EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Sean Cummins	v	**Mears Limited**

Heard at: **Leeds** **On:** **8 January 2018**

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mrs J Fry (HR Director)**

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The claimant caused or contributed to his dismissal as to 50%.

REASONS

(Oral reasons given. Written reasons supplied at the request of the Respondent)

Background

1. The issues between the parties were as follows:
   - 1.1 The respondent asserted that the reason or principal reason for the claimant's dismissal was a potentially fair reason, namely, conduct. The burden of proof was on the respondent to establish conduct.
   - 1.2 Was the dismissal fair or unfair having regard to section 98(4) Employment Rights Act 1996 ("ERA 96").
   - 1.3 To what extent, if at all, did the claimant cause or contribute to his dismissal.
   - 1.4 To what extent, if at all was the principle in Polkey –v- AE Dayton Services Ltd engaged
2. I heard evidence from:-

   The claimant

   Mr John Sweeney, dismissing officer

Mr Wayne Hudson, appeal officer

3. I also had before me a statement from Andrew Greaux. He was not called by the claimant and therefore the Tribunal gave little weight to the statement.

4. I had before it a bundle of documents consisting of 137 pages.

The Law

5. Unfair Dismissal

5.1 I applied section 98(1), 98(2) and 98(4) of the Employment Rights Act 1996 ("ERA96") which provides as follows:-

"98(1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that either it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

98(2) – a reason falls within this subsection if it…

(b) relates to the conduct of the employee

98(4) - … where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on whether in the circumstances (including the size and the 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"

5.2 In **Abernethy v Mott, Hay & Anderson 1974 IRLR 213** the Court of appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

5.3 I had regard to the guidance given in **British Home Stores Limited v Burchall 1978 IRLR 379**

5.4 However, I reminded myself that **Burchall** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

5.5 In that case the first question raised by Mr Justice Arnold: "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, do to the question of reasonableness under section 98(4) of the ERA 96 and then the burden is neutral.

5.6 I had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09/ZT**

5.7 The approach to fairness and procedure is the standard of a reasonable employer at all three stages: **Sainsbury's Supermarket v Hitt 2002 EWCA Civ 1588**

5.8 I noted that I must assess fairness looking at the disciplinary proceedings in their entirety.

5.9 I noted from the authorities in looking at a case where bad language is used the individual circumstances of the case must be looked at carefully along with any provocation or chance to apologise.

5.10 I also had regard to the guidance given in the case of **Iceland Frozen Foods Limited v James 1992 IRLR 439**:-

"The authorities established that in Law the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98(4) is as follows…

(i) The starting point should always be the words of section 98(4) themselves

(ii) In applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(iii) In judging the reasonableness of the employer's conduct and Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(iv) In many (although not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another

(v) The approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair… if the dismissal falls outside the band it is unfair.

Section 126(6) ERA 96 states that:-

"(W)here the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the … compensatory award by such proportion as it considers just and equitable having regard to that finding".

5.11 A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson v BBC(2) 1980 ICR 110** where three factors are satisfied namely,

i. the relevant action must be culpable or blameworthy

ii. it must have caused or contributed to the dismissal, and

iii. it must be just and equitable to reduce the award by the proportion specified.

5.12 For a deduction to be made a causal link must be established between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of that conduct; and the employer must then have dismissed the employee at least partly in consequence of the conduct.

5.13 In **Hollier v Plysu Limited 1983 IRLR 260** guidance was given on the amount of any reduction. The reduction should be assessed broadly and generally, will fall into one of the following categories:

i. wholly to blame – 100%

ii. largely to blame – 75%

iii. employer and employee equally to blame – 50%

iv. employee slightly to blame – 25%

5.14 Under Section 123 (1) ERA1996 I must consider whether it would be "just and equitable" to make a reduction from the compensatory award. **Polkey v AE Dayton Service Limited 1988 ICR 142 HL** holds that I must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date, or if a proper procedure had been followed. The Polkey principal applies not only to cases where there is procedural unfairness but also substantive unfairness, ***O'Dea v ISC Chemicals Limited 1996 ICR 222 CA.*** If what went wrong was more fundamental and went to the heart of the matter it may well be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King & Others v Eaton Limited (2) 1998 IRLR 686 Ct Sess**. The mere fact that a Polkey Reduction may involve a degree of speculation or is difficult does not mean that the task should not be undertaken – **Gover & Others v Property Care Limited 2006 ICR 1073 CA**. Helpful guidance was given in the case of **Software 2000 Limited v Andrews 2007 ICR 825 EAT** which I applied.

