EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Dazz Michael	**v**	**London Underground Limited**

Heard at: London Central
On: 26 and 27 March 2022

Before: Employment Judge Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr H Zovidavi, counsel

The claim of unfair dismissal is well-founded and succeeds.

REASONS

Introduction

1. On 1 November 2023, the claimant, Mr Dazz Michael, filed proceedings alleging unfair dismissal.

2. The hearing proceeded on 26 March 2024; the parties agreed the only claim before the tribunal's unfair dismissal. Dismissal was admitted. The respondent alleges that the dismissal was fair for a reason connected with conduct.

The evidence

3. The claimant gave oral evidence.

4. For the respondent, I heard from Mr Carl Painter, area manager, who dismissed the claimant.

5. Both parties gave oral submissions and later filed written submissions.

The facts

6. The respondent employed the claimant as a customer service assistant, level 2, on 28 October 2019. Subsequently, he progressed to the role of customer service supervisor.

7. In his role as customer service supervisor, he was assigned to White City. His second day was 15 November 2022. On that day, he started at approximately 7:00 and he was observing his colleague, Ms Atagana, a customer service supervisor.

8. The claimant and Ms Atagana had not worked together previously, and they did not know each other. During the course of the morning, it is common ground that two other customer service assistants, Mr Richardson and Mr Browne were in the control room. Mr Richardson attended first, and Mr Browne was there after around 9:45. The material events occurred during a period of approximately 30 to 45 minutes after about 09:45.

9. There was some form of discussion concerning polygamy, which the claimant later described as heated.

10. Following the discussion, Ms Atagana contacted her area manager, Ms Evans. Her email of 19 November 2022 is headed "Incident – unprofessional conduct."

11. Her complaint accepts that there was discussion about "polygamy and countries that openly practice it." However, she stated -

> **Then to the surprise of myself as the only female… DM speaks about himself and his manhood and women in explicit terms. It took me aback…**

12. She referred to a specific incident she found offensive, which says was directed at her. She stated the claimant used the following words:

> **…take for example Gina – [and points his finger at me] – I can just look at her and I'm in my mind I have already f**ked her.**

13. She stated she carried on working, but described her increasing distress.

14. On 22 November 2022, Ms Evans, area manager, suspended the claimant. The letter stated "The reason for your suspension is because it is alleged that you made inappropriate comments to a colleague on Tuesday, 15th November 2022."

15. Ms Evans undertook the investigation. She met with Ms Atagana on 1 December 2022. This resulted in a statement, signed by both Ms Atagana and Ms Evans. Ms Atagana accepted there was a discussion about polygamy, a practice that she did not support, albeit it was practised in her "culture." She stated that the claimant was also Nigerian. There was also discussion as to whether the claimant would me remarry, as he was separated. She describes that discussion as "clean and respectful." She stated the conversation moved on to "is it possible to be monogamous." She stated the claimant then became vulgar. When asked to clarify what she meant she stated the claimant said words to the effect, "I can stick my dick in as many women and it's just nothing or it means nothing." (I will refer to this as allegation one.) She said at that point she turned her chair to face the window, as she did not wish to encourage him. She complained that shortly thereafter the claimant directed a comment at her and said "Gina… I can just look at her and in my head I have already fucked her." (I will refer to this as allegation two.) She stated she felt disgusted and livid.

16. Ms Evans interviewed Mr Richardson on 6 December 2022. He reported the claimant said "I like pussy." He was asked about allegation one and allegation two. As for allegation one he said he did not remember it 100%, but he "wouldn't be surprised if that was said." He was asked about allegation two and said he remembered that kind of comment.

17. Ms Evans interviewed Mr Browne on 8 December 2022. He confirmed the claimant had used the words contained in allegation one. He stated "I remember this was at the point he got very passionate." He corroborated Ms Atagana's account of allegation two.

18. Ms Evans interviewed the claimant on 4 January 2023. A work colleague attended with the claimant. As to allegation one, he denied recalling the comment. He said "I can't recall making such a comment. It was a heated discussion." The notes of the interview are countersigned by the claimant, they report that he nodded and said "that was out of context. He went on to say "I didn't mean I was going to do something with Gina." He suggested the comment was in the context of a conversation where it was suggested that "every man is polygamous in nature." He was specifically asked, by his own colleague, "Did you say 'fucked her?'" The claimant responded "I'm going to put my hands up, I think something like that was said."

19. Ms Evans then asked him "To confirm, you do think you said the second alleged quote?" The claimant responded "Yes. I can't say if it was word for word, but something along those lines was definitely said."

20. Ms Evans produced a report. The report included the various interviews.

21. On 9 March 2023, Ms Evans wrote to the claimant to confirm the claimant would be referred for a formal company disciplinary interview. The claimant was sent a copy of the full report prior to the disciplinary hearing.

22. The disciplinary process was undertaken by Mr Carl Painter, area manager, as the first chair, and Mr Robert Edwards, as the second chair. The claimant was not represented. Mr Painter, and Mr Edwards, explored the two allegations with the claimant. As for the second allegation, he denied it. He was asked about the investigation, and the reference to nodding his head, in apparent agreement, when first asked. The claimant stated it was a nod of disapproval, in that he shook his head. When asked about whether he said "fucked her," the claimant said "Yes but not the exact words.

23. Mr Painter and Mr Edwards did not reinterview anyone. They referred to the respondent's general code of conduct. They referred specifically to the following -

> **3.2 Working Relationships**
> **• 3.2.2 At all times employees must:**
> **-treat everyone with whom they come into contact at work with courtesy and respect;**
> **- be aware of and comply with LUL's policy, standards and procedures on equality and workplace harassment;**
> **-Avoid initiating or provoking violent situations or otherwise behaving in a manner which is offensive, abusive, intimidating, bullying, malicious or insulting to fellow employees, customers and contractors and others with whom they come into contact in the workplace.**

24. The procedure includes, as an example of gross misconduct "insulting, threatening or violent behaviour towards customers, colleagues…"

25. Mr Painter prepared a summary of the interview, and the findings. It sets out, in some detail, the panel's questions and observations.

26. Mr Painter and Mr Edwards concluded that the allegations were well-founded. They concluded the comments were derogatory and upsetting. Whilst the claimant disputed the specific words, they accepted Ms Atagana's account.

27. Mr Painter believed the claimant's actions justified dismissal. He asked HR for anonymised comparator cases. He was referred to four cases: two resulted in summary dismissal, one in suspended dismissal, and the other a final written warning. Mr Pointer was not given any details of the circumstances of the alleged comparable cases. The respondent produced no supporting paperwork. It is unclear how Mr Painter described the claimant's case. He did not know the circumstances of the comparators or why some were dismissed and some were not. He took on face value the HR report that there were four similar cases.

28. Mr Painter and Mr Edwards took into account the claimant's lack of apology. They considered the incident to be serious enough to constitute gross misconduct and found dismissal was the appropriate sanction.

29. The claimant was asked to attend a meeting on 24 May 2023. The findings were given to him. Both parties signed a written note. The claimant was summarily dismissed.

30. Thereafter, it appears that he remained on the payroll for a number of months. Mr Painter was informed of this on 28 September 2023. I do not know the full circumstances. I accept there was some form of error, as the claimant had been dismissed.

31. I accept that the possibility of a secondment was raised around February 2023.

32. The claimant appealed on 31 May 2023. He grave four broad reasons: inadequate/improper representation; misquoting; severity of sanction; and procedural anomaly." He did not expand on those matters.

33. Mr Painter had no involvement with the appeal or its progress.

34. The respondent has failed to offer the claimant an appeal hearing. There was some suggestion at the hearing that the respondent still intends to send the claimant a notice of appeal hearing. However, there was no written evidence, and no evidence from any witness.

