THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Mr E Ojo **Claimant**

AND

Mitie Facilities Services Ltd

Respondent

ON: **24 March 2017**

Appearances:

For the Claimant: **Mr (Lay Representative)**

For the Respondent: **Ms Danvers (Counsel)**

JUDGMENT

1. The claimant's claim for unfair dismissal fails.

WRITTEN REASONS

The claim

1. By a claim presented to the Tribunal on 13 December 2016 the claimant claimed he had been unfairly dismissed from his role as a Caretaker at Haverstock School on 7 September 2016. The respondent provided cleaning and maintenance services to the school and directly employed the claimant. The reason given for the Claimant's dismissal was gross misconduct. The respondent asserts that this was because he was aggressive and swore at his manager in an incident on 27 May 2016. The claimant stated at today's hearing that the real reason for his dismissal was that the respondent had wanted to change his hours and he had resisted that process. This argument was not put forward in the ET1. The claimant also stated that the dismissal was unfair in that a reasonable investigation was not carried out and a fair process was not followed. In summary, he stated that basic questions had not been asked of the witnesses including the claimant, discrepancies in other witnesses' evidence were not taken into account by both the decision makers and erroneous information about the claimant's disciplinary past were taken into account by the appeal decision maker. He stated that the respondent's decision to dismiss him was not based on a reasonable belief in the claimant's misconduct and that it fell outside the range of reasonable responses for an employer in all the circumstances.

2. The respondent presented a response disputing the claims on 12 January 2017. The respondent asserted that the claimant had committed a repudiatory breach of his employment contract by swearing and being aggressive towards a manager. They maintained that they had followed a reasonable investigation, followed a fair process and reached a conclusion within the range of reasonable responses particularly given that the claimant already had a 'live' final written warning on record.

3. I was provided with witness statements for 4 witnesses but only heard oral evidence from 3 witnesses. The claimant provided me with a witness statement for Mr Pierre, the trade union representative who had attended the disciplinary meetings with the claimant. However Mr Pierre did not attend. No reason was given for his non-attendance although the claimant and his representative made several efforts to contact him in the course of the hearing. As he did not attend and the respondent was unable to challenge his evidence, I have attached very little weight to his evidence. The three witnesses I heard from were the claimant, Ms Andrea Ogden who heard the appeal against the claimant's dismissal and Ms Lauren Prince, the claimant's line manager against whom he was alleged to have sworn and been aggressive.

List of Issues

4. The issues were agreed with the parties at the outset of the hearing.

5. What was the reason for dismissal? Can the Respondent show that the reason or principal reason for dismissal was a potentially fair reason under s 98 (2) Employment Rights Act ('ERA') 1996? The Respondent relies on conduct (s98(2)(b).

6. If the dismissal was for a potentially fair reason, was the dismissal fair or unfair under s98(4) ERA 1996?

   6.1 The Tribunal should take account of all the circumstances including the size and administrative resources of the Respondent's undertaking in determining whether the respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismiss the claimant. In particular the Tribunal should consider:

   6.1.1 whether the respondent held a genuine belief of misconduct
   6.1.2 whether the grounds for any such belief were reasonable
   6.1.3 whether at the time it held that belief it had carried out as much investigation as was reasonable
   6.1.4 whether the procedure followed was within the range of reasonable responses;
   6.1.5 whether the sanction imposed was within the range of reasonable responses

   6.2 In considering the above the tribunal will consider the following issues which the claimant relied upon as evidence of why the investigation, procedure and decision were unfair:

   6.2.1 was there any evidence that the respondent could reasonably rely on to conclude that the claimant swore at his manager?

   6.2.2 was there any evidence that the respondent could reasonably rely on to conclude that the claimant threw down the chair trolley?

   6.2.3 was there evidence for the disciplinary or the appeal panel to genuinely believe that the claimant had sworn and thrown the chair trolley at his manager?

