



EMPLOYMENT TRIBUNALS

Claimant

Mr Andrew Rush

v

Respondent

JD Wetherspoon plc

Heard at: Bury St Edmunds (by CVP)

On: 08 January & 08 February 2021

Before: Employment Judge Laidler

Appearances

For the Claimant: In person represented by his father Mr Simon Rush.

For the Respondent: Mr O Lawrence (Counsel).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The claimant was dismissed for conduct a potentially fair reason for dismissal falling within section 98 (2)(b) Employment Rights Act 1996.
2. The respondent acted fairly within the meaning of section 98(4) Employment Rights Act 1996 in treating that as a reason for dismissing the claimant
3. The claim of unfair dismissal therefore fails and is dismissed.

REASONS

1. The ET1 in this matter was received on or about 24 April 2020 (although the copy in the tribunal bundle did not have a date on it). The claimant brought a claim of unfair dismissal. Whilst reference is made to mental health issues the claimant has not asserted and does not assert that he had a disability and there was no disability discrimination complaint before this Tribunal.
2. The respondent defended the allegations stating that the claimant had been dismissed for gross misconduct.
3. The Tribunal heard from the claimant and from the following on behalf of the respondent:-
 - (i) Keyne Sutherland, Pub Manager.
 - (ii) Jo Heracleous, Pub Manager.
 - (iii) Christopher Olssen, Pub Manager.
 - (iv) Antony Edwards, Regional Personnel Manager.
4. The Tribunal also had a bundle of documents in excess of 265 pages. From the evidence heard the Tribunal finds the following facts.

The Facts

5. The claimant was employed from the 1 April 2017 until his dismissal on the 14 February 2020 as a kitchen assistant at the respondent's public house called The Standard Bearer in Stevenage.
6. The claimant was issued with a standard form contract of employment seen in the bundle at page 226. It was signed and dated the 11 November 2018. At clause 9 of this document the company set out the notice provisions and then went on to deal with the circumstances which could justify immediate termination. The clause provides as follows:-

“The company is entitled to terminate your employment with immediate effect as detailed in the Employee Handbook and without any notice or Payment in Lieu of notice if:

- a. You are guilty of Gross Misconduct (full details are in the Employee Handbook).
- b. Material non-compliance with any of the company's security rules for pub based employees.
- c. You are convicted of a criminal offence for which you are sentenced to a term of imprisonment whether immediate or suspended.

- d. You commit any serious breach or persistent breaches of the terms of your employment.
- e. You become bankrupt or make any arrangement or composition with or for the benefit of your creditors.
- f. You cease to be eligible to work in the United Kingdom.
- g. Some other substantial reason requiring the immediate termination of your employment.

The company's rights as set out above are without prejudice to any other rights that it might have at law to terminate your employment or to accept any breaches of the terms of your employment as having brought your employment to an end. Any delay by the company in exercising its rights to terminate your employment shall not constitute a waiver thereof."

7. Clause 10 dealt with the grievance and disciplinary procedures as follows:-

"Disciplinary Procedure

A high standard of conduct and behaviour is requested at all times. Should you be involved in any misconduct the company, where appropriate, shall seek to follow the non-contractual disciplinary procedure set out in the Employee Handbook. These procedures do not form part of your contract of employment. The disciplinary procedure may be varied by the company from time to time. The company reserves the right to suspend you from work during a period of investigation which may lead to disciplinary action. Further details in respect of the circumstances in which it may be appropriate to suspend an employee appear in the Employee Handbook."

8. The following extracts from the Employee Handbook are of relevance:-

"Working at JD Wetherspoons

Equal Opportunities

The company is committed to equality of opportunity. We want to create and promote a diverse and inclusive working environment and eliminate any direct or indirect discrimination; harassment or victimisation of our employees, job applicants, customers and contractors. We strive to maintain a working environment, terms and conditions of employment, and personnel and management practices that ensure that no individual receives less favourable treatment on the grounds of their age, disability, race, religion or belief, sex, sexual orientation, gender re-assignment, marriage or civil partnership, pregnancy or maternity. In addition to the legally defined protected characteristics the company extends the same protection from harassment to an individual or groups, nationality/ethnic origin, gender identity and trans employees.