35. On 30 October 2023, Mr Mike Donnithorne wrote the following email.

> **This seems to have been caught up in heavy e mail traffic**
>
> **This CDI appeal has come to me but this person was on stations not trains so should this go to the SSDM?**
>
> **Can you please advise as the person has emailed me again to ask what is going on as he wrote to me back in June**

36. The response of 10 January 2024 acknowledges that the appeal had not been progressed.

The law

37. Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

38. In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held -

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

39. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

40. In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

41. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

42. Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant

provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

Conclusions

43. Has the respondent established a reason for dismissal?

44. The respondent dismissed because Mr Painter, and his colleague, genuinely believed that on 15 November 2022, the claimant had used words as described in the two allegations. They believed his use of those words were inappropriate and had caused serious offence and distress. They believed his actions breached the company policy, of which he was aware.

45. At the time they formed that believe, where there grounds to sustain it?

46. The incident occurred on 15 November 2022. There were four people in the control room. Each of those four people was interviewed and their accounts were recorded.

47. The claimant was able to expand on his account during the disciplinary hearing. At that hearing, he gave contradictory and unconvincing evidence.

48. The written records of the interviews, and the claimant's own account, provided grounds for the conclusions reached by Mr Painter and Mr Edwards.

49. At the time the respondent formed its belief, had an investigation which was open to a reasonable employer been undertaken?

50. Ms Evans had undertaken an appropriate investigation which established the primary facts. She produced a clear and appropriate report which exhibited the relevant documents. The claimant was able to consider this.

51. The claimant was invited to a disciplinary hearing. The letter itself did not describe in detail the specific allegations. However, having regard to the questions raised at the investigation stage, and the fact that each of the witnesses was asked about two specific allegations, as was the claimant, I accept that the claimant understood the specific complaints he was to answer. Further information was sought from the claimant at the hearing. I am satisfied that this was an investigation which was open to a reasonable employer.

52. The claimant raises a number of criticisms which I should deal with.

53. I do not accept that he did not know the case he was to answer. Whilst I accept that the specific allegations could have been set out in the letter more clearly, it is appropriate to consider the entirety of the

documentation, and I have no doubt the claimant understood the specific allegations he was to answer.

54. I do not accept the claimant's criticisms of the investigation. For the reasons I will come to, there may be aspects of the investigation which could have been explored more thoroughly. However, what is required is an investigation which is open to a reasonable employer acting reasonably.

55. The fact that secondment was a possibility is not relevant. This occurred before the disciplinary panel concluded the claim should be dismissed.

56. The claimant alleges the sanction was too harsh. On the findings made by the disciplinary panel, it cannot be said that the dismissal was outside the range of reasonable responses. Mr Painter and Mr Edwards made rational findings based on a reasonable investigation. It is apparent that the panel did not accept there could be any criticism of Ms Atagana. On the information before the disciplinary panel, that, may have been a finding open to it. It is not for the tribunal to substitute its view.

57. I accept the claimant's contention that the respondent failed to follow, adequately or at all, its appeal process. This needs to be considered. I asked both parties to provide specific submissions on this.

58. The disciplinary procedure provides for a process of appeal. The employee has a right of appeal. It should be exercised within seven days. The procedure states "An appeal interview will be held within 14 days of the appeal being requested, or as soon as possible thereafter. The appeal manager will not have been previously involved in the case. The appeal manager will review the formal action taken, but cannot increase any sanction awarded." There is a further level of appeal in exceptional circumstances to a director.

59. The claimant filed his appeal in the appropriate time. The appeal went to a manager. It was not progressed. The respondent has given no proper explanation for that failure. Mr Painter speculated that there was some form of administrative error. However, he has no direct knowledge.

60. It follows there was a failure to progress the claimant's appeal. This is contrary to the respondent's procedure and it is in breach of the ACAS disciplinary and grievance procedures 2015.[1]

61. The respondent submits that it has acted in good faith in relation to the appeal, but this is not supported by evidence.

62. The claimant sent his appeal on 24 May 2023. On 1 June 2023, Mr Donnithorne sent the appeal to an employee relations partner, Mr Amrit

[1] See paragraph 26 of the code.

Phlora, asking whether the appeal should be dealt with by SSDM[2]. On 6 June 2023, Mr Phlora agreed, and suggested it would be taken forward. The claimant asked for a progress report on 24 October 2023. Mr Donnithorne acknowledged the difficulty. The failure to deal with the appeal was acknowledged in the response. The respondent has failed to give any evidence explaining the delay.

