



EMPLOYMENT TRIBUNALS

Claimant
Mrs D Goddard

v

Respondent
Leicester City Council

RECORD OF AN OPEN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: Wednesday 3 May 2017

Before: Employment Judge Britton (sitting alone)

Appearances

For the Claimant: In Person

For the Respondent: Ms H McDade, Solicitor (In-house)

JUDGMENT

1. The claim of unfair dismissal is not struck out and a deposit is not ordered, the claim having more than a little reasonable prospect of success.
2. The claim is amended to also include a claim of breach of contract (notice pay).

REASONS

Introduction

1. The reason for today's Preliminary Hearing at my direction is the current state of this case which is a claim of unfair dismissal. There have been problems on the discovery front which I will endeavour to address and there have also been concerns by the Respondent that the one day for which this case was listed back when the claim was served on 1 February 2017 and which would mean a hearing on 24 May 2017 is inadequate and needs to be revisited. There were also issues raised by me when I considered this case on 19 April 2017 as to whether this claim should be struck out as having no reasonable prospect of success or a deposit ordered it having only little reasonable prospect of success. However after a very long day, at which the parties, and in particular the Claimant have been able to fully articulate the issues; and my having considered the draft trial bundle prepared by the Respondent and some additions to it by the Claimant, I think that the way forward is now clear.

2. The basic scenario in this case is that the Claimant was employed as a domestic cleaner as part of a team at a hostel run by the Respondent known as Border House. She was employed there between 5 October 2005 and her summary

dismissal for gross misconduct for the use of racist language on 6 October 2016. Prior thereto she had an impeccable record.

3. The reason why she was dismissed is to put at its simplest because one of her colleagues, Janet Haslam, made a covert recording on 9 October 2015 on her mobile phone. She had hidden it in her locker. She then raised a complaint to supervisor Betty Clarke circa 12 October and on 13 October she played to either Betty Clarke or the more senior manager Patrick Kelly, part of the recording. Patrick Kelly and/or Betty Clarke was sufficiently concerned to escalate the matter and because inter alia they heard, in what is quite a short recording, the use of the words "Black bastard" uttered by the Claimant. Mrs Haslam was saying, her being as I understand it of Black Afro Caribbean ethnicity, that the remarks were directed at her. The recording played was full of background noise. At this first stage she would not leave the phone with the Respondent which via its IT department would obviously endeavour to filter out the background noise; apparently it covered a 6 hour plus recording albeit she had only played the key extract..

4. Sometime later ,it seems to me in late November, Mrs Haslam sent in, via her trade union the crucial part of the recording by what is known as a media file. However it came in a format which the Respondent could not download. There was then a delay until it got it in a different format as a digital recording which meant the Respondent could listen to it. Circa that time the problem was as to whether or not it could be used as it was a covert recording. The advice of in-house legal was that in the circumstances it could be. Thus at that stage an investigation, at first discretely, was started by Mr Kelly, focusing on the Claimant and a colleague:Glenda Barnet. This was on the basis that from the transcript that I have read and the recordings that I have been played, that Glenda, who is the superior of the Claimant, was clearly present when the discussion took place and is overheard in respect thereof. There was a third person also present when the conversation which was recorded took place, namely Lorna Oswin, another domestic. She was not the subject I gather of a disciplinary investigation but I will come back to her. Whilst the Respondent was trying to clean up the recording because much of it was still difficult to hear, albeit the offending words could be made out, the disciplinary investigation formalised, and in that context the Claimant was sent a transcript.

5. At her first interview conducted by Mr Kelly on 29 January 2016 she denied all knowledge of any such discussion and was adamant that she would never have referred to Mrs Haslam as a "Black bastard".

6. Then on 22 February the Claimant was sent a copy of the first digital recording. And so when she was interviewed again on 26 May 2016 she had listened to it. Furthermore on 10 May 2016 the Respondent had now sent out to both the Claimant for her disciplinary hearing and also to Glenda who was also having a separate disciplinary hearing, a copy of a CD that it had made which I will refer to as the "cleaned up version" in that IT had tried to get rid of the "dead air", ie hissing and background noise from the recording it had received in order to make it more audible.