Equality, Diversity and Inclusion (EDI) Policy

A failure to comply with this policy may subject an employee to serious disciplinary action up to and including summary dismissal. Any concerns or queries regarding EDI (including Equal Opportunities) should be raised immediately with a line manager or with a member of the personnel team.

...

Anti-Harassment, Sexual Harassment or Bullying.

Harassment is not permitted or condoned in the work environment under any circumstances. Everyone must be treated fairly and is entitled to work in an environment free from harassment, victimisation and bullying.

All employees are strongly urged to become familiar with behaviour that may be construed as harassment as detailed in the Company Harassment Policy in Section 5 of this Employee Handbook....

All employees should remember that this policy applies to Company social functions and training events and the policy of no harassment applies to colleagues, customers, contractors and visitors.

Disciplinary and Dismissal Procedure

...

Disciplinary Sanctions

The level of any disciplinary sanction awarded will be determined by the seriousness of the allegations the individual is reasonably believed to be culpable of. Whether the actions are considered to be misconduct or gross misconduct will also have a bearing on the level of warning.

Gross misconduct is a single act of misconduct that is serious enough on its own to potentially justify the employee's dismissal.

...

Examples of breaches of standards or procedures that constitute gross misconduct

When a number of people are working together there must be certain agreed standards so that everyone knows what is expected of them as a member of the team. Gross misconduct is an act of misconduct so serious that may no longer have enough trust or confidence in the employee for a working relationship to be maintained.

The Company takes a particularly serious approach to gross misconduct where health and safety or security of Company assets is involved and it will enforce its ability to summarily dismiss employees. It is imperative that you follow all Company procedures and record information accurately in order to prevent theft, loss of stock, hazards to others and security of company premises.

The following is a non-exhaustive list of examples of breaches of standards or procedures which may be considered as gross misconduct rendering the employee responsible liable to summary dismissal.”

9. The examples relevant to this case are set out under the heading of Behaviour and include:-

“Inappropriate or insulting language

Use of obscene language towards colleagues and/or customer.

Failure to comply with the Equal Opportunities, Harassment or Disabled Persons Policies.

Serious acts committed outside of work or an arrest or conviction for a criminal offence which has an actual or potential adverse bearing on the employee’s suitability for the job and/or which amounts to a serious breach of trust and/or which may adversely affect employee or customer relations and/or which may or does bring the company name into disrepute or is detrimental to its local reputation.

Any conduct resulting in a fundamental break down in trust and confidence.

Intentional behaviour that involves a serious breach of company policies or procedures.”

10. Keyne Sutherland was the claimant’s Pub Manager. His Line Manager at the time was Sophie Quinlin the Kitchen Manager. The claimant’s sister Sam Rush also worked at the pub at the time originally as a full time shift manager before reducing her role and hours.

11. In or around August/September 2018 Ms Sutherland needed to call the claimant’s sister because the claimant was at work talking about taking his own life. She believed the claimant had a lot going on outside work although she had a limited understanding of what these issues were but was aware that his mood at work was at times low. She did recall him telling her that he was not getting any external support and she directed him towards organisations that may be able to help.

12. On or about 4 January 2020 it was reported to Ms Sutherland by Sophie Quinlin the Kitchen Manager that the claimant had been speaking inappropriately with regard to another colleague in the kitchen that day. Sophie Quinlin posted a message on a WhatsApp Group between managerial colleagues advising them:

‘Andrew asked Hewitt if he knew why Ollie was back and accidentally said ‘she’ and then he was like ‘oh ffs, he, her, thing what ever it is. Why is thing back’

13. Ms Sutherland met with Ms Quinlin on 4 January to take a statement from her and she confirmed what she said in the WhatsApp message and what has been set out above. She said she heard the claimant talking about this particular colleague before. Also, she was concerned that others were

making fun of this particular colleague who is a trans man. Someone had told him that Ariana Kadira liked him and Sophie Quinlin had heard the claimant laughing about it with someone else. The colleague had believed this and had been messaging Ariana asking if she wanted to meet up and that had made her feel bad.

