



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr A Youssuf

v

**Respondent:**

OCS Group UK Limited

**Heard at:**

Reading

**On:** 8 and 9 November 2017

**Before:**

Employment Judge Chudleigh

**Appearances**

**For the Claimant:**

Mr J Khalid of Counsel

**For the Respondent:**

Mr C Baran of Counsel

**JUDGMENT** having been sent to the parties on 1 December 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In a claim presented on 28 September 2016 the claimant complained of unfair and wrongful dismissal.
2. At the outset of the hearing, the issues for determination were identified as follows:-
  - 2.1 The reason for the dismissal was said to relate to the claimant's conduct. It was for the tribunal to determine whether the respondent genuinely believed the claimant was guilty of misconduct and whether this was the reason for the dismissal.
  - 2.2 Whether the dismissal was fair or unfair having regard to the provisions of section 98(4) of the Employment Rights Act 1996 and in particular whether any belief that the respondent had in the claimant's guilt was based on reasonable grounds following a reasonable investigation.
  - 2.3 Whether dismissal was within the band of reasonable responses.
  - 2.4 In the event of a finding of unfair dismissal, whether but for any procedural defect, there was a chance that the claimant would have been dismissed in any event and whether or not the claimant contributed to his dismissal.

- 2.5 Whether or not the respondent breached the claimant's contract of employment by dismissing him without notice.
3. At the hearing, I heard evidence from Mr N Pearce, Operations Manager, and the individual who conducted the disciplinary investigation, Mr Tony Lowes, Operations Manager, and the individual who made the decision to dismiss, and Mr James Wilkes, General Manager, and the person who presided over the appeal. The claimant gave evidence on his own behalf.
4. I made the following findings of material fact:-
  - 4.1 The claimant was employed by the respondent as a guide person/high lift banksman between 28 March 2008 and 10 June 2016 when he was summarily dismissed.
  - 4.2 At the time of his dismissal, the claimant was not the subject of any disciplinary warnings.
  - 4.3 The claimant's duties included provisioning aircraft at Heathrow Airport with stock. This required products to be loaded onto a high lift vehicle. The vehicle would then be raised to an aircraft door which would be opened and the stock unpacked from the vehicle into the aircraft.
  - 4.4 On 20 May 2016, the claimant was working at Terminal 3. He was working together with a colleague called Radoslaