THE INDUSTRIAL TRIBUNALS

CASE REF: 2651/16

CLAIMANT: **David Rice**

RESPONDENT: **Dignity Funerals Limited**

DECISION

The decision of the tribunal is that the claimant's claims are dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Murray**

Members: **Mr T Carlin**
Mrs M O'Kane

Appearances:

The claimant was represented by Ms E McIlveen, Barrister-at-Law, instructed by Murphys Solicitors.

The respondent was represented by Ms G Roberts, Barrister-at-Law, instructed by Mr Rea, Legal Counsel in the respondent company.

THE CLAIM

1. The claimant's claim was for unfair dismissal and race discrimination. The respondent's case was that the claimant was fairly dismissed for gross misconduct.

THE ISSUES

2. The issues for the tribunal were therefore as follows:

   (1) Was the content of the meeting of 6 May 2016 between the claimant and Mr Studd (referred to in this decision as the Scottish meeting) which was

covertly recorded by the claimant, covered by without prejudice privilege?

(2) Was the claimant dismissed for gross misconduct following a reasonable investigation and on reasonable grounds?

(3) Were the actions of the employer in relation to process and penalty within the band of reasonable responses for a reasonable employer?

(4) Was the claimant subjected to race discrimination in relation to comments made by Mr Studd at the Scottish meeting and in relation to the provision of training?

SOURCES OF EVIDENCE

3. The tribunal had written and oral evidence from the following witnesses and had regard to all the documentation to which it was referred, together with the claim and response forms. It was agreed by the parties that the respondent's witnesses would give evidence first.

(1) Mr Ian Studd, Regional Manager for the Midlands region.

(2) Mrs Emily Skelton, Investigating Officer.

(3) Mr John Laker, Disciplinary/Dismissing Officer.

(4) Mr Stephen Rymer, Appeals Officer.

(5) Mr Anthony Driver, the claimant's Line Manager/Regional Manager.

(6) Mr David Rice.

THE LAW

Without prejudice issue

4. The parties referred in detail to the following authorities in relation to the without prejudice issue:

(1) **Framlington Group Ltd and Another v Barnetson [2007] IRLR 598 (CA).**

(2) **BNP Paribas v Mezzottero [2004] IRLR 508 (EAT).**

(3) **McKinstry v Moy Park and Others [2015] NICA 12.**

5. The scope of the without prejudice rule is set out in **Harvey**. The rule is that without prejudice communications cannot be disclosed and are inadmissible in evidence. The following principles can be gleaned from the authorities.

6. There are two reasons underlying the rule:

(1) A public policy reason which relates to the desirability of encouraging litigants to settle their disputes rather than to litigate to a finish. To this end the rule

operates to ensure that negotiations are not constrained by a fear that what is said in negotiations might later be used against a party in evidence if negotiations fail.

(2) That there is an express or implied agreement between the parties to the communication that the communications in negotiations will not be admissible in evidence.

7. One does not have to use the words "without prejudice" in order for the "cloak" to fall. The tribunal must look at all the circumstances to establish whether it was clear that the parties were seeking to compromise a dispute.

8. There are two elements which must be satisfied:

(1) There must be an existing dispute between the parties at the time the without prejudice communication is made; and

(2) The communication must be a genuine attempt to settle that dispute.

9. There are limits on abuse of the rule in that it cannot be used to cloak perjury, blackmail, or other unambiguous impropriety. It is clear from the authorities that the unambiguous impropriety exception should only apply in clear cases, it is not to be interpreted widely, and it means more than a party being disadvantaged by the exclusion of the evidence. In this regard we reject Ms McIlveen's submission that "abuse" generally is a further reason to limit the rule. Abuse has been defined in the authorities as unambiguous impropriety, perjury and blackmail. The only potential relevant aspect of the exception in this case is the unambiguous impropriety exception.

10. If the parties are not legally represented there may be doubt as to whether an employee genuinely agreed to enter discussions on a without prejudice basis.

11. In the **McKinstry** case the Northern Ireland Court of Appeal reviewed the relevant authorities. The following dicta from that decision are particularly relevant to this case:

(1) "The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or to put another way, the dividing line may not always be clear". (Paragraph 30 cited from **Barnetson**).