14. As will be seen in the chronology as set out below this issue whilst it formed part of the disciplinary allegations was not then upheld and therefore the evidence at this hearing did not focus on it. It is of relevance however to the chronology as it is that which alerted Ms Sutherland to other comments that had been made by the claimant involving Ariana Kadira, another employee and the claimant's former girlfriend. This led Ms Sutherland to meet with Ariana on 13 January 2020 (page 68).
15. After having been asked about the comments about her colleague in the kitchen, Ariana was asked about racial comments made to her by the claimant. Ariana said she could not remember because it was a long time ago but she might be able to find messages on her phone. She could not find them and could not recall exactly what the comment was. She was asked by Ms Sutherland whether she had ever heard him referring to her as "the black one" to which she answered yes. Ariana said it had happened more than once. She understood the claimant did not think it was offensive because they were going out at the time but she had disagreed with that. She said the comment was made once at work and other times when she saw him out drinking. She could not recall any other racial comments that had been made.
16. Ms Sutherland explained that she had a copy of a conversation that the claimant had had with Megan Lynch on 29 November 2019 (on Snapchat?) where Ariana had asked advice because the claimant was saying things about her.
17. Ariana explained they were on a night out and someone had asked for her telephone number, she had not given it to him because she knew what the claimant was like. They got into a taxi to go to another's house and the claimant assumed that she had given the colleague her number and started calling her 'a slut and a horrible person'. When they got to Jack's house the claimant was telling everyone how easy it would be to sleep with her again and said he only had to click his fingers and sleep with her. He was discussing their sex life in front of everyone and in 'graphic detail' and Ariana told him multiple times to stop and she had to leave because she did not want to be in that situation. She believed that Jack Mees whose house it was, was present and Frank Webb and Louise might have been there and also Ryan Hewitt. Two of those people were shift leaders.
18. Ariana explained that the claimant tended to apologise a lot but then not actually change his behaviour. She was aware that Frank had spoken to him after the night they were at Jack Mees' house and had asked her if she wanted to take it further. The claimant had apologised and she did not feel she needed to take it further after that. Ariana explained that as they had

been in a relationship and she had cared for the claimant, "I let a lot slide that I shouldn't have when it comes to him".

19. Following this meeting with Ariana, Ms Sutherland decided that there could be a perceived conflict of interest if she continued with the investigation. The matter was therefore passed to Reece Egerton and her involvement in the investigation ceased.
20. Reece Egerton interviewed Elise Griffin on 20 January 2020. She recounted how she had been working in the glass wash and the claimant had said something about Ariana being black. She recalled that he had referred to Ariana as "the black one". She said she did not feel comfortable when she heard that.
21. Reece Egerton also interviewed Sidney Bacon on the same date, he was asked whether he knew of anyone making any inappropriate comments regarding Ariana and he said that he did but when asked to elaborate he said it was not said within the last few months and had nothing else to add.
22. The claimant was then interviewed by Reece Egerton on 23 January 2020. He was asked about the trans colleague but that is not a matter that was pursued. He was then asked about the comment "the black one" and the claimant accepted he referred to her as being black but not the black one. He is noted as stating:

"The context was that Ariana and her dad not being around for certain reasons like Christmas and it was referred to as someone from school did the same thing as Ariana's dad. Their dad turned out to have a second family they must just have overheard that part of the conversation."

When asked the relevance of that explanation the claimant said:

"I used the word black rather than using African".

He accepted he was talking about Ariana and his friend from school but that it was not meant in an offensive way.

23. By letter of 24 January 2020 (page 88) the claimant was invited to a disciplinary hearing on 28 January 2020. The hearing was to be held by Steve Baldwin Pub Manager. The claimant was to respond to the following allegations:-
 - (i) On 4 January 2020 he had referred to a colleague as 'it' and/or 'thing' when in conversation with other kitchen members of staff.
 - (ii) He had referred Ariana Kadira as 'the black one' when discussing her to two colleagues when there was no context to refer to race and/or ethnicity as they were both colleagues who had worked with the claimant and Ariana over a long period of time.