   6.2.4 was there any evidence of previous swearing or bad language by the claimant and were there any relevant disciplinary instances as a result of similar behaviour?

   6.2.5 was the claimant given the opportunity to apologise if this was an instance of bad language?

   6.2.6 did the respondent provoke or plan the incident on 27 May 2016?

7. If the dismissal was unfair then the tribunal must consider issues of remedy including:

7.1 Should any award be reduced to reflect a change that the claimant would have been dismissed fairly had a fair procedure been followed?

7.2 Has the claimant caused or contributed to his dismissal If so, by how much is it just and equitable to reduce any award?

Findings of Fact

The incident on 27 May 2016

8. The incident for which the claimant was dismissed took place on 27 May 2016. Ms Prince, one of the Claimant's managers, gave evidence to the tribunal and during the disciplinary process. She stated that she had entered the school hall around lunch time, had spoken to the claimant and that the claimant had ignored her. Then, when she said that she was going to speak to his line manager, Daniel Fernandes, the claimant became aggressive, shouted at her, 'You fucking slag' on at least 2 occasions and he then threw or dropped a chair trolley. She states that she then suspended him with immediate effect.

9. The claimant disputes her version of events. In his witness statement at paragraph 7 he says that he had not heard her asking him where Daniel was and that the first he became aware of her was when she said "Where was Daniel? Are you fucking deaf and dumb, you fucking devil?". He said that in his shock the chair trolley fell from his grip. He states that he responded saying 'Lauren I'm not deaf or dumb or a fucking devil, what do you want?'. He says that he did not swear and did not at any time call her a fucking slag.

10. This version of events, as set out in the claimant's witness statement, differs from what the Claimant said in the disciplinary investigation, the disciplinary meeting and in evidence to the tribunal today. The accounts given by the claimant have changed on every occasion that he has been asked about the incident. At various points he has stated that he did hear Ms Prince but chose to ignore her because she was not his manager, or that he did hear her but she said something different to him. In the course of evidence today he has said that the chair trolley both did and did not fall to the floor.

11. Further he stated that he understood he had been suspended by Ms Prince in his witness statement (paragraph 8) but today states that he did not know he was suspended until his next shift when he came in to get some things from his locker.

12. The claimant attributed the inconsistencies between his versions of events on inaccuracies in the notes of the meetings he attended. The respondent has asserted that the claimant attended the following meetings:

    (i) an investigation meeting on 2 June 2016, (chaired by Mr Iqbal)

(ii) a disciplinary hearing on 14 June 2016 which was the reconvened on two further dates (7 July and 1 September 2016) (chaired by Mr Stafford who has now left the respondent's employment)
(iii) an appeal hearing on 20 September 2016. (chaired by Ms Ogden)

13. During evidence to the tribunal today the claimant said that all the above meetings had been recorded and that if we were to hear a recording we would see that the disciplinary meeting on 14 June was in fact chaired by Mr Iqbal not Mr Stafford. He also said that there were numerous other inaccuracies within the notes and that what he said in his witness statement and before the tribunal was correct and echoed what he had really said at all the meetings above.

14. The claimant asserted that the disciplinary meetings had been recorded by mobile phones belonging to those chairing the disciplinary meetings and that he and his trade union representative had repeatedly asked for copies of the recordings. Later in evidence, the claimant also maintained, despite repeated questioning by his representative, that the meeting on 14 June 2016 had not in fact taken place and had been entirely fabricated by the respondent.

15. I accept that giving evidence in tribunal is a stressful and difficult process for anyone and that on occasion it was difficult for the claimant to follow questions from both representatives and from the tribunal. However the claimant said that he understood the questions and where I felt that he did not I took steps to clarify things for him. Even then the claimant continued to repeatedly contradict himself, even to his own representative. It is of note that his representative continued to assert that the meeting on 14 June 2016 did take place whilst his client said, repeatedly, that it had not. The contradictions in the claimant's evidence occurred frequently between his oral evidence to the tribunal and his witness statement as well as between the notes of the hearing and his evidence (oral and written) to the tribunal today.