*(2) "Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffman LJ in **Forster v Friedland [1992] CA Transcript 1052**)".* (Paragraph 33 cited from **Unilever**).

(3) "The court will doubtless have to adopt a pragmatic approach, balancing the primary consideration of ensuring protection for parties involved in true settlement negotiations against the need to ensure that the privilege afforded by the rule is not abused". (Paragraph 34 cited from **Foskett**).

(4) *"… the concept of without prejudice discussion is a complex and challenging one even for lawyers and the judiciary. Whilst the agreed Statement of Facts declared that the concept was explained to the appellant and he confirmed his understanding of the principle and agreed to continue, this begs the question as to what precisely he did understand and what it was to which he had agreed? What was the explanation given to him of the concept of "without prejudice"? Was it a legally accurate one? Without oral evidence, based purely on the stark statement of the agreed facts and absent some clear evidence that the meaning of "without prejudice" communications was properly explained to the appellant, we consider that it was not open to the Tribunal to conclude that there was an express or implied agreement that the said discussions were to be "without prejudice".* (Paragraph 47 – emphasis added).

(5) *"… even if there was an extant dispute, can the discussion have been agreed to be "without prejudice" when that agreement was made before the dispute had been outlined or crystallised? Obviously the dispute had not been defined before appellant arrived at the meeting because he was unaware of the purpose of the meeting".* (Paragraph 50).

(6) *"… it seems to us arguably inescapable that an agreement to the without prejudice principle made in vacuuo before any attempt was made to outline what the alleged dispute was nullifies any meaningful agreement to discuss an unknown dispute on a without prejudice basis".* (Paragraph 51).

12. The content of the without prejudice meeting was at the heart of the case being made by the claimant. However, we reject Ms McIlveen's point that the relevance of the evidence is the test for whether or not it is without prejudice.

13. The case of **SCA Packaging v Boyle [2010] (HL)** gives guidance on when it is appropriate to deal with any issues separately as a preliminary point.

Unfair Dismissal

14. The right not to be unfairly dismissed is enshrined in ERO. At Article 130 of ERO it is stipulated that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal, listed at Article 130(2)(b), relates to the conduct of the employee. If the tribunal finds that the employer has dismissed for a potentially fair reason, the tribunal must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:

> *"(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason show 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".*

15. The task for the tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case".*

16. The Northern Ireland Court of Appeal decision in the case of ***Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the **Burchell** approach and outlines the task for the tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.

17. The case of **Connolly v Western Health and Social Care Trust [2017]** NICA states as regards dismissal for gross misconduct for a first offence:

> *"[22] The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.*
>
> *[23] The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:*
>
> > *"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:*

'… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.

I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating that the overall test was. I think it important to bear this in mind. Harvey also cites in support Gair v Bevan Harris Limited [1983] IRLR 368. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in British Leyland but it does not exclude consideration of a lesser sanction as a relevant consideration".

18. The parties were invited to provide further submissions on the effect if any of the decision in **Connolly** on this case. Both sides declined the opportunity to have an oral submissions hearing and opted instead to provide written submissions. The written submissions were provided by the parties to each other and the respondent took the opportunity to provide replying submissions to the claimant's submissions.

19. The **Connolly** decision confirms that the task of the tribunal is not to substitute its view for the employer's. The tribunal must decide in a gross misconduct case whether there was wilful and deliberate disregard for rules or policies and whether dismissal was an appropriate sanction particularly where an employee is summarily dismissed for a first offence. The tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the tribunal must look at whether a lesser sanction was appropriate in the circumstances.

20. Race discrimination is dealt with in the Race Relations (Northern Ireland) Order 1997 as amended (referred to as RRO). Direct discrimination is defined at Article 3(1)(a) and harassment is defined at Article 4A of RRO.

21. The burden of proof provisions stipulate that in a claim of unlawful discrimination it is for the employee to prove facts from which the tribunal could conclude that the employer's treatment was on grounds of the claimant's race and that the treatment was less favourable. It is also for the claimant to prove facts from which the tribunal could conclude that he suffered unwanted conduct on grounds of his race which had the required purpose or effect set out in the harassment provisions. If the claimant proves such facts, the burden of proof shifts to the respondent to prove

that any adverse treatment alleged was not related to race or that it did not have the alleged purpose or effect.