- (iii) He took part in a joke where a rumour about Ariana and another for which he changed his statement throughout the investigation. The allegation was the joke had no purpose other than to cause disruption within the workplace and make employees feel uncomfortable working together.
24. It stated in the letter that the actions could amount to implied or actual violence, threatening, inappropriate or insulting language and the use of obscene language towards colleagues and/or customers. It might also amount to a failure to comply with the Equal Opportunities Policy and a breach of trust and confidence. As the matter might amount to gross misconduct one sanction that could be imposed was summary dismissal. The claimant was sent the investigation minutes of his own meeting and witness statements of Ryan Hewitt, Elise Griffin, Sidney Bacon, Maribah Channer, Sophie Quinlin and Ariana Kadira together with copies of the relevant policies. The claimant was advised of his right to be accompanied by a colleague or trade union representative.
25. The claimant was issued with a notice of suspension on 28 January 2020 pending the investigation.
26. On 28 January 2020 Steve Baldwin (who this Tribunal did not hear from) postponed the disciplinary hearing determining that further investigation needed to be carried out. This was passed to Jo Heracleous who the Tribunal did hear from.
27. Mr Heracleous was passed a pack of information that had been compiled for the cancelled disciplinary hearing and received this on 4 February 2020. He was concerned by what was alleged to be transphobic and racist comments made by the claimant.
28. Mr Heracleous decided to start the investigation again. Prior to holding an investigation meeting with the claimant, he wanted to ensure he had collated all relevant information. In addition to the written statements already provided he conducted investigation meetings with the following people:-
- (i) The claimant – pages 116-121;
 - (ii) Sophie Quinlin – page 93;
 - (iii) Ollie – page 95;
 - (iv) Ariana Kadira – pages 96-99 and pages 129-130;
 - (v) Elise Griffin – pages 102-103;
 - (vi) Jack Mees – pages 104-107.
 - (vii) Maribah Channer – pages 108-109;
 - (viii) Frank Webb – pages 110-113 and page 131;
 - (ix) Sam Rush, the claimant's sister – pages 114-115;

- (x) Louise Solis – pages 122-123;
 - (xi) Ryan Hewitt – pages 124-126;
 - (xii) Sidney Bacon – pages 127-128; and
 - (xiii) Megan Lynch – page 94.
29. He was also provided with a number of screen shots of Facebook Messenger messages in relation to Ariana (pages 44, 48 and 49 in the bundle). He also had messages from Elise Griffin and Megan Lynch that he included in the pack of information provided to the claimant when he referred the matter to a disciplinary hearing.
30. The investigatory meeting with the claimant was on 5 February 2020 and present was Sophie Nigro Shift Manager. The minutes are at pages 116 to 121 of the bundle.
31. The claimant's comments in relation to the transphobia matter will not be set out as they were not pursued but the claimant:-
- (i) Accepted that he had mistreated Ariana. He said he was abusing drugs and alcohol at the time because of his mental health.
 - (ii) On an occasion he accepted calling her a slut and saying she was easy to sleep with which he had said when he was not on drugs and was not as intoxicated, it was said in front of colleagues and he knew it was inappropriate. He admitted he had spoken graphically about sex with her in front of male colleagues.
 - (iii) He admitted using slurs towards Ariana and accepted that his struggles with mental health did not excuse it.
 - (iv) He did refer to his mental health being an issue and said he had been abusing alcohol and drugs and that was taking a toll on his mental health as it does with anyone.
 - (v) He accepted that being in a group of colleagues even outside of work had implications for the workplace.
32. Mr Heracleous had the impression that the claimant was not being frank with him about what he could and could not recall. When it was put to him that he could not recall what he had said about Ariana sexually because of how obscene it was the claimant had responded by saying, "it sounds like me" and confirmed such language was common place for him.
33. Mr Heracleous also found that the explanation about referring to the Ariana as 'the black one' lacked all credibility (page 119). In responding to that allegation the claimant had said:

‘I have made racial comments towards her when I’ve been in those drunk situations. I have spoke to her and apologised. Its because of my mental health. I’m not using it as an excuse’

34. The claimant was ‘pretty sure’ he had called Ariana ‘a lot of racial terms’. He accepted using the ‘N’ word to her and ‘black time’ as in he explained black people have their own time. The claimant did not think he had used such terms for 4 months and gave the names of others he had heard call Ariana racial names. The claimant accepted that what he had said was wrong and should not have been said.
35. Although the claimant did mention his mental health he did not provide Mr Heracleous with any substantive information.
36. Mr Heracleous spoke with Ariana Kadari on 4 February 2020 (with Sophie Nigro, Shift Manager present, p99). He dealt firstly with the claimant referring to Ariana as a ‘slut’ which she confirmed had upset her. She had considered talking to Kenye (Sutherland) about it but the claimant had apologised so she didn’t. She said that ‘everything he said was wrong but worse because we all work together.’ She confirmed however that the claimant did also go into detail ‘to the guys at work’ about their relationship and sex life. She did not want to go into the specifics ‘but it was disgusting. But he would describe sexual acts’. She described feeling really upset and having to leave the room as she felt ‘really uncomfortable’.
37. Ariana was also asked about racial comments and she confirmed that she had been told the claimant had referred to her as ‘the black one’. The claimant had made such comments when they were together ‘but they were more jokey’. She considered his comments inappropriate and should not have been made. She described feeling upset and angry when the comment had been repeated to her as she was confused as to why the claimant would refer to her like that.
38. Jack Lees at his interview confirmed that he had heard the claimant make comments about Ariana for example ‘how easy it is to sleep with her’. He had called her stupid when they first got together. He did not think it appropriate as it ‘can cause problems at work’. He had heard the claimant call Ariana a slut and other degrading names on ‘multiple occasions’. This was when they were a couple and when they were not.
39. Other staff confirmed the allegations against the claimant of referring to his sex life with Ariana and calling her the ‘black one’.
40. From the investigation Mr Heracleous formed a belief that the claimant had acted in a way that it made it necessary to refer the matters to a disciplinary hearing.
41. As part of his investigation Mr Heracleous also suspended Frank Webb Kitchen Shift Leader because he felt that Frank was in a position of responsibility as a Shift Leader but that he had commented on the ongoing investigation and had demonstrated a total lack of concern over the

language used to colleagues. He also referred Jack Mees to disciplinary hearing although he had been demoted from his Shift Leader post by the time Mr Heracleous met with him. Mr Webb resigned prior to disciplinary action being taken. Jack Mees also resigned before the disciplinary but then retracted that after a cooling off period. Before the disciplinary could go ahead the Coronavirus Lockdown started and after coming back to work in July 2020 Mr Heracleous contacted his new pub about arranging a new disciplinary for him.

42. After concluding his investigation process Mr Heracleous contacted Chris Olssen, Pub Manager and asked that he be the hearing manager for the claimant's disciplinary.
43. The claimant was invited to a disciplinary hearing on 10 February 2020 (page 132) and it was explained that Mr Olssen would chair the meeting. The hearing was on the 14 February 2020. Again, the claimant was advised that if the allegations were proven they would amount to gross misconduct which could result in his dismissal.
44. Prior to the disciplinary hearing Mr Olssen was sent a full pack including the investigation meeting with the claimant on 5 February. He reviewed additional information provided by the claimant which included a number of witness statements and messages.
45. The claimant did not bring a companion with him to the meeting and confirmed he was happy to continue without being accompanied. It was discussed why he could not bring Ariana as she had provided a witness statement as had his sister. The claimant then signed the minutes of the meeting to state that he was content to proceed without anybody else with him.
46. During the hearing the claimant provided the following explanations in relation to the allegations:-
 - (i) He admitted using racist language towards Ariana. He continued to suggest she was comfortable with it.
 - (ii) He sought to distance himself from specific comments he was alleged to have made to Ariana.
 - (iii) He accepted that his relevant training had been done and he grasped what prohibited behaviour the training addressed.
 - (iv) He accepted that saying to Ariana in a group of people that she is a slut and "likes it bent over" was probably not pleasant to her even if they had just come out of a relationship and he was jealous and perhaps drunk.
 - (v) The claimant had referred to his mental health and that he was using alcohol which could exacerbate his moods.