16. On balance, I do not find that the meetings were recorded. There is no mention of a recording or of the claimant's trade union representative requesting copies of those recordings. There is evidence that the written notes of all the meetings were sent to the claimant and his trade union representative (pages 168, 182 and 192) and nothing to suggest that the notes were challenged or that recordings were requested in the minutes of any of the hearings. The matter is not referred to at all in the claimant's witness statement and has only been raised for the first time at today's hearing. No requests for disclosure of the recordings were made as part of these proceedings.

17. I conclude, on the balance of probabilities, that the written notes I have seen are a broadly accurate note of what was said at the meetings and that the

claimant has indeed changed his version of what happened during the incident in question on numerous occasions.

18. I also accept that all the meetings that are recorded in the bundle took place and have not been fabricated by the respondent. I accept that the meeting on 14 June did take place. The claimant and the trade union representative mention the meeting in their witness statements and the claimant initially gave evidence about the meeting before the tribunal today. His representative also contradicted the claimant's own evidence and stated that the meeting on 14 June took place.

19. The significant, relevant and continuous inconsistencies in the claimant's account of what happened both during the investigation and disciplinary process and before the tribunal today included:

    (i) Whether the claimant swore at Ms Prince at all or just as he said in his witness statement
    (ii) Whether he dropped or threw the chair trolley
    (iii) What he was stacking at the time of the incident (chairs or desks)
    (iv) Whether he knew that he had been suspended or not
    (v) What meetings were held by the respondent as part of the investigation and disciplinary process

    Given the claimant's failure to adequately explain the reason for these inconsistencies I prefer the evidence of Ms Prince about the incident in question. I conclude that the incident occurred as she described namely that the claimant became aggressive and swore at her as set out in her witness statement. I also find that the claimant was fully aware that he was suspended as this is what he put in his witness statement and accords with previous versions of the incident and accords with the statement of his other manager, Daniel Fernandes, who confirmed as part of the disciplinary investigation, that he had spoken to the claimant shortly after the incident and been told by the claimant that he had been suspended.

The investigation and disciplinary process

20. To investigate the incident the respondent held a meeting on 2 June 2016 with the claimant and his union representative. Mr Iqbal also interviewed Ms Prince and Mr Fernandes. It is not clear what else the claimant asserts the respondent should have done as part of the investigation although I will deal with the claimant's concerns about Mr Fernandes' witness evidence shortly. I therefore find that the investigation was a reasonable investigation as they collected evidence from the relevant witnesses.

21. There then followed three disciplinary meetings on 14 June, 7 July and 1 September. The claimant was accompanied at every meeting by the same trade union representative.

22. The claimant made significant criticism of the evidence of Daniel Fernandes and I agree that there were inconsistencies in what he said. Mr Fernandes originally provided one witness statement for the investigation saying that he overheard Ms Prince and the claimant shouting and swearing at each other. After this evidence was challenged by the claimant at the first disciplinary hearing (14 June), Mr Fernandes subsequently provided another statement (given to the claimant's representative on 16 June) saying that he had not heard the argument but that the claimant had told him that the Claimant and Ms Prince had sworn at each other.

23. The claimant's representative raised the inconsistencies in Mr Fernandes' evidence at the second disciplinary meeting on 7 July 2016. As a result another meeting was convened on 1 September 2016 so that the claimant's representative could challenge Mr Fernandes and Ms Prince's version of events in person. At the meeting on 1 September Mr Fernandes and Ms Prince attended the disciplinary meeting and the claimant's representative was allowed to ask them questions about the events and challenge their evidence.

24. Mr Stafford concluded that the claimant should be dismissed for gross misconduct because he found that the claimant had been aggressive and sworn at his manager and that he had seriously breached Mitie's code of conduct. Mr Stafford was not present to give evidence to the tribunal today as he no longer works for the respondent. There was no evidence to the tribunal today that he took into account any aspect of the claimant's previous disciplinary record nor his longevity of employment. The dismissal letter (page 191-192) relies on the evidence he was provided by the investigation and the disciplinary meetings.

