EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Woods	AND	GE Aviation Systems Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD **ON** 6 February 2024
BY CLOUD VIDEO PLATFORM

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss S Crawshay-Williams of Counsel
For the Respondent: Miss L Bell of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim has little reasonable prospect of success and is now subject to the attached Deposit Order under Rule 39.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's claim for unfair dismissal should be struck out on the grounds that it has no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim because it has little reasonable prospect of success.
2. In this case the claimant Mr Sam Woods has brought a claim alleging unfair dismissal. The claim is denied by the respondent.
3. I have considered the grounds of application and the response submitted by the parties. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make

findings of fact as such, but my conclusions based on my consideration of the above are as follows.

4. The respondent company specialises in the manufacture of aircraft systems. The claimant was employed by the respondent from August 2014 until 2 February 2023. At that stage he was employed as a skilled operator, and he was dismissed by reason of gross misconduct. The claimant and a number of his colleagues had historically made a number of posts to a WhatsApp Group, which by reasonable standards would be considered to have been extremely offensive, including derogatory comments about those with disabilities and other protected groups. Disciplinary proceedings were commenced against the claimant and other employees. The claimant and two others were dismissed by reason of gross misconduct, and three other employees were issued with final written warnings.
5. The claimant accepts that he was dismissed by reason of conduct which is a potentially fair reason for dismissal. He also accepts that the procedure adopted by the respondent was fair and reasonable. He asserts that his dismissal was unfair for two main reasons: first, his circumstances were the same as his three colleagues who were issued with final written warnings; and secondly, his dismissal was not within the band of responses reasonably open to the respondent when faced with these facts, not least because insufficient consideration was given to a number of mitigating factors. The claimant's reasons for asserting unfairness are more fully set out in paragraph 18 of his Particulars of Claim.
6. These factors include that the relevant conduct took place over four years ago and that in the intervening four years no further issues were raised. At the time when the posts were made by the claimant, he had not had training on social media use, and there was generally less public awareness of the potential professional pitfalls of social media than there is today. He played an extremely minor role in the group and showed contrition for his actions and a commitment to learn from his mistakes. The three colleagues who received final written warnings had, like the claimant, made very few posts, whereas the others who were dismissed had made repeated and numerous posts.
7. Having established the above facts, I now apply the law.
8. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".
9. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
10. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
11. In this case the reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
12. Section 98 (4) of the Act provides "…. the determination of the question whether the dismissal 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 reasonably 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".

13. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Polkey v A E Dayton Services Ltd [1988] ICR 142 HL; North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA; Anyanwu v South Bank Students' Union [2001] IRLR 305 HL; Hussain v UPS Limited UKEAT/0221/17/DM; Jaffrey v Department of the Environment, Transport and the Regions [2002]IRLR 688 EAT; Tayside Public Transport v Reilly [2012] IRLR 755 CS; and Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA; Balls v Downham Market High School & College [2011] IRLR 217 EAT
14. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
15. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
16. HHJ Eady QC as she then was in Hussain v UPS Limited gave the following guidance as to the legal principles to be applied (at paragraphs 19 to 25):
17. "[19] The power to strike out an ET claim is provided by Rule 37 of Schedule 1 of the 2013 Rules, which allows that an ET may strike out all or part of the claim on the basis that it has no reasonable prospects of success. This is, for example, to be contrasted with an ET's power to order that an allegation or argument may only be pursued upon payment of a deposit, which requires that the ET consider that the allegation or argument in question has little reasonable prospect of success.
18. [20] In Ezsias v North Glamorgan NHS Trust v [2007] ICR 1126 CA, Lord Justice Maurice Kay stated as follows: "29 … It would only be in exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation …"
19. [21] Guidance was further provided by the EAT in Balls v Downham Market High School & College [2011] IRLR 217 at paragraph 6. [6] "Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success ... The tribunal must first consider whether, on a careful consideration of all of the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects." (Original emphasis).

20. [22] more specifically, in Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly [2012] IRLR 755 CS, it was noted that in almost every case the decision in an unfair dismissal claim is fact sensitive, and it was further observed that: "30 … Where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts …"
21. [23] And further, where there is a dispute as to the reason for dismissal, it has been stated that it would be very rare indeed that the dispute could be resolved without hearing from the party or parties who actually made the decision (per Langstaff J in Romanowska v Aspirations Care Ltd UKEAT/0015/14 at paragraph 15).
22. In this case there is very little dispute between the parties. They agree that the claimant was dismissed by reason of conduct, which is a potentially fair reason for dismissal. There is no dispute as to the procedure adopted which is accepted by the claimant as having been fair and reasonable. The claimant's main assertion of unfairness is that he received disparate or inconsistent treatment from his three colleagues who were issued with final written warnings and who were not displaced.
23. The respondent accepts that an employer's previous decisions not to dismiss employees for the same misconduct will make a dismissal unfair where employees in "truly parallel circumstances" arising from the same incident are treated differently (see Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, approved in Paul v East Surrey District Health Authority [1995] IRLR 305). However, it will be rare for circumstances to be "truly parallel" such as to render a dismissal unfair (MBNA Ltd v Jones UKEAT/120/15) at. The test for the Tribunal is to ask whether the employer's differential treatment of the employees was so irrational that no reasonable employer could have taken out decision (Securicor Ltd v Smith [1989] IRLR 356). Disparate treatment of two employees involved in the same incident did not render the employer's decision to dismiss only one employee "perverse or wrong" as long as the decision to dismiss was found to be within the reasonable band of responses (Epstein v Royal Borough of Windsor Maidenhead UKEAT/0250/07).
24. One important issue which remains open to debate in this case is the extent to which the three colleagues who were given final written warnings and not dismissed were in "truly parallel circumstances" to that of the claimant. The respondent says that the claimant will not succeed in meeting the high threshold of proof in that regard, and even if he did so, then the decision to dismiss him was nonetheless within the band of reasonable responses open to the respondent.
25. On balance I agree with the respondent's submissions in this respect, which is why, in my judgment, the claimant's claim has little reasonable prospect of success. Nonetheless I cannot say that it has no reasonable prospects of success. There are a number of issues which in my judgment it is in the interests of justice to allow the claimant to have determined by tribunal having considered the relevant evidence in full, which includes the documentary evidence and cross-examination of the relevant decision maker. These include the extent to which a number of mitigating factors put forward by the claimant were, or were not, properly take into account; why other colleagues who appear to have been "charged" with the same disciplinary offences and found equally to have breached the relevant procedures and not "to have fostered an environment free from discrimination and bullying and harassment" or alternatively to have been found to have been guilty of harassment, were issued with final written warnings rather than dismissal, which was the sanction applied to the claimant.
26. These reasons I dismiss the respondent's application to strike out the claimant's claim under Rule 37, but I have made the attached Deposit Order under Rule 39 having considered such information as to the claimant's means as he was able to provide at this hearing.

Employment Judge N J Roper
6 February 2024

Judgment sent to Parties on
12 February 2024

For the Tribunal Office

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