- (vi) The claimant believed that CCTV footage would be relevant.
 - (vii) The claimant accepted that mental health problems were not an excuse and he understood he had offended people.
47. Mr Olssen concluded that Ariana was not comfortable with the claimant's racial and sexually abusive language towards her. Even if she had tolerated it whilst in a relationship that did not mean that she had enjoyed it or the company should not address it when aware of it.
 48. When the claimant tried to suggest he did not make some of the comments he was alleged to have done Mr Olssen did not believe he was answering his questions directly or honestly. People who were present when he used abusive and racist language gave evidence in the investigation of the comments they had heard and he did not think that the claimant was being honest with him.
 49. In response to the sexually graphic comments he made about Ariana, Mr Olssen felt the claimant was trying to "muddy the waters" and was saying he could not remember some of these things being said when Mr Olssen was confident there was no dispute about them having been said.
 50. Whilst accepting people can be more outspoken when they are drunk and it may have been the claimant's opinion his own language became more severe when he was drunk the claimant did not accompany his submissions with any remorse and did not directly connect the way he chose to address Ariana as being caused by poor mental health.
 51. Mr Olssen did not see the relevance of CCTV footage.
 52. With regard to the transphobic comments, whilst Mr Olssen was satisfied the claimant had used the language he was accused of he chose to not thoroughly assess those issues and to concentrate on the racist and sexist language. He acknowledged in his witness statement that in his interview with Antony Edwards who held the appeal hearing, Mr Edwards felt that he had thereby made an error of judgement.
 53. After discussing all aspects of the case Mr Olssen adjourned the disciplinary hearing to make his decision. He sought advice from personnel and spoke to advisors there about the claimant's mental health situation. He reached the conclusion that he had a reasonable belief that the claimant had not only said the things he was accused of but used language like this regularly and did not see anything wrong with it as it as he had apologised afterwards.
 54. When considering the appropriate outcome, he gave consideration to alternative sanctions but was not comfortable with the claimant continuing to work in the business given his belief that he had said these things, had

the propensity to do so again in the future and had been dishonest at the disciplinary hearing, and had shown no remorse. He believed dismissal was reasonable and fair in all of the circumstances.

55. The outcome decision was set out in a letter dated 17 February 2020 place (pages 142-143). There was delay in sending this out. The disciplinary hearing was on a Friday and Mr Olssen left on holiday the next Sunday morning. He did mention to the claimant at the disciplinary hearing he may not have time to complete the letter before he went away. On his return it slipped his mind before it was brought to his attention that the letter had not been sent. It is accepted that the claimant did not receive it until end February/beginning of March 2020.
56. The claimant queried the lack of the disciplinary outcome letter by his email of the 17 March. The claimant still submitted his appeal on the 11 March and this was acknowledged by the respondent on the 23 March 2020 by which time the country was about to enter the first national lockdown due to the pandemic. The claimant was advised that all on going investigations and marrings had been put on hold and he would be updated as soon as it was possible to do so.
57. The appeal eventually took place before Antony Edwards on the 5 August 2020 by telephone. The notes of the meeting (page 155) show that Mr Edwards summarised what he understood the claimant's grounds of appeal to be as follows and that the claimant accepted that as a list of them:
 - 57.1 that no complaint had been made about the behaviour.
 - 57.2 that no consideration had been given to the claimant's health and medical evidence submitted.
 - 57.3 that the claimant refuted some of the allegations.
 - 57.4 that the claimant had stopped making jokes about Ollie and Ariana.
 - 57.5 That there had been some procedural errors in the process, namely that some witnesses were not interviewed, delay in receiving the outcome letter and that the claimant had not had CCTV footage he had requested.
58. The claimant's emphasis at the appeal hearing was that comments made to Ariana had been made in private whilst they were in a relationship. Ariana had told him she was not happy about them and they had a conversation about it. She knew where the claimant was mentally at that time. The claimant said that it was his mental health that led him to take things out on those nearest to him. There had been "jokey banter" between them.