The appeal

25. The claimant was given the right to appeal against the decision. He appealed partly on the basis that the witness evidence was inconsistent. I have dealt with Mr Fernandes' evidence above. With regards to Ms Prince it was asserted that she was inconsistent regarding the time of the incident and whether the claimant was stacking chairs or desks. Ms Ogden re-interviewed the claimant and Ms Prince and Mr Fernandes as part of the appeal process. She also considered the additional evidence produced by the claimant, namely a character statement in support of the claimant by an ex-colleague. It is not clear from the claimant's submissions today what was unfair procedurally about the appeal process.

26. I find that the timing of the incident is and was largely irrelevant. Ms Prince has consistently said it was at lunch time and it is not clear to me why a variation of times between 1pm and 1.30 is relevant to the reasonableness of

the decision. Further I find that the claimant was also inconsistent regarding what he was stacking as he today said that he was stacking both desks and chairs and that his objection was the Ms Prince had said she was stacking tables not desks. Again I find that if there were inconsistencies they were insignificant and did not necessarily mean that the evidence she gave about the incident itself should be disregarded. This is contrast to the claimant's whose evidence changed even today before the tribunal.

27. I am satisfied from her evidence today that Ms Ogden considered the issues regarding the evidence and that she found that they were not relevant to the findings about the incident itself or the reliability of Ms Prince's evidence to her and need not affect the decision regarding the claimant's dismissal.

28. The claimant also appealed against the decision to dismiss on the basis that the decision fell outside the range of reasonable responses. It was asserted at the appeal hearing that the claimant's clean disciplinary record and his longevity of service should have been taken into account.

29. Ms Ogden did consider this ground of appeal and considered more evidence in this regard namely all the documents from page 145-157 which were from the claimant's personnel file. The claimant's representative today submitted to the tribunal that all this information was irrelevant and it was unfair for her to take those documents into account.

30. Whilst I agree that some of the incidents are very old and that the existence of the out of date warnings should not necessarily be held against an employee, I am satisfied that Ms Ogden looked at them in light of the assertion by the claimant's trade union representative that the claimant had been employed for a long period of time and had a clean disciplinary record. It is therefore correct that these factors should be considered when deciding whether dismissal was the right sanction. From looking at the records, Ms Ogden concluded that the claimant did not have a clean disciplinary record and that there was still a final written warning on his record that had not 'expired'. I conclude that it was reasonable for her to have considered them when assessing whether dismissal had been the right response in all the circumstances.

31. The claimant also states that Ms Ogden should have asked all the witnesses whether the claimant actually swore and that her failure to do so affected the reasonableness of the appeal process and conclusion. Ms Ogden asked all the witnesses, including the claimant, to restate their version of what happened during the incident. All the witnesses addressed the issue of whether the claimant swore during their meeting with Ms Ogden, including the claimant. It is therefore not clear to me why it would have been necessary for her to ask the direct question nor whether it would have elicited any different evidence.

Reason for dismissal

32. The claimant states that he disputed the changes to his hours earlier in 2016 on the basis that he would not be able to fulfil his morning duties in time. The claimant's representative asserted that the change in hours was first agreed and then the claimant was pressurised to change them further. Ms Prince in evidence could not recall whether it was the respondent or the claimant who asked for the additional meetings after the agreement in February. I therefore I find it plausible that this situation had occurred and that discussions had taken place between the claimant and his managers about this issue and that the claimant disagreed with the proposed changes.

The Law

33. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
        (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and
        (b) Shall be determined in accordance with equity and the substantial merits of the case.

34. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98 ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band or reasonable responses also applies to the belief grounds and investigation referred to.

