been advised about subsequently by his solicitors, when bringing the claim, indicating that in fact it was not something he felt relevant at the time. I am confident, therefore that this element of his claim is not well-founded and dismiss it.
- m. In respect of his claim of direct discrimination, it was suggested to him that he was prone to, in Mr Small's words, 'play the race card', if he considered that it would advantage him to do so. He was, in particular, referred to a previous dispute of his about pay grades, in 2013, in which he wrongly considered that he was not being paid at the right grade. When promptly shown the relevant pay documentation, he immediately accepted that he was wrong. However, when he first raised the issue, he said in an email that, by implication, if his concerns were not addressed to his satisfaction, *'then this might just have to turn into an equalities issue, what do you think?'* [3]. While he denied that this was a threat, it is difficult to see how any manager receiving it would not regard it as such. When it was put to him that this was simply a pay issue and nothing to do with race, he said, nonetheless, despite having very quickly been disabused of his concerns at the time that *'it could have been'*. He seemed, on questioning by the Tribunal, to be utterly unconcerned about the effect such accusations could have on those he accused, but accepted that if he himself had been accused in this manner, he would have been very upset.
- n. In respect of the comparators upon which he relied in the direct discrimination claim, he referred to two or three non-black employees who had, it appeared from such documentation as was available, made homophobic or racist comments, but had not been dismissed. He accepted that these persons' actions would not necessarily bring the entire Council into disrepute and that *'perhaps'* a person who made such comments was not irredeemable, particularly if they could be

retrained (of which some evidence was provided in one case). He did not accept, however that a white person, in his circumstances, would have been dismissed.

16. I turn now to the issues in the remaining principal claims of unfair dismissal and direct sex discrimination.

17. Unfair Dismissal.

- a. It is clear to me that the reason for the Claimant's dismissal was his misconduct and that is clearly a potentially valid reason. This was not seriously disputed in closing submissions, although Mr Johns submitted that there may have been some conscious or unconscious bias on the Respondent's part in this respect.
- b. I find that the Respondent did carry out as much investigation as was reasonable in the circumstances, leading Mr Davies, in particular, to have a genuine belief in the Claimant's 'guilt'. Mr Johns submitted that the investigation was 'tainted' by race discrimination, conscious or unconscious, on the basis that the assumption was that the Claimant, due to his race, was likely to be a thief. However, the Respondent had incontrovertible evidence and then subsequently the Claimant's own admission that he had taken a phone not belonging to him, disposed of it improperly and then failed, despite several opportunities, to report that fact, instead seeking to implicate innocent others in his actions. It was these actions, not his race, which lead the Respondent to their belief in his guilt. The only real potential flaw in the investigatory process was the Respondent's failure to view fully, in a timely fashion, the CCTV footage of the drops. It was clear from Ms Leyland's evidence that she was inexperienced in such matters and dependent on advice from HR. Therefore, she did not grasp the potential relevance of such material, until it was too late. She said that in any event, when she viewed later unrelated footage, it showed only the top shelf over the drops and not the drops themselves in any detail. I had no reason to disbelieve her evidence on this point. In any event, I don't consider the lack of this evidence as fundamental, when the evidence as to the Claimant's taking of the phone, not returning it to its original location and his dishonest omission to report it, while seeking to blame others, was clear.
- c. Apart from the time taken to conduct the process, there was no particular criticism of the procedure adopted. It is the nature of large organisations like this that sometimes processes can become elongated. However, this was a complex investigation, with many witnesses and the managers organising it had other roles to fulfill, so I do not view the delay as excessive, during which time, in any event, the Claimant will have been on full pay, while suspended. Both the disciplinary and appeal processes were thorough, with the appeal, in particular, being before a panel of entirely independent councillors. While the Claimant complains now as to the relative brevity of the

notetaking at both meetings, he did not complain of it at the time; there is no strict requirement to keep verbatim notes and of course he had the opportunity, if he had wished, to have his own note-taker present, but did not.

- d. The range of reasonable responses test is a broad one and I am conscious that I must not substitute my opinion for that of the employer. I am in no doubt that the Claimant's misconduct fell within that range, for the following reasons:
- i. He was, as he accepted, in a position of considerable trust, which I consider he had irredeemably breached (and as he effectively accepted in his resignation letter). While not, as in **Salter**, a police officer, his role was not so far removed, in terms of integrity, as to not bear some comparison.
 - ii. His actions will have inevitably damaged the Team's reputation with the police, with whom they needed a close working relationship.
 - iii. He had ample opportunity to put the matter right, at a very early stage.
 - iv. If his account was to be believed, then there was somebody else in the Team who had moved the phone and removed its simcard and he had done nothing to assist in identifying that person.
 - v. He deliberately sought to shift the blame to other innocent parties.
 - vi. I refer to my comments above as to the difficulties of comparing the Claimant's case with those of others.
 - vii. He is, as I have said, an experienced, mature and long-serving social worker, of which much more could have been expected.

18. Direct Race Discrimination. This claim is simply not made out, as the Claimant has failed to show less favourable treatment. The actual comparators relied upon are not true comparators, being people in less responsible positions, who, the Claimant accepted, had not necessarily carried out irredeemable actions. They could, as was the case, be trained on appropriate behaviour and if necessary, be redeployed to non-public facing roles. The Claimant's behaviour was of an entirely different level, by a person in a professional role (unlike the comparators), of whom much more could and should be expected. His acts and omissions stretched over a period of time and were multiple, as opposed to one-off acts. In respect of a hypothetical white comparator, I saw no evidence to indicate that such a person would have been treated more favourably (and indeed the examples given at 184 a-c indicate the opposite). I saw no reason to accept Mr Davies' assertion that if the Claimant *'had been white, he would have been given the benefit of the*

doubt', when there was no doubt as to the Claimant's actions. The assertion that the decision not to immediately confront him with the CCTV evidence, leading to a police investigation, was racially motivated, is not made out. I accept that the Claimant was simply being given the opportunity to explain his actions, but that very quickly the matter was taken out of the Council's hands, once the phone was reported missing to the police. In any event, I don't consider that the fact that the police interviewed the Claimant was necessarily significant to his dismissal. They didn't charge him and the Claimant was dismissed for his admitted acts and omissions, which would, in any event, have damaged the Council's reputation with the police, as the police officers in the YOT would have known of these events, even without that police investigation (albeit that some investigation would no doubt have taken place, regardless, due to the missing simcard). Finally, there was no evidence that Mr Davies, or anybody else in the process was motivated by the Claimant's race and on that basis I am entirely satisfied it had nothing to do with his dismissal.

19. Breach of Contract. Having found that the dismissal was fair and that therefore, on the balance of probabilities, the Claimant committed the misconduct of which he was accused, this claim must fail.
20. Conclusion. For these reasons, therefore the Claimant's claims of unfair dismissal, race discrimination and breach of contract fail and are dismissed.

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Employment Judge O'Rourke
Dated: 3 June 2020
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