59. The claimant stated that he was suffering from concussion and PTSD at the time of the allegations. He described his symptoms and felt that this had not been taken into consideration at all. The claimant when asked stated that he believed his thinking and managing his emotions had contributed to the actions that led to his dismissal. He had been trying to cope by drinking but that made his symptoms worse and 'you don't really understand what you have said until you have said it'.
60. The claimant having advised at the outset of the meeting that he could only stay for an hour as he had to get to work it adjourned at 10.36. After the hearing and in response to the first set of minutes the claimant sent an email with various documents. On 9 August 2020 he sent to Mr Edwards:
- 60.1 The two-page document with a timeline prepared by Simon Rush.
- 60.2 A four-page document entitled General Points for Appeal (Mr Edwards believes this is what the claimant read from the hearing on 5 August 2020).
- 60.3 A 13 page document entitled questions and comments around witness statements.
61. Mr Edwards took the view that the 13 page document had a different emphasis to that put forward by the claimant at their hearing. It addressed alleged deficiencies with the investigation process whereas at the hearing the claimant had focused on his belief that his behaviour was a private matter and resulted from his poor mental health. Mr Edwards concluded from these documents that they did not provide any evidence that was either new or which was substantive in supporting the points the claimant was raising.
62. In addition to considering this material Mr Edwards spoke to a number of staff.
63. Keyne Sutherland confirmed her investigation of the issues. She also said she had spoken to the claimant more than once about his mental health and had once called his sister to come and get him from work due to concerns. He had spoken about wanting to kill himself. She had carried out a well-being checklist which should have been on his file. She was confident she had spoken to personnel.
64. Mr Edwards also spoke to the investigating manager Joe Heracleous prior to reconvening the appeal hearing to understand his overall impression of the claimant's behaviour. From speaking to Joe he understood how action had been taken against others involved in inappropriate comments and behaviour but that they had left the business prior to any disciplinary.
65. At the reconvened appeal hearing took place on 12 August 2020 (page 177) the claimant appeared to believe that because Ariana did not lodge a formal complaint about his behaviour it should not therefore be a problem

for the company. Mr Edwards drew the claimant's attention to the interview that Joe Heracleous had with Arianna on 9 February where she stated she had reflected on the claimant's use of racist language towards her and that it was both unwelcome and inappropriate in her mind.

66. The claimant did not deny the sexually graphic and insulting language he had used towards Ariana and in Mr Edwards view did not try to excuse it because of any mental health issues. Although Mr Edwards understood the claimant might have also been drinking he did not consider that a reasonable excuse for the behaviour and neither did the claimant appear to rely upon that.
67. Mr Edwards did not accept that there was missing evidence. He accepted that the delay in sending the outcome letter was not acceptable but it had not prejudiced the claimant as he still was entitled to and had appealed
68. On 12 August 2020 Mr Edwards interviewed Chris Olsen who had conducted the disciplinary hearing as he wanted to be clear in his mind what the decision-making process had been. He also wanted to understand why he discounted the allegation of trans-phobia when in Mr Edwards mind there was independent evidence that the claimant had made derogatory comments about the individual. Having spoken to Mr Olsen he was concerned that he had not appreciated the effect of this behaviour on Ollie and was concerned why that had also not been taken forward
69. On 17 August 2020 Mr Edwards interviewed Ariana herself as he wanted to understand from her whether the claimant's argument this was banter was accepted by her. He found her to be a credible witness. He was concerned about her references to the relationship with the claimant being in a situation in which he was controlling her. She confirmed that the claimant had referred to her as "the black one" multiple times along with other racial slurs. She also confirmed he called her a slag and other expletives. Mr Edwards came to the conclusion that she had found herself in a verbally abusive relationship with the claimant and his comments to her were not welcome.
70. Mr Edwards found the case to be difficult because the claimant was not disputing that he had done some things which he knew were wrong but other comments he had made he tried to distance himself from.
71. On 17 August 2020 the claimant emailed Mr Edwards again raising further concerns about the witness statements and speculating on motives for what he believed were discrepancies in them. Mr Edwards view was that this was "further speculative critique of the documentation" rather than the submission of any new evidence to support the claimant's arguments.
72. Having carried out this further investigation and reviewed all of the evidence Mr Edwards believed that the evidence supported that he did make trans-phobic comments about Ollie. He acknowledged that Mr Olsen removed

allegation from his reasons but he felt that Mr Olsen was wrong to have done that.