Findings of Fact

6. Findings of Fact

6.1 The claimant commenced employment with the respondent on 1 March 2009.

6.2 The claimant was employed by the respondent as a plumber.

6.3 The respondent is a large company engaged in the provision of repairs and maintenance services to social housing providers.

6.4 Amongst the contracts held by the respondent was one with Leeds City Council.

6.5 The claimant was assigned to that maintenance contract.

6.6 The claimant was required as part of his duties to wear the uniform of the respondent and to drive a liveried van.

6.7 The claimant had a clean disciplinary record.

6.8 The incident which led to the termination of the claimant's employment occurred on or about 16 March 2017 at the junction of Wide Lane and Newlands Drive in Morley whilst the claimant was on duty.

6.9 I had regard to the helpful plan prepared at page 68. The plan was prepared by a Council tenant who will be referred to as Mr A. The plan is not, in my judgment wholly accurate as it fails to show that there was a vehicle parked behind Mr A's vehicle in Newlands Drive. This error can be seen when the photograph taken by the claimant is looked at on page 70.The respondent had sight of the photographs in the disciplinary proceedings This is but one factor that should have been clear to the respondent and impacted upon Mr a's credibility

6.10 The claimant was driving along Wide Lane towards Newlands Drive with the purpose of taking a left hand turn.

6.11 I find that a car driven by a female motorist travelled towards the claimant.

6.12 The female motorist was on the wrong side of the road. The reason for this was because there were parked cars on her nearside.

6.13 The claimant had just negotiated the turn between Wide Lane and Newlands Drive. The net result was that neither the lady driver nor the claimant could proceed. They blocked each other in on Newlands Drive. It was this incident that was to trigger off the events that led to the claimant's dismissal.

6.14 The relevance of this incident does not impact upon the dismissal but does go, in part to the claimant's credibility.

6.15 There is a further point as to the credibility of Mr A. there was a clear evidential dispute between him and Ms walker as to when Ms Walker arrived

6.16 As part of the investigation process a number of people were interviewed. One of those people interviewed was Ms Katie Walker, a Housing Officer employed by the local authority.

6.17 The claimant's case was that the female driver was using a mobile phone and was abusive to him.

6.18 The respondent's case was it was the claimant that was abusive. This certainly was the evidence that was put forward by Mr A and upon which the respondent placed considerable weight.

6.19 However, if the statement taken from Ms Walker for the purpose of the appeal is looked at, page 102 she was specifically asked whether the claimant was abusive towards the female driver. She replied "don't think so, she called him names…"

6.20 This was a further factor that impacted upon the credibility of Mr A. The respondents failed to take any or any sufficient account of this fact

6.21 What is clear is the claimant was annoyed that the other driver would not reverse. He could have reversed but failed to do so. Had he reversed it is likely the situation would not have escalated. The respondent's were entitled to find that the claimant could have reversed the van as despite what the claimant stated there were no vehicles behind him. The respondent reached this conclusion on justified grounds. Firstly there were no photographs taken by the claimant which showed any cars behind him and secondly the claimant was subsequently able to reverse slightly and then drive forward onto the pavement so the female motorist could pass him.

6.22 Unfortunately the situation escalated. What then occurred was open to considerable conjecture. The respondents relied on the evidence of Mr A. Put succinctly Mr A's case was that he went out to assist the female driver. His evidence was he was watching television and heard a commotion and came out of his house. He alleged that the claimant was screaming and shouting. (I observe this is not what Ms Walker said). He then said he was called by the claimant a 'wanker' and an obscene gesture was made to him. The respondents placed considerable weight upon this evidence. The claimant argued Mr A was aggressive and shouting.

6.23 However, it was before the respondent's important evidence they had gathered from the local authority about Mr A which was further relevant to Mr A's credibility. That evidence can be found on page 77A. Put succinctly Mr A's file had been marked to warn local authority employees due to threats of verbal and physical abuse from Mr A. The entry read "very violent person was abuse [sic] towards two members of staff at Morley NHO. Do not visit alone". Whilst this in itself does not mean that Mr A was unreliable , coupled with the other concerns I have highlighted his evidence needed to be treated with care

