



EMPLOYMENT TRIBUNALS

Claimant: Mr G Horner

Respondent: Recovery North West Limited

HELD AT: Liverpool

ON: 18 August 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Ms J Hughes of Counsel

Respondent: Mr D Flood of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal succeeds.
2. The respondent's contractual claim is dismissed on withdrawal. The claimant had no claim for wrongful dismissal before the Tribunal.
3. However, the claimant would have been dismissed for gross misconduct if a proper procedure had been followed under the Polkey principles and because of the claimant's contributory fault, both the basic and the compensatory award will be reduced to nil as he is 100% to blame for his dismissal.

REASONS

1. The claimant was a maintenance manager with the respondent and was employed from 3 November 2013 to 16 November 2017 when he was dismissed for gross misconduct. The claimant was accused that on 14 November he assaulted another member of staff, namely Perry Bates.
2. The respondent did not go through a disciplinary process, save that Mr Stephen Hall and Mr Lee McArdle, both directors with the company, viewed the CCTV footage of the yard where the business is situated with Mr P Wylie, who is their HR adviser. He is self employed.

3. The CCTV footage has been wiped and therefore was not available to me, but all the witnesses who viewed it, save for the claimant, say that it showed there was a knot of people talking in the yard when an altercation took place between the claimant and Mr Bates. The evidence of those who watched the CCTV was that Mr Horner followed Mr Bates when Mr Bates left the group, grabbed him violently around the neck, pushed him round the corner into the workshop and then the video evidence ended.
4. Mr Turnock, an employee, confirmed to me that he witnessed, via the CCTV, Mr Horner grabbing Mr Bates by the neck, forcing him towards the workshop entrance and Mr Horner then verbally and physically accosted Mr Bates.
5. Mr Roper, who was checking the inside of his cab, says that he witnessed Mr Horner grab Mr Bates round the back of his neck, threw him a couple of metres into the warehouse and stormed in behind him and at that point lost sight of the incident.
6. Mr Bates himself says that he did have an altercation with the claimant over a request for some straps for the recovery vehicle. The person in authority who he wanted to ask was Mr Horner. He says that when he walked away from the group the claimant followed him, and when Mr Bates said to the claimant over his shoulder "you're out of order" the response of the claimant was to walk after him and violently grab the back of his neck with "some serious force which knocked me off my feet and then threw me forward towards the workshop. I managed to keep my footing but the force propelled me forward". There was some suggestion that the claimant then accused Mr Bates of getting the claimant's mate, Mr Leslie Higgins, sacked.
7. It was that incident, only lasting seconds, which got the claimant dismissed.
8. The claimant's account is different. He does accept that he grabbed hold of Mr Bates but simply held him by the lapel and pulled him into the workshop.
9. Mr Wylie advised the respondent that, although he was in the middle of taking statements about the incident, having seen the CCTV footage with Mr Hall and/or Mr McArdle the claimant could be dismissed without any further investigation. His view of the CCTV footage was similar to Mr Hall's and Mr McArdle's. He said:

"The footage clearly revealed that the claimant had seized Mr Bates around the back of the neck, propelled him forward approximately 5-6 feet. CCTV footage corroborated the witness testimony."
10. It was Mr Wyle's job, after Mr McArdle and Mr Hall had decided to dismiss him, to tell the claimant. The claimant was called into a meeting with Mr Wylie and the claimant asked if he needed a union representative. Mr Wylie told him "no". Mr Wylie handed him a pre-typed letter dismissing him. The claimant was annoyed and remonstrated in Mr Hall's office demanding an explanation from the directors. The dismissal letter offered the claimant the opportunity to appeal. The claimant did not appeal as he felt it would be futile.
11. Mr Hall was upset about having to dismiss the claimant so he offered him the use of a van and some money to tide him over.
12. Mr Horner had been dismissed summarily without a full investigation.

The Law

13. I must not substitute my views for the views of the dismissing officer. However, there was no wrongful dismissal claim therefore I do not have to decide what happened save when deciding remedy, I have to consider what the likely outcome would be in view of the evidence that I have heard. I have not seen the CCTV footage.

14. The dismissing officer must have a genuine belief on reasonable grounds after a reasonable investigation that the claimant was guilty of the misdemeanour of which he was accused.

15. Consideration should be given to whether the sanction, even if gross misconduct has occurred, should be dismissal or some lesser punishment.

16. The onus and burden is upon the respondent to prove that they dismissed for one of the potentially fair reasons set out in section 98(1) and (2) of the Employment Rights Act 1996, namely redundancy/capability/conduct or some other substantial reason.

17. If the employer has fulfilled the requirements of sub-section (1) and (2) then there must be consideration as to whether the dismissal is fair or unfair (having regard to the reason shown by the employer). That 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

18. Mr Flood when making his submissions was anxious that I considered ,in particular, two cases: the 1984 case of **The Royal Society for the Protection of Birds v Croucher**; and a 2015 case which approved **Croucher** called **CRO Ports Limited v Mr P F Wiltshire**. Both cases concern the issue of misconduct and employees who, having been accused of malpractice in the workplace, both admitted the misconduct.

19. Both Tribunals at first instance found that they failed to carry out a reasonable investigation and both respondents appealed and the appeals were allowed. The EAT in both cases said that it was hard to see where the decision to dismiss was based on an admission that dismissal was not within the range of reasonable responses, and it was unnecessary to carry out any further investigation.

20. In the **Croucher** case the words used by the court was:

“The employee having admitted the dishonest conduct there was little scope for an investigation and the Industrial Tribunal had erred in law in placing too much emphasis on the need for investigation rather than considering generally whether the Society had acted reasonably and in accordance with equity and the substantial merits of the case in dismissing the employee.”

21. Ms Hughes on behalf of the claimant, however, suggested that first of all the procedure was in breach of the ACAS Code and that when listening to the evidence the Tribunal could not conclude the conduct of Mr Horner was so bad that he had to

be dismissed. She submitted that the Tribunal would have to conclude that the case against Mr Horner was so obvious that the only outcome from an investigation would be to find the claimant guilty of the offence, and that dismissal was inevitable. In short she was saying this was not a clear and obvious case of misconduct.

22. She asked me to note that there was no sound on the CCTV footage; that the participants were some distance away; that it was not analogous to the example Mr Flood had given that when an employee steals in front of his manager then there is only one outcome. Here she suggested that violence could be provoked and that provocation should be considered.

23. Although Ms Hughes recognised that the respondent directors thought the CCTV footage was clear, I did not have the advantage of watching that footage as Mr Hall and Mr McArdle had done. She also asked me to recognise that the claimant gave a different version of the CCTV footage having watched it also. She suggested that this was not a sustained assault on Mr Bates. Consequently she suggested to me that the respondent had failed the first stage of the **Burchell** test in that they had no genuine belief of the claimant's behaviour.

Conclusion

24. Applying that law to the facts of the case and taking into account the submissions that I have just summarised, I came to the following conclusion.

25. I could not agree with Mr Flood that this was one of those rare cases where there was no need for a proper process. Mr Wylie's advice to his directors was difficult to understand because he was already putting in place an investigation. Part of the investigation would have been to look at the CCTV footage and also to retain it. He then could have put the allegation to the claimant with a package of supporting information and statements and allow him to have with him a trade union representative or companion from the workplace at a properly constituted disciplinary meeting. Unlike the two cases referred to in the paragraph 18 above the claimant did not admit the offence, although he did accept he man - handled Mr Bates.

26. It would not have taken long to investigate this matter, perhaps only a couple of hours, and put the allegation and the evidence to Mr Horner.

27. Going through a proper process would have allowed Mr Horner to show that he had been a good employee without any blemishes on his employment record over the four years he had been employed by the respondent and to suggest that he was provoked by Mr Bates. There was some evidence from Mr Horner that Mr Bates was an irritating employee who got on peoples' nerves and was blameworthy in the way that he talked to his more superior colleague. It may have been that if there had been sound on the CCTV footage that a provocative comment might have been picked up.

28. Mr Horner was offered an appeal in the letter dismissing him but did not take up that option because he felt that the way he was treated by the respondent meant that he had no hope of succeeding with regard to his appeal.

29. Procedures are still important when disciplining employees. The ACAS Code is there to protect parties so that justice can be seen to be done. It allows the employee to put his or her case.

30. Here no such opportunity was afforded to Mr Horner and that cannot be right. It is an unfair dismissal and Mr Horner has his declaration that it is.

31. However, I was asked to decide by both counsel what actually happened on that day. On the balance of probabilities, having heard the evidence from all the witnesses including those who were in the yard watching what happened and those watching the CCTV footage, the evidence proves, on balance, that Mr Horner acted in the way that Mr McArdle and Mr Hall suggest he acted and not in the way that he, Mr Horner, suggests he acted. He was violent to Mr Bates. Consequently, when looking at whether it is just and equitable to give Mr Horner any compensation, it is clear that that would be inappropriate.

32. He, and he alone, brought dismissal upon his head. Whatever was said to him by a junior colleague, who is smaller in size and not of the same employment status as the claimant, should not have provoked such reaction. Mr Horner was angry and walked after Mr Bates when Mr Bates was walking away. He did grab him violently by the neck and push him into the workshop.

33. In making no award I considered the order of deductions and decided, applying the principles laid out in the case of *Polkey v A E Dayton Ltd* (1987 – IRLR 50 – HL), that there was a 100% chance that the claimant would have been dismissed fairly in any event. In making that reduction I have considered, not what any employer would have done, but what this employer, in these particular circumstances, would have done had the unfairness not occurred. I conclude that he would have been dismissed within a very short period of time. This is especially so as Mr Wylie was well on his way to completing his investigation.

34. I then considered the issue of contributory fault. The claimant's conduct was blameworthy and culpable and was the sole cause of the claimant's dismissal. In those circumstances no compensation, either basic or compensatory, should be given to the claimant. If there is no compensation awarded then despite the breaches of the ACAS Code any percentage uplift would still amount to nil.

35. With regard to the breach of contract claim which was initially issued by the respondent against the claimant, I confirm that that was withdrawn by Mr Flood and no further order or direction needs to be made with regard to that issue.

29-09-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 October 2017

FOR THE TRIBUNAL OFFICE