73. The claimant had tried to explain away his use of the term “the black one” but Mr Edwards did not accept his evidence. They had a first-hand account of this statement being made by the claimant (in particular Elise Griffin corroborated his behaviour at the time)
74. Mr Edwards did not feel that the claimant’s health condition could by itself excuse his actions in abusing his colleagues inside and outside of work. They were not slips of the tongue or one-off incidents but he formed a few serious and deliberate actions designed to belittle and harass others and Mr Edwards was satisfied and the claimant had admitted that he knew what he was doing was wrong.
75. Mr Edwards considered whether a lesser sanction might be appropriate because of the claimant’s health condition. Having concluded however that the claimant knew that what he was doing was wrong and regrettably that he either provided some explanations that were not credible or worse still he was untruthful about what he did Mr Edwards did not feel a different sanction could or should be applied. He did not believe the claimant would change his ways and felt he had harassed the people involved. The decision to dismiss was upheld

Relevant Law

76. The claimant claims he was unfairly dismissed and the burden is on the respondent to show that the reason for dismissal was a potentially fair reason falling within s.98 of the Employment Rights Act 1996 (‘ERA’). It relies upon conduct, a potentially fair reason.
77. The Tribunal must then apply the provisions of s.98(4) and determine whether in all of the circumstances of the case the respondent acted fairly in treating that reason as one to justify the dismissal of the claimant. It must look at all relevant circumstances and must consider what was within the band of reasonable responses and not submit its view for that of the employer.
78. In a conduct case the Tribunal should apply the guidance set out in British Homes Stores Ltd v Burchell [1978] IRLR 379.
79. It was stated in that case that there are three elements that must be established by the employer the fact of the belief in the misconduct, that the employer did believe it. Secondly it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly, the employer at the stage at which it formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Conclusions

80. There has been no dispute in this case that the reason for the claimant's dismissal was conduct, a potentially fair reason falling within section 98.
81. The tribunal must have regard to the threefold test set out in British Home Stores. There is no doubt that the respondent through Mr Olssen had a belief in the claimant's misconduct in using unacceptable language to a colleague and that he had reasonable grounds for that belief. There had been a thorough investigation carried out by Mr Heracleous who spoke to all the relevant staff involved. The claimant was also interviewed by him. The claimant admitted using some of the language but gave an unconvincing explanation about referring to Ariana as 'the black one'. The claimant seemed to take the view that as no formal complaint was made by Ariana then it was not for the respondent to investigate. The tribunal does not accept that position. If an employer has inappropriate language brought to its attention used by its employees, even outside of work but with colleagues, it is entitled to investigate that matter.
82. The tribunal must then decide whether the employer acted fairly in all of the circumstances in treating the claimant's conduct as a reason for dismissal. It is satisfied that it did. The claimant places much emphasis on the comments being made outside work. One of the comments 'the black one' was in work and heard by colleagues. The other comments were made to a colleague albeit someone the claimant had been in a relationship with. They were said in front of other work colleagues. The tribunal accepts the evidence of the respondent's witnesses that this gave them cause for concern as to the ongoing working relationship and had destroyed their trust and confidence in the claimant.
83. The respondent did not act unreasonably in refusing the claimant permission to bring Ariana as his work colleague to the disciplinary hearing bearing in mind she was at the heart of the allegations and had been interviewed. His sister had also been interviewed and it would not therefore have been appropriate for her to be present either. The claimant agreed to proceed without anyone with him and did not request a postponement.
84. The delay in sending out the disciplinary outcome letter was not acceptable but has been explained and it did not disadvantage the claimant in that he still appealed and that was heard.
85. This was not a case of disability discrimination as was made clear at the outset. The claimant had disclosed his mental health issues to the respondent but the respondent was entitled to conclude that they did not excuse the comments made and words used by the claimant. Particularly when, in relation to those said outside work, the main influence seemed to be the claimant's drinking.

86. As the case law makes clear it is not for this tribunal to substitute its decision for that of the respondent but to decide whether the decision to dismiss was within the band of reasonable responses. Dismissal was clearly in the band when the respondent was satisfied that the claimant had used inappropriate racial terms and graphic sexual references to a work colleague.
87. If the tribunal were found wrong in its conclusions and the dismissal found to be unfair the tribunal would have had to consider when dealing with remedy whether the basic and/or compensatory awards should have been reduced due to the conduct of the claimant before the dismissal or where it considered that the dismissal was 'to any extent caused or contributed to by any actions' of the claimant. Whilst these issues have not been canvassed it follows from the findings of fact in this matter that the probability is that there would have been a finding of a high level of contributory conduct.

Employment Judge Laidler

Date: 4 March 2021

Sent to the parties on: 15 March 2021

For the Tribunal Office