6.24 Balanced against this was the claimant who was a man of previous good record.

6.25 He regularly visited clients in their homes. No evidence was put before me that he had any complaints about his behaviour to others The respondents were not entitled to find on the evidence obtained that the claimant was the instigator of any incident involving Mr A. The evidence points against that. I reach this conclusion for a number of reasons. Firstly on the evidence of Ms Walker. Ms Walker was asked whether Mr A was abusive to the claimant. She did not answer the question directly but did say "Mr A is awkward to deal with…" She was asked about the claimant's demeanour towards her, which she described as "fine". The only thing that she had cause for concern was that she was adamant that the claimant then called Mr A a "wanker". She made no other complaint as to the manner of the claimant to Mr A. She indicated she was surprised that the claimant said this. This indicates that the claimant was not the aggressor. Secondly for the reasons I have highlighted there were grounds on the evidence to doubt the credibility of Mr A's evidence

6.26 The female motorist made no complaint.

6.27 Mr A made no complaint although his evidence came to light when he was interviewed by the respondents.

6.28 Ms Walker did make a complaint. She was adamant that the claimant had called Mr A a 'wanker'. She also observed that the claimant had been taking photographs of the location of his vehicle and that of the female driver. In my judgment that was consistent with the claimant's account that he feared that the other driver was to blame and wanted to protect his position.

6.29 The claimant's account to the respondents as to the word 'wanker' is not in my judgment credible and the respondents were entitled to discount his explanation. It is true that immediately after the incident the claimant did speak to his manager Mr Cooper to report that an incident had occurred. He complained about the actions of the female motorist. He complained he was being sworn at, both by the female motorist and by Mr A. Mr Cooper recorded that the claimant had said that he had called "a tenant a wanker".

6.30 There was no dispute that this was said as the claimant was in his van and about to drive off. Whilst the claimant alleged that the window of his van was up the respondents were entitled to find it was down as this is more probable given the word was heard by Ms Walker and Mr A.

6.31 The respondents were entitled to find that the claimant did use the word 'wanker' and further were entitled to find that it was directed to Mr A. The respondents were entitled to find that there was no reason why Ms Walker would lie upon this matter. She had no grudge towards the claimant. The respondents were entitled to find that it was more probable than not that the word was used towards Mr A and not, in effect, as the claimant suggested swearing at himself because he had failed to get a photograph of the female drive who he contended had committed a moving traffic offence namely she was using her mobile phone whilst driving.

6.32 In terms of the procedure adopted by the respondents the claimant made a criticism that the investigation was initially undertaken by Mr Cooper but only after he had effectively completed the investigation was it passed over to a Mr Thompson. It was accepted by the respondents that the investigating officer should have had no involvement in the case. Mr Cooper did have an involvement because he both suspended the claimant and, in addition was a witness as to fact. That said, looked at in isolation I do not find that this procedural error was such as to taint the dismissal such that it was unfair. However there were other procedural errors which taken together did taint the fairness of the dismissal. Both Mr Sweeney and Mr Hudson spoke to witnesses of fact before making their decision and did not advice the claimant or his representative of what took place so they could make representations. This was particularly important with Mr Hudson who obtained further evidence from Ms Walker that was helpful to the claimant and if known to the claimant and his representative may have materially affected their submissions. Finally Mr Hudson accepted he did not deal point by point with the claimants grounds of appeal

6.33 I have carefully looked at the dismissing officer's letter of 10 May. I was told by Mr Sweeney that the letter set out all relevant factors that he had considered. The letter is contained in the bundle at pages 85 to 87.

There is not in that letter any mention of any mitigating factors that were put forward on behalf of the claimant. Mr Sweeney's evidence was that he did not take mitigation into account as it was clear gross misconduct. That is simply wrong in law and in itself would render the dismissal unfair. Whilst the "tariff" for an offence may be dismissal for gross misconduct the penalty may be reduced dependant on mitigation. Here the claimant did of course have a clean disciplinary record. He had, I find, apologised to Mr Cooper, his manager and I also accept his evidence, although it is not recorded, that he apologised at the disciplinary and subsequent appeal hearing. The latter is certainly documented.

6.34 The allegations the claimant had to face were as follows:-

1. "Any act which is deemed to be detrimental to the conduct of the Company's business or to the employees of the Company

2. Gross negligence in the performance of duties including infringement of health and safety rules

3. *Any conduct which undermines the trust that exists between the Company and the employee"*

6.35 Further clarification was then supplied as regards the allegations namely that the claimant had:-

1. "refused to move your company van when asked, blocking the right of way

2. You used foul and abusive language to a council tenant"

6.36 There was no dispute before me that the claimant was aware of the allegations prior to the meeting on 5 May and he had received details of the evidence upon which the respondents relied.

6.37 Mr Sweeney the dismissing officer looked at each allegation in turn. He found allegation 1, that is an act which was deemed to be detrimental to the conduct of the Company's business, proven on the basis that he found that the claimant had used the word 'wanker' and made an obscene gesture. On the basis of the evidence placed before him he was entitled to make that finding that the allegation was proven.

6.38 The second allegation he also found proven. This was the allegation of alleged gross negligence in the performance of duties including infringements of health and safety rules. In my judgment there was no or insufficient evidence to support such a finding. What Mr Sweeney relied upon was that the claimant could have avoided the incident by reversing. This is not gross negligence. The female motorist could equally have reversed. There was no infringement of health and safety rules. The allegation should not have been upheld.

6.39 The third allegation namely any conduct which undermines the trust which exists between the Company and the employee was upheld by Mr Sweeney. In effect, however, this duplicated the first allegation namely that the claimant's swearing had resulted in a complaint from the Council and that behaviour was unacceptable.

6.40 I find there was an element of "overcharging" and both Mr Sweeney and Mr Hudson had a closed mind to the claimant's case. This is illustrated by the fact that allegation number 2 was upheld. It is further illustrated by the fact that as I have already noted that the grounds of appeal were not specifically addressed

6.41 I add that on appeal that all these 3 allegations were also upheld.

6.42 The long and the short of matters were that the claimant had sworn and called Mr A a 'wanker' and made a gesture towards him. That was a finding which Mr Sweeney was entitled to find.

6.43 In my judgment the real issue in this case is whether dismissal for gross misconduct fell within the band of responses of a reasonable employer. I will return to this later in my findings.

Conclusion

7. I am satisfied that the respondents have established on the balance of probabilities that the reason the claimant was dismissed was by reason of conduct. That is a potentially fair reason. It follows therefore the respondents have surmounted the first hurdle.

8. The second issue I need to determine is whether the respondents dismissed on the basis of a reasonable investigation and held a reasonable belief for that decision. I have already dealt with this matter in my findings of fact. I am only satisfied that they had reasonable grounds to believe on a reasonable investigation that the claimant used the word wanker to Mr A disciplinary action was justified on the 'wanker' issue.

9. The final issue is whether the dismissal fell within the band of responses of a reasonable employer.

10. I am conscious that it is not for me to determine what I would have done in this particular case. It is for this respondent. I have to ask whether the respondent acted out with the band of responses of a reasonable employer.

11. In looking at an issue of swearing there are a number of factors that I take into account.

12. The first is the status of the person who utters the bad language. As a generalisation a Senior Manager who utters bad language in front of other staff may possibly be more culpable than a more junior member of staff.

13. Secondly I take into account the issue of provocation. I am satisfied that there was a degree of provocation from the female motorist and Mr A That said, the claimant could have conducted himself in a better manner by reversing his vehicle.

14. I take into account it was one word. It was not a tirade of abuse. It was not as though Mr A and the claimant were toe to toe. The claimant was driving off.

15. I take into account that the claimant did apologise to his manager.

16. I take into account the claimant's record which was unblemished. He was a long serving employee. Neither Mr Sweeney nor the appeal officer Mr Hudson took this into account. The claimant had an unblemished record and this was an isolated incident taken out of character with an element of provocation from others.

17. It is with some hesitation I have come to the conclusion that dismissal was outside the band of reasonable responses. That is not to say, however, that disciplinary action should not have been taken against Mr Cummins and perhaps severe disciplinary action at that in the circumstances.

18. The claimant was representing the respondents. It cannot be appropriate to use bad language towards others.

19. In my judgement the claimant would not have faced disciplinary proceedings had he not used the 'wanker' term. His conduct was culpable. He is therefore, to some extent, brought these proceedings upon himself. This conduct occurred prior to dismissal and was known to the respondent and indeed the respondent based much of its decision upon that conduct. I have therefore come to the conclusion that the claimant has engaged in culpable conduct. It follows therefore that I must make a reduction from any compensation that he may be entitled to, to take into account this culpable conduct.

20. I have looked carefully at the guidance given in **Hollier v Plysu Limited**. I take the view that the employee is more than slightly to blame. He bears responsibility in part. I have therefore decided that any compensatory award should be reduced by 50%.

21. I do not make any finding under Polkey. for the procedural and substantive errors I have identified I am not satisfied that if this employer had followed a fair procedure this claimant would have been fairly dismissed

Employment Judge T R Smith

Date: 18 January 2018