35. In the event that the claimant is found to have been unfairly dismissed a monetary award is made under s119 ERA (basic award) and s123 ERA (compensatory award). Reductions may be made to those awards. For the basic award a reduction can be made where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, then the tribunal is to reduce that amount accordingly. Under s123 ERA subsection 6, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just an equitable having regard to that finding.

Conclusions

36. I find that the reason for the dismissal was gross misconduct. The issue regarding the hours is not, in my view, a plausible reason that the respondent witnesses would have created an entire incident to arrange for the claimant to be dismissed because they wanted him to start work an hour later. Conversations with the claimant about his hours were ongoing at the time that he was dismissed and no evidence was provided to me today that indicated that this had caused concern to the respondent or that the claimant would be penalised because of those conversations. No evidence was provided that suggested that the entire incident on 27 May was fabricated in its entirety by the respondent which was the claimant's assertion today.

37. I find that the decision to dismiss the claimant was based on a reasonable investigation and a proper process was followed regarding the disciplinary process. An investigation was held in which all the relevant witnesses were interviewed. The claimant was allowed to consider that evidence, was allowed to challenge the evidence relied upon and was entitled to be accompanied at the meetings. The meeting was adjourned twice to consider further evidence as produced by the claimant.

38. It is correct that this was, in effect, one person's word against the others. The claimant has submitted that there was therefore no actual proof that the incident occurred and so he should not be disciplined for it. However it was not suggested what proof could be obtained in situations where it is one person's word against another's and serious situations can easily occur with no witnesses.

39. I consider, on the basis of the evidence that Mr Stafford had in front of him, taking into account the investigation and the meetings he had with the witnesses, the opportunities the claimant and his representative were given to challenge the evidence and the frequent inconsistencies in the claimant's own version of events, that it was a reasonable conclusion for Mr Stafford to prefer Ms Prince's version of events over the claimant's. I also conclude that it was reasonable for Mr Stafford to conclude that the claimant had shouted and sworn at Ms Prince in the way that she described.

40. In those circumstances I find that the decision to dismiss the claimant fell within the range of reasonable responses for an employer in all the circumstances because I find that it was reasonable for the respondent to conclude, based on a reasonable investigation, that the claimant had shouted, and sworn at his manager and been aggressive. Such behaviour is capable of being gross misconduct and was in breach of the respondent's code of conduct. The claimant did not apologise for the incident but denied it had happened and continually changed his version of what had happened. In those circumstances, bearing in mind my obligation not to substitute my opinion for that of the respondent's, I find that the decision to dismiss was within the range of reasonable responses for an employer in all the circumstances.

41. The claimant was given an opportunity to appeal against that decision and as part of the appeal process the witnesses were interviewed again and the claimant was entitled to produce new evidence and challenge the findings of the original decision.

42. Ms Ogden considered the reasons he put forward as to why the original decision was unfair and considered the decision in the round taking into account the claimant's longevity of service which it appears was not considered by Mr Stafford. It is possible that Mr Stafford's original failure to consider the claimant's longevity of service in the original decision could have pushed the original decision outside the range of reasonable responses. However as part of the appeal process Ms Ogden considered this and as a result considered his disciplinary record. I conclude that by doing this she rectified any possible unfairness in the original decision (Taylor v OCS Group Ltd [2006] ICR 1602, CA).

43. As part of the appeal process, Ms Ogden considered that the claimant had been employed for a long time, but she also found that he had a live final written warning and several other disciplinary issues suggesting a pattern of outbursts and erratic behaviour by the claimant. It is trite to say that a claimant cannot rely on longevity of service without also allowing the respondent to consider the quality of that service. The existence of this final written warning and the claimant's continued failure throughout the process to give a consistent version of events, means that I find it was within the band of reasonable responses for Ms Ogden to uphold the decision to dismiss the claimant in all the circumstances.

44. I have not considered the issue of remedy as I conclude that the claimant's claim for unfair dismissal fails.

Employment Judge Webster

Date: 24 March 2017