7. The Claimant at the second interview now said that her memory had been jogged by listening to the recording or recordings and that she had been making reference to a spider when she used the phrase. She gave more explanation to the effect that she is always the one who has to deal with spiders which are common place at the hostel and because nobody else will; and that this was a particularly large spider. She also said that this reference to the spider was at a different time from the rest of the recorded conversation. In other words as now articulated more clearly

before me by her someone had altered the tape recording by cutting it so as to make it read as if this was all part of one conversation when it wasn't. This goes to context: in other words was the Claimant being racist about Mrs Haslam because she considered her to have not being pulling her weight earlier over placing toilet rolls in a WC. Also there is the issue as to whether the Claimant thought Ms Haslam was trying to falsely claim for an injury sustained at work which did not happen. So the contention is the editing was deliberately done to falsely put the black bastard comment in the wrong context: Furthermore that a motive could be because the Claimant had refused to support Mrs Haslam in her injury at work claim.

8. So as to the integrity of the phone recording the Claimant has for sometime now been wanting further evidence out of the Respondent it seems to me based upon the proposition that the cleaned up recordings it produced were doctored by the Respondent. The latter has responded that it has nothing further to disclose have repeatedly explained what the IT department did. And on this topic I have seen the Claimant's own expert report. I know it is rather limited because the Claimant cannot afford £7,000 for a full forensic investigation, but having said that the expert does not think that there is any significant difference between the recordings received by the Respondent and provided to the Claimant to which I have now referred. In other words he has not found evidence of any tampering with them, just the filtering and which of course is in all the parties interest. He can't deal with the issue of whether there has been any interference with the overall 6 hours of recording that would have been on the mobile phone because of course it is not there for him to hear. So the issue becomes refined. It is whether Mrs Haslam or some one on her behalf, not the Respondent, doctored the original recording. Thus the issue becomes, if this was made sufficiently clear by the Claimant and her TU reps at the internal proceedings, as to what steps did the Respondent take to inquire into it. Mrs Haslam does not appear to have been re-interviewed and she was not called to any of the disciplinary hearings apparently because she was by now off long term with stress/anxiety. Furthermore what the Claimant says before me, and stresses that she tried to so explain at the internal proceedings, is that she has evidence that Mrs Haslam:-

- (a) had 2 mobile phones whilst at work and;
- (b) may have during the period before she allowed the Respondent to hear the extract which she first introduced, via her brother who has an electrical shop in Birmingham, by implication falsified it in the way I have endeavoured to describe.

9. This brings me on to the second point about everything I have read today. Not clear from the response but now clear from today's discussions and references by Mr Kelly as investigating officer, particularly in his findings of a case to answer and at the disciplinary hearing, is that Glenda also had a disciplinary investigation. Furthermore her disciplinary hearing was on the same day as that of the Claimant and it was heard by the same person: Mr Evans. Mr Kelly had made references in the case against the Claimant that there was evidence of collusion he thought on the spider issue between her, Glenda and Lorna. This is because all three had originally denied all knowledge of the uttering of the words black bastard but then subsequently remembered about the black spider and that the Claimant had uttered the offending words in that context. But he did not exhibit in the investigation pack, for the purposes of the disciplinary hearing of the Claimant the statements taken from Glenda, including of course her investigatory interviews, or from Lorna. I now know from the bundle in front of me that Lorna made a statement albeit it seems to have been prepared some months after the

start of this disciplinary investigation. And most important corroborated the black spider defence, but then it would appear that she would not sign that statement when it was provided to her in the usual way. The Claimant tells me today that this was on the advice of Lorna's trade union. On an aside if that be correct then the trade union has much to answer for in that the same representative and union, GMB, was representing the Claimant. And of course if the Respondent knew that Lorna had made a statement but it surmised that she was not prepared to sign it because of the intervention of her trade union, then why didn't it proceed in any event to require her to give evidence or charge her as an accomplice as it had done with Glenda? Of most importance even if the statement had not been signed, should it not have been served upon the Claimant in terms of the disciplinary pack and so she could at least address the issue and Mr Kelly's view that there had been collusion? The same observation applies as to holding two disciplinary processes. Given that Glenda was found guilty of in effect aiding and abetting or failing to stop the Claimant therefore it arises out the same set of circumstances, surely the Claimant and Glenda should have been the subject of a joint disciplinary investigation and disciplinary hearing because amongst other things the evidence of the two of them on the spider issue and the assessment of collusion or not surely required the assessment of both of them in the same hearing. I make no findings of course and that is because these matters will need to be determined at the main hearing and when the Respondent witnesses have a chance to explain themselves more fully and of course can be cross examined.

10. I also now know that the Claimant put in a grievance against Mrs Haslam in relation to matters. Maybe that was a pre-emptory strike by her trade union, ie a tactical move. Even so, initially the Respondent was of the view that it would investigate and hear that grievance, as it covered the same evidential territory, at the same time as the disciplinary hearing. That decision was revisited it seems and the decision was taken to hold them separately. I also now know that Mrs Haslam had brought a grievance against the Claimant, some of which at least links to the same events. So surely these grievances and certainly that raised by the Claimant should have been heard in the context of her disciplinary hearing? Thus it seems to me from what I have read so far that it meant that in some respects disclosure on the one front did not find its way into disclosure on the other.

11. Therefore what it means is that I now no longer can say that this case has no reasonable prospect of success. I do find that the Claimant will have some explaining to do about the recording as it currently stands because on the face of it black spider would have nothing to do with the conversations recorded and given the context and in terms of allegedly shortly before there occurring the Claimant and Mrs Haslam having crossed swords over the issue of who was responsible for placing toilet paper in a particular room. But of course that depends upon the integrity of the mobile phone recording and also back to the fact that the issues that were raised by the Claimant do not appear to have ever been the subject of further investigation ie in the appeal process in terms of Mrs Haslam. So what it means is that there are on the face of it shortcomings in the way that this matter was handled. Therefore I also cannot say that it also has only little reasonable prospect of success and therefore I am also not going to make a deposit order.

Breach of Contract Claim

12. It is self evident from reading the claim form that the Claimant was also complaining that she had been dismissed without notice. Therefore I amend her claim as she is not legally represented to include a claim for breach of contract/failure to pay notice pay. It is also highly relevant for this reason. It often escapes parties and

particularly Respondents that although the test for whether a dismissal was fair is a range of reasonable responses test, it is not the same test for a breach of contract claim. For the latter to be successfully defended the Respondent must show on a balance of probabilities that the Tribunal Judge can be objectively satisfied that the Claimant acted in a way that fundamentally undermined trust and confidence. Thus the Tribunal could find that within the range of reasonable responses test an employer dismissed for a reason which is sustainable after a reasonable investigation, which is the **British Home Stores and Burchell** test, but might not necessarily find that nevertheless the threshold for being satisfied there was a repudiation of the contract of employment is met. So it means that a party could nevertheless therefore be awarded notice pay. But of course it is a matter for the Judge at the hearing.

Discovery

13. There has been lots of red herrings here. As now explained the Respondent has disclosed all it can on the mobile phone front. The issue is can you trust the integrity of the mobile phone extract given in by Mrs Haslam?

14. There will be more than sufficient documentation in the trial bundle, plus from the orders I am now making, to enable a Judge to make a fair determination in this case. There is no need for any other documentation

15. The Claimant has explained why she intends to call various witnesses. I can see why of course she would want to call Glenda Barnet who is a willing witness. I am not quite so clear as to why her husband is needed but doubtless all will be revealed as and when a witness statement is obtained from him. I can see why Mel Swindler, a Maintenance Operative (see Bp¹ 42) might be relevant but the Claimant should consider whether in fact she can simply rely upon what he told the investigator in that witness statement. Isn't that enough to deploy the argument she wants to make about matters getting leaked? Heather Syllis: what she has to say in handwritten format has been shown to me and again I can see that she could be relevant, certainly in sketching a culture and climate in Border House within which was an alleged posse so to speak of those "close to the ear" of the management and who also may have treated other members of staff in a less than respectful way: and I note that if that was to be correct then one of that coterie was Mrs Haslam. The Claimant also wants to call Lorna Oswin. She says the problem is that as Lorna is still working for the Respondent: she may feel uneasy. However I think we can rest assured that the Respondent would not stand in the way of her being interviewed or giving evidence and that she would not fear any repercussions. Therefore we have agreed that the way forward is that Lorna Oswin will be asked if she is prepared to be interviewed. To that end Mr Goddard as the Claimant's representative will send a polite letter to Mrs McDade for onward transmission to Lorna, which could be marked in the first instance if necessary private and confidential in which he will simply explain that he would like to interview her. If Lorna declines then he will obviously have to think about what to do. He could of course contemplate asking for a witness order but he would have to think it through whether there is any point if Lorna is unlikely to be helpful. On the other hand if Lorna is willing to be interviewed, then there is no property in a witness and therefore Ms McDade will make the arrangements for Mr Goddard to interview in the presence of a member of the legal team Mrs Oswin from which can then be agreed a record of what she has to say for her to then to be asked to sign as an accurate record which could then be used as her witness statement for the purposes of any hearing.

¹ Bp = a page in the bundle before me.

16. I then turn to the Respondent. Obviously given the way the case has expanded so to speak and the issues which I have now explored and which Mr McDade had already realised were probably on the agenda, hence her application for a longer hearing, I have now established that she is likely to call 6 witnesses. Given that we are going to have a trial bundle which will now extend into 2 bundles and therefore I think well over 700 pages, there has clearly got to be a reading in period on this case. The Judge can also of course read the witness statements.

17. I am therefore providing for a reading in day.

18. Obviously the existing hearing is cancelled.

19. The directions that have already been made are hereby revised; that brings me to my orders for directions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Additional Discovery

1. The entirety of the Glenda Barnet disciplinary pack, including disciplinary hearing minutes and appeal if any and the outcome in each case will now be disclosed and form part of the trial bundle.

2. The same applies to the entirety of the Mrs J Haslam grievance. Furthermore for the avoidance of doubt in that context any recorded relevant conversations, in particular between Mr Kennedy and Mrs Haslam, already not disclosed. I make it plain of course that this is germane to the issues; not in any wider context such as welfare issues.

3. Third there will be disclosed all documentation relating to the evidence gathering from Lorna, any document letters or other form of correspondence to her relating to any alleged collusion and if there is any trail thereafter whether it be in the form of e-mails, meetings or otherwise which is in the context of her not signing her statement then that is to be disclosed as well.

4. There is also to be disclosed the original notes of Paul Cox taken at the second disciplinary investigation meeting and second those of Ruth Barr who was the note taker at the disciplinary hearing.

5. As to this discovery what will then happen is as follows. The Respondent will by **13 July 2017** send the Claimant a revised trial bundle index and a second ring binder in terms of the documentation which would follow on from that in the first ring binder.

Witness Statements

Varied Deadline

6. By not later than **28 September 2017**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main

evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

The Hearing

7. The hearing of this matter will now take place at the Leicester Employment Tribunal, Kings Court, 5A New Walk, Leicester LE1 6TE between Monday 20 November 2017 to end on Monday 27 November 2017 (excluding of course the weekend). Day one ie 20 November will be a reading in day to which the parties attendance will not be required. For the purposes of the reading in the Respondent will ensure that sent in, in good time for the use of the presiding Judge will be the following:-

- 7.1 The trial bundle.
- 7.2 An agreed chronology.
- 7.3 An agreed cast list.
- 7.4 An agreed reading in list.
- 7.5 The combined indexed witness statement bundle.

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
<https://www.judiciary.gov.uk/wp-content/uploads/2014/08/presidential-guidance-general-case-management.pdf>
- (v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may*

order a departure from this rule where it considers it in the interests of justice to do so.” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Britton

Date:12 May 2017

Sent to the parties on:

...05 June 2107.....

For the Tribunal:

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