FINDINGS OF FACTS AND CONCLUSIONS

22. The tribunal considered all the evidence both oral and documentary to find the following facts on a balance of probabilities. The tribunal applied the legal principles to the facts found in order to reach the following conclusions.

The without prejudice issue

23. This issue related to the respondent's contention that the Scottish meeting was covered by without prejudice privilege and that, as a result, its contents could not be referred to or relied upon whether in internal processes or in these proceedings.

24. At the outset of the hearing the respondent applied to have the without prejudice issue determined as a preliminary issue. This had been refused at a previous application by Employment Judge Drennan in line with the approach set out in the **McKinstry** case. The claimant objected to the matter being dealt with as a preliminary issue at the outset of the hearing stating that all the facts needed to be determined as this was a fact-sensitive issue which could not be separated from the factual matrix of the case as a whole.

25. At a CMD on the first morning of hearing the Employment Judge ruled that it would be inappropriate to deal with the without prejudice issue as a preliminary point, by applying the principles in the **McKinstry** and **SCA Packaging** cases.

26. The tribunal therefore proceeded to hear all the evidence which included listening to the recording of the Scottish meeting and reading an agreed transcript of it.

27. Mr David Rice's wife, Mrs Diane Rice had a separate claim for constructive dismissal and sex discrimination which had been case-managed alongside Mr Rice's case. During the case management process it was considered by an Employment Judge as to whether or not the two cases should be consolidated. The claimant's side agreed with this approach whilst this was objected to by the respondent side. It was therefore agreed that the cases be listed one after the other and that they would be heard and determined by the same tribunal panel. The Diane Rice case was therefore heard by this panel immediately after David Rice's hearing.

28. At the outset of Mr Rice's case it became apparent that Mr Studd was not to be called to give evidence by the respondent in Mrs Rice's case. It was also clear that in Mrs Rice's case she wished to rely on the content of the Scottish meeting. The parties therefore agreed that any evidence given by Mr Studd in relation to that meeting could be relied upon by either side in Mrs Rice's case.

29. It was further agreed that the submissions in Mr Rice's case by both sides in relation to the Scottish meeting and the associated without prejudice issue, would be relied upon by both sides in Mrs Rice's case together with additional points to be made in her claim essentially in relation to the extent of the scope of without prejudice privilege to litigation in involving third parties.

30. We have decided for the reasons set out below that the content of the Scottish

meeting was not and is not covered by without prejudice privilege and can therefore be referred to by Mr Rice in his claim. The effect of this finding is that the contents of the meeting can be considered as part of this claim and this tribunal must therefore consider whether the refusal to let the claimant allude to it before his dismissal is evidence supportive of his claims of race discrimination and unfair dismissal.

31. The trigger for the events which ultimately led to the claimant's dismissal was an appeal by one of the respondent's employees Ms G against her dismissal. In Ms G's appeal letter she also raised a list of issues which concerned alleged breaches of policies and procedures in the respondent's operation in Northern Ireland. The claimant was the Area Manager for Northern Ireland at all relevant times for the respondent's funeral business.

32. Because of the serious nature of the issues raised, the respondent sent an investigation team from England to Northern Ireland to look into the matters. In the course of that investigation, which was headed by Mrs Skelton, the claimant was suspended pending further investigation into his specific role as Area Manager and into whether disciplinary proceedings should follow against him in that capacity.

33. The claimant was therefore suspended on 22 April 2016 pending further investigation into any role he as Area Manager might have had in dealing with (or failing to deal with) any such breaches of policy and procedure.

(1) <u>The contractual element</u>

34. The claimant was then contacted by Mr Studd (a regional manager of an area in England) by phone after his suspension and was invited to meet Mr Studd in Scotland. At that stage the claimant did not know what any agenda for the meeting was, nor what it would be about.

35. There was debate in our hearing as to whether or not Mr Studd specifically mentioned in his phone call that the meeting would be a "without prejudice" meeting. In view of our concerns about the reliability of the claimant's evidence, we accept that Mr Studd probably mentioned that in the phone call. What is not clear to us is whether the claimant understood what that meant or indeed whether Mr Studd (and other managers in Great Britain) understood what that meant. We can understand why the claimant might not have appreciated that these talks in Scotland could never be alluded to. His decision to record the conversation supports a view that he did not regard it as a without prejudice discussion in the legal sense.