63. The fact the claimant was paid a salary for some months after dismissal is irrelevant.

64. The respondent refers to a number of cases. It relies on **Westminster City Council v Cabaj** [1996] ICR 960. I have not found this case of particular assistance. In **Cabaj**, the appeal did take place, albeit before a panel of two when the contractual procedure required three.

65. I accept the general proposition that failure to provide an appeal is a matter relevant to determining the fairness of the dismissal.

66. The respondent refers to "procedural fairness." **Taylor v OCS Group Limited** 2006 ICR 1602 CA makes it plain that procedural fairness is not separated from other issues arising. The procedural issues must be considered along with the reason for dismissal. It follows that not all procedural imperfections will lead to a finding a dismissal was unfair. Each case must be considered on its merits. The question is one of fairness under section 98(4) Employment Rights Act 1996.

67. There may be occasions when refusing a right of appeal will not lead to a finding the employer acting unreasonably in treating the reason as a sufficient reason to dismiss. For example, where it is clear that an appeal would not establish anything new, and would be pointless.

68. The ACAS code makes the importance of an appeal plain. **Polkey v AE Dayton Services** Ltd [1987] UKHL 8 establish that a fair procedure is an integral part of the test of reasonableness.

69. The respondent has given no explanation for its failure to comply with its own procedure, or to comply with the ACAS code. This is not a case of partial compliance, nor is it a case of non-compliance justified by a rational explanation. This is a case of total failure.

70. The respondent appears to suggest that the outcome would have been inevitable, and in that sense appeal would have made no difference. There is no is adequate evidence in support of this.

71. There were two broad questions to which an appeal may have been relevant. The first is whether the claimant's actions constituted

[2] Perhaps another personal department.

misconduct. The second is whether the sanction of dismissal was appropriate.

72. The claimant's comments were made in the context of a conversation which raised issues concerning the practice of polygamy. The context is important and the claimant disputed the context. There is suggestion that all four participants used inappropriate and offensive words. In his statement, the claimant refers to Ms Atagana stating of one person's father, who was said to have made a woman pregnant when having an affair, that he can't help but stick his dick anywhere. If that was a comment made by Ms Atagana, it may have been inappropriate, and may have invited other inappropriate comments.

73. It is part of the claimant's complaint that he was singled out when all participants had used inappropriate language. There may be some scope for suggesting that the context was not adequately considered by the dismissing panel.

74. Mr Painter did seek information on how other comparable cases had being treated. The circumstances of the comparison remain unclear. Mr Painter took the representations from HR this on trust. The claimant does not accept that he was treated comparably with others. An appeal may have reviewed this.

75. It is not all use of inappropriate language which will demonstrate either harassment or gross misconduct. Mr Painter acknowledged that foul language can be used in the workplace. The appropriateness of the use, and whether it constitutes harassment, must be viewed in context. It is apparent there was a discussion about polygamy. There is some indication it became heated. There is an argument that Ms Atagana used inappropriate language. An appeal panel may have been concerned that the context had not been fully explored. Whilst it is possible an appeal panel would not have found that any context exonerated the claimant, it may have found the context was relevant to the question sanction.

76. This is not a case where one can say that the appeal would have made no difference, and as such could be safely discarded. An appeal is an important part of the procedure. It can provide an opportunity for reflection and it may lead to a different result.

77. There is a real prospect that the appeal would have led to a different outcome. In the circumstances, the failure to allow an appeal in this case was unreasonable. For the reasons given, I find that the dismissal was unfair.

78. It will be necessary for there to be a remedy hearing. As was agreed at the hearing, the question of contribution, and any Polkey reduction[3] will be considered at that hearing.

79. It should be noted that I must make findings of fact as to what actually occurred. The primary evidence will be important . The parties may wish to call further evidence. It may be necessary for there to be further witness statements.

80. I will give directions. The partes should apply to vary if the directions are not appropriate.

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Employment Judge Hodgson

Dated: 21 May 2024

Sent to the parties on:

30 May 2024
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For the Tribunal Office

[3] The question of whether the claimant would have been dismissed in any event and if so by when.