36. As is made clear in the **McKinstry** decision, the definition and scope of without prejudice privilege is complicated and has led to lengthy legal debate in the legal authorities and in legal text books. One of the key issues for us therefore is whether the claimant understood what without prejudice meant as regards that conversation as this relates to the contractual element of the test as set out in paragraph 6 above.

37. It is clear from the documents that managers in Great Britain were familiar with the concept of "protected conversations". These were introduced in Great Britain to enable employers to have conversations with their employees at an early stage in order to deal with any issues between them. Protected conversations do not exist

in Northern Ireland.

38. On the issue of the claimant's knowledge of without prejudice discussions, the respondent relied upon an email from Mr Rea, the legal counsel in the respondent company which was sent to Area Managers including the claimant on 18 August 2015 and stated as follows:

> *"I think it is appropriate for me to remind you of the stark differences in employment law which persists over there and which are a trap for the unwary.*
> *…*
> *No facility for a Protected Conversation – just not recognised. BE CAREFUL!*
> *You can still utilise 'Without Prejudice' discussions where a current problem exists etc.*
>
> …
>
> ***<u>NI v GB Law</u>***
>
> *Key differences in employment law between NI and GB – June 2015*
>
> | ***NI*** | ***GB*** |
> | --- | --- |
> | **…** | |
> | *The law on compromise agreements and settlement processes remains as it was.* | *Recent reforms in relation to "settlement" agreements and protected conversations."* |

39. That advice therefore states that without prejudice conversations can be used where there is "*a current problem*". This is not the correct legal position.

40. If the respondent had set out in writing that the meeting was to be without prejudice and if an offer had been set out in writing, then it might have been clear that the claimant understood what he was agreeing to. We are not satisfied that Mr Studd and the claimant agreed to without prejudice negotiations, so we find that the contractual element of the test is not satisfied.

(2) <u>Extant dispute</u>

41. A second key issue for us is whether the discussion was at too early a point in the process, in that any dispute had not crystallised yet, for those discussions to be covered by the without prejudice rule. We note in this regard that the claimant had been suspended but he had not yet raised his grievance and that this was only sent following the Scottish meeting.

42. The fact that the claimant said during the meeting that his position was "untenable" does not mean that the parties at that point were in a dispute. We find that it actually points the other way, in that effectively he was agreeing that there were problems in the business "on his watch".

43. The claimant had been suspended with a view to further investigations being carried out specifically into the claimant and his role as Area Manager. It was possible that the investigations would ultimately find that he had no disciplinary case to answer. This is a factor pointing away from the parties being in dispute at that point.

44. The claimant was on his own, he did not know the subject in advance and he had been suspended following an investigation into allegations about the operation in Northern Ireland generally. The claimant had not yet raised his grievance. The element of the test relating to an extant dispute is therefore not satisfied.

45. In summary, we reject the submission that without prejudice applies to the meeting as firstly, we are not satisfied that there was an expressed or implied agreement that without prejudice in the legal sense should attach to the meeting and secondly, we are not satisfied that there was a dispute extant at the time of the meeting.

The content of the Scottish meeting

46. It was apparent in the Scottish meeting that Mr Studd was seeking to find a way out of a difficult position for the company as he could see the ramifications for the Northern Ireland business of the serious matters uncovered by Mrs Skelton. Whilst the claimant appeared to agree that he might be interested in a move to Scotland and he did not demur when Mr Studd mentioned his family in Scotland, we can understand why the claimant did not want to have a confrontation in the meeting, in that he wanted to hear what Mr Studd had to say. The offer to move the claimant to Scotland only emerged in the course of the meeting.

47. Having listened to the recording, we find that there was no bullying, harassment or threat from Mr Studd. We specifically reject the claimant's contention that he was effectively told that if he did not go to Scotland he would be sacked. A key point in this regard was the fact that the claimant and his wife had close family in Scotland and Mr Studd had been given information which meant that he genuinely had reason to believe that the claimant and his wife might therefore be open to a move to Scotland. Mr Studd did not therefore suggest a move to Scotland "out of the blue".

48. Mr Studd's approach involved a realistic assessment of the situation at that time in view of the emerging information about serious organisational issues, breaches of key policies, and an imminent detailed audit by Mr Brown. Mr Studd was taking a commercial approach to stabilise the business and to offer something which might potentially be beneficial for the claimant and for the respondent at an early stage before the audit process began in earnest and before disciplinary proceedings began against the claimant and, possibly, against numerous others. Mr Studd's mention of an "amnesty" for everyone reinforces to us that commercial imperatives underpinned his discussion of an offer to the claimant to relocate to Scotland.

Events leading to dismissal

49. The claimant was employed by the respondent and its predecessor Kirkwoods from 21 August 1995 until 9 September 2016 when he was dismissed for gross misconduct. The claimant had been engaged in the business of an undertaker for over 20 years at varying levels including at management level.

50. The respondent company took over Kirkwoods in 2011 and the claimant was appointed Area Manager in October 2013. As Area Manager he was responsible for overseeing the business in NI and for identifying and organising training for his staff and for himself.

51. The claimant lodged a grievance on 11 May 2016 concerning allegations against Ms G and about the content of the Scottish meeting and this was dealt with separately from the disciplinary process.

52. The claimant was suspended on 22 April 2016 pending investigations into potential misconduct.

53. On 6 May 2016 the claimant met Mr Studd. We do not accept that Mr Studd gave an ultimatum to the claimant at the Scottish meeting that he either had to accept a move to Scotland or be sacked. This was an unreasonable interpretation by the claimant of the points put forward by Mr Studd in the Scottish meeting. At that point Mr Studd did not know the full extent of the more serious allegations which were uncovered the Brown audit and which put the spotlight firmly on the claimant's role as Area Manager.

54. It is clear from the meeting that Mr Studd was seeking to do a deal with the claimant given his assessment of the emerging issues and their seriousness for the respondent's business and for the claimant as the person in charge. This was a realistic assessment given the nature of the issues that had been found to be substantiated by Mrs Skelton. We can understand why such a senior manager sought to nip in the bud any potential disciplinary action against the claimant and others because of his realistic assessment that the any further information that might emerge could destabilise the business. The nature of the issues raised (detailed in para 62 below) was such that there was the clear risk of an adverse effect on the respondent's business and reputation given the particular nature of the funeral business.

55. The full extent of the serious matters were uncovered by the audit undertaken by Mr Brown which occurred after the Scottish meeting. Effectively it was the fact that those more serious matters had not been properly investigated by the claimant nor reported to his senior managers in Great Britain which led to the disciplinary action against the claimant and to his ultimate dismissal.

56. During the disciplinary process the claimant was told that he could not allude to the content of the Scottish meeting as it was without prejudice. Nevertheless the claimant did in his appeal letter state that at that meeting he was told to move to Scotland or be sacked and he outlined the allegedly racial comments which had been made at the meeting.

57. We are satisfied that there was a reasonable investigation. Mr Laker was appointed as disciplinary manager and by that time the Brown audit had uncovered the extent of the very serious failings which had happened on the claimant's watch. These were in some important respects additional to the matters uncovered by Mrs Skelton's investigation. For that reason it was perfectly reasonable, and indeed fair, for Mr Laker to have Mr Brown interview the claimant about those points as Mr Brown was the person who had most knowledge of policies and of the audit which he had carried out.

58. The claimant's point throughout the disciplinary process was that there was some sort of vendetta against him which was driven by Ms G and her associates. In this regard the claimant relied on Mrs Skelton's finding that there was evidence of a group of staff who wanted to discredit the claimant when she stated in her report:

> *"There is a clear divide within the team which has resulted in a number of employees, I believe, actively manipulating situations and gathering evidence to discredit David Rice. However, despite this it is my belief that by failing to act and investigate the Area Manager has placed Dignity Northern Ireland and the wider business at risk and potential disrepute."*

59. The height of the claimant's point in tribunal on this was that he suspected that Ms G had engineered some of the adverse events in order to discredit the claimant. There was no evidence produced to us of this and the claimant mentioned this point for the first time in tribunal. We therefore find that point to be irrelevant to this case.

60. Mrs Skelton's investigation was into Ms G's allegations and it meant that Mrs Skelton was investigating several staff so it is not the case that the initial focus of the investigation was on the claimant. We find that the focus later legitimately turned to the claimant because the issues uncovered appeared to be related to systemic failures and because he was the Area Manager with responsibility for the running of the operation in Northern Ireland.

Reasons for dismissal

61. The following extracts from the Disciplinary Policy and Procedure outline categories of gross misconduct which are relevant in this case.

> *"Examples of gross misconduct which may result in summary dismissal (please note that this list is not exhaustive):*
>
> *20. Any act liable to bring the Company into disrepute or affect its goodwill;*
>
> *…*
>
> *27. Failure by those employees involved in carrying out any aspect of 'caring for the deceased' or Funeral activity in accordance with the Company's procedure manual applicable at the time;*
>
> *28. Failure by those employees to take proper care of jewellery and other property belonging to a deceased person or Client and the failure to observe the wishes of the family of the deceased concerning jewellery or other property of the deceased;*
>
> *29. Failure by those involved in arranging and conducting a funeral to check that they are conveying the correct coffin and deceased".*

62. The dismissal letter was dated 9 September 2016 and ran to 6 pages. In summary the reasons outlined in that letter for the dismissal were as follows:

(a) That the claimant permitted staff to use manual systems rather than the computerised Compass system in relation to funeral arrangements. When this resulted in a funeral which was almost missed, no investigation was

carried out and senior managers were not informed. This amounted to gross misconduct.

(b) That the claimant did not investigate or make recommendations for improvement when he discovered that the ashes of a deceased had been scattered and not buried and he did not inform his line manager of this. This amounted to gross misconduct.

(c) That significant breaches of the Identification and Jewellery and Personal Effects procedures were known to him and amounted to systematic failure and blatant disregard for procedures in that he failed to address any known breaches. This amounted to gross misconduct.

63. The letter states:

> *"You acknowledged that whilst under your management a significant number of breaches occurred. These had the potential to bring the Company into disrepute; and impact on our reputation. You failed to notify anyone outside of Northern Ireland including your Regional Manager and I believe that this was a deliberate attempt to cover up any short comings in your managerial ability and a serious abdication of your responsibilities."*

This finding related to 2 key policies of the respondent which the respondent regarded as fundamental to its business as serious errors could result from non-compliance. In this case non-compliance led to several occasions when a deceased was dressed in the wrong clothes and on several occasions bodies were put into the wrong coffins.

64. Mr Laker then went through each of the points made by the claimant to explain the deficiencies in his performance namely staff turnover, inability to use Compass due to lack of training and lack of support from the Regional Manager.

65. We are satisfied from the evidence of Mr Laker and from the documentary evidence that Mr Laker carefully considered all of the disciplinary charges and the evidence which was before him. He also considered carefully the points made by the claimant in explanation and mitigation. Mr Laker considered lesser sanctions and considered that dismissal was the appropriate sanction due to the serious and repeated nature of the shortcomings and due to the claimant's admission that he had repeatedly failed to address the serious breaches of procedure which were likely bring the company into disrepute. It is clear that in assessing the matter Mr Laker took account of the fact that the claimant deliberately flouted company procedures and that he presided over a situation where he knew that his staff operated alternative procedures which contributed to some of the serious failings yet he did little about this and did not tell his manager.

66. We find that Mr Laker reasonably formed the view that the claimant failed to inform his manager about the serious shortcomings because he wanted to conceal the true situation in Northern Ireland. We also find that Mr Laker reasonably concluded that any one of the serious shortcomings amounted to gross misconduct as they had the clear potential to bring the company into disrepute given the nature of the funeral business.

67. Mr Rymer dealt with the appeal. We find no material fault with the appeal process nor with the outcome. His outcome letter is dated 8 December 2016 and it shows that he looked both at the disciplinary charges and the issue of the alleged racist comment (the bubble comment) made at the Scottish meeting. In regard to the latter he stated:

> *"**You felt that Northern Ireland operated in a bubble – racist comment***
>
> *You have confirmed that this alleged statement was mentioned at a 'Without Prejudice' meeting which we cannot discuss in this appeal hearing. That said I cannot find any racialism in the statement whether it was said or not.*

You also stated during your appeal that 'Without Prejudice' is not recognised in Northern Ireland. That is incorrect and I am satisfied that you were fully aware of this. Further you and HR partners have previously received an advisory email outlining the differences between English and NI law".

68. The claimant was disciplined and dismissed for failure to comply with fundamental policies as he failed to investigate serious incidents and failed to advise his manager, Mr Driver of them. The respondent reasonably formed the view that the claimant had actively ignored key policies and allowed them to be ignored or substituted. The claimant either directed or knowingly acquiesced in his staff not using the Compass computer system. The respondent's point was that this system was of fundamental importance to it as it ensured consistency across its operations and, more importantly, it minimised the risk of adverse events (such as those in this case) occurring or recurring.

69. It was made clear in the offer of appointment as an Area Manager that he had to keep in contact with his Manager at least weekly. This was therefore an important contractual obligation on the claimant. We accept the respondent's witnesses' evidence that, as a funeral manager of longstanding, the claimant knew that he should have reported the adverse incidents, some of which were clearly very serious to his manager.

70. The claimant's explanation in tribunal for failure to advise his manager was firstly that his manager trusted him so he did not need to do so, and secondly that he was in the process of informing his manager when he was suspended and therefore could not do so. This was a contradictory position for the claimant to adopt and it tainted his evidence for us.

71. The claimant accepted that when the respondent took over, there was training of all staff in policies and we find that he was well aware of the importance of those policies to the respondent. In particular, he was aware of the fundamental importance of the *Identification of the Deceased* policy and the *Jewellery and Personal Effects* policy. We accept the respondent's witnesses' evidence, with which the claimant agreed, that these policies were fundamental to the business and breach of them had the clear potential to have serious adverse effects on the business.

72. The claimant alleged that he had not been properly trained in policies, stating that it was for his Manager, Mr Driver to offer him the training he needed. We reject the claimant's case on that and accept the respondent's witnesses' evidence that as Area Manager it was for him to decide on the training that he needed. We find it

evident from the documents that the claimant was familiar with arranging training for his staff and he could have sought training for himself if he had been minded to do so.

73. In tribunal the claimant stated that he did not think that he had anything to answer for in relation to the matters which had been uncovered by Mr Brown's audit although he agreed that they were serious failings. It was also apparent in the disciplinary process that he did not feel he had any responsibility for his failure to investigate these matters and for his failure to notify his Manager about them. It was reasonable for Managers to find this attitude (evident in the disciplinary and appeal process) to be of serious concern to them. It was also reasonable for managers to conclude that the claimant was trying to cover up serious failures by not reporting them

74. We are satisfied that the actions of the employer were within the band of reasonable responses for a reasonable employer as regards both process and penalty. Given the nature of the business and the claimant's position in the company we find that it was well within the band of reasonable responses for this employer to regard as gross misconduct:

    (1) His deliberate failure to ensure implementation of policies and procedures correctly which led to serious adverse events;

    (2) His failure to investigate serious breaches and to inform his managers of them;

    (3) The implementation by him of an alternative procedure to the Compass logging procedure and this was a contributing factor to a funeral almost being missed.

75. It was also reasonable for the managers to reject the claimant's explanation in relation to training and lack of support. We find that these points made by the claimant had no real substance in view of his longstanding experience in his profession. The points raised by him in relation to the vendetta point was irrelevant to the issues being dealt with by managers.

76. In the unfair dismissal case the issue for us in relation to the Scottish meeting is whether or not that shows that the claimant was given an ultimatum to move or be sacked and that this rendered his actual dismissal unfair because it was predetermined. We reject the claimant's case on this having considered all the evidence in this case. The matters for which the claimant was ultimately dismissed emerged in full following the Scottish meeting and they were so serious that dismissal was a fair sanction in the circumstances. In particular, given that the claimant did not accept responsibility for the failures under his command and he blamed others for his deficiencies a lesser sanction would not have been appropriate.

77. We do wish to record however our view that it is undesirable in internal procedures for an employee and managers to have to deal with legalistic arguments on whether or not matters are without prejudice. In our view the key point is whether or not there is a reasonable point being made by the employee and/or whether potentially discriminatory actions or comments are contained in the disputed meeting which

means that a good manager should listen to the employee to see whether their point in the disciplinary process has some validity.

78. In this case we do not accept the claimant's point that the content of the Scottish meeting shows a predetermination in the ultimate decision to dismiss him. In the event, the Appeals Officer was told of the allegedly racial comments and rejected the suggestion that they were racial. As set out in this decision we agree with that assessment on the comments.

79. In all these circumstances we find that, whilst the failure to let the claimant discuss the content of the Scottish meeting in further detail led to a valid perception of unfairness on his part, this did not render unfair the decision to dismiss him.

80. We note that the claimant did pursue a grievance separately and whilst he was constrained in what he could discuss in that grievance because of the refusal to let him discuss the Scottish meeting in detail, any issues to do with the grievance did not form part of the employer's reason for dismissing him. Whilst we find that the claimant had a valid sense of grievance that he could not discuss in more detail the content of the Scottish meeting we do not find that the content of that meeting supports the claimant's allegation that the outcome was predetermined.

Race discrimination

(1) Comments

81. The first element of the claimant's claim of race discrimination was that the comments in the Scottish meeting were racially discriminatory. The comments relied upon were:

(1) *"You work in a bubble over there".*

(2) *"All because of how the business is viewed in Northern Ireland, there sometimes you might as well be on the moon".*

(3) *"You work in a bubble and you work in a void".*

82. The references to Northern Ireland related to geography and indeed the claimant agreed this in tribunal. We find that the comments were not inherently racially discriminatory and, in context, could not reasonably be construed as racially discriminatory. The claimant has therefore not proved facts from which we could conclude that the comments amounted to race discrimination and that element of his claim fails on that basis.

83. The claimant's allegation was that he was subjected to direct race discrimination. The correct comparator is an Area Manager in a geographically remote place such as the Isle of Man. We had no evidence that there would have been any different treatment given the nature of the comments which were not inherently discriminatory and which related to the geography of Northern Ireland meaning that there was an element of isolation and remoteness from the rest of the business in the United Kingdom.

(2) Training

84. The second element of the race discrimination claim was the allegation that Ms Anne-Marie Studd received substantially more training than he did. We find that Ms Studd is not a proper comparator as she had only newly been appointed as a Manager and she had requested training, which was granted to her. In contrast the claimant was a Manager of long standing and he had not requested further training for himself. It was clear from the evidence that the claimant knew that training could be requested for staff, that he had actually done this for staff, and that he was aware that it was his responsibility as Manager to deal with their training needs and, by extension, his own.

85. We find it, at best, disingenuous of the claimant in this context to state in tribunal that it was not his responsibility to identify his own training needs but that it was for his manager to suggest them. This contention ignored the fact that the claimant was a highly experienced manager. In addition the shortcomings identified in the Northern Ireland business were so obviously serious that the claimant did not require training (over and above that which he had received) in order to know that they were serious breaches of procedure, that he should have reported them to his manager, and that he should have investigated them properly.

86. We therefore reject the claimant's claim that any difference in treatment could amount to race discrimination because the comparator relied upon is not a valid comparator and the claimant would not have proved less favourable treatment even if she had been a valid comparator.

Summary

87. We find that the disciplinary process and penalty were within the band of reasonable responses for a reasonable employer. We also find that the dismissal was not unfair in accordance with equity and the substantial merits of the case.

88. The fact that the meeting in Scotland could not be alluded to, did not inject unfairness into the process given the content of the Scottish meeting and the fact that it occurred before the full extent of the more serious issues and the claimant's role with regard to them were uncovered. It was in relation to those more extensive serious issues uncovered by the audit that the claimant was ultimately dismissed.

89. It was not unreasonable for managers to dismiss the claimant for gross misconduct despite his clear record given:

(1) The seriousness of the failings in procedure which were uncovered;

(2) The deliberateness of the claimant's disregard of fundamental policies,

(3) The fact that the policies which, to the claimant's knowledge, were repeatedly breached, were important policies that went to the heart of the business and its reputation;

(4) The deficient response of the claimant to those failings and;

(5) His evident lack of acceptance of any responsibility.

90. The claimant failed to investigate at all or adequately, he knowingly presided over a situation where key policies were actively ignored, and he did not communicate with his manager as required under his contract. Alternative sanctions were considered and dismissal was in those circumstances the reasonable sanction for cogent, reasons.

91. We found no evidence from which we could conclude that any act of race discrimination occurred. The comments relied upon by the claimant in the Scottish meeting were not inherently racially discriminatory. The actual comparator relied upon was not a valid comparator and there was no less favourable treatment.

92. The claimant's claims of unfair dismissal and race discrimination are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: 18-21 September 2017, Belfast.

Date decision recorded in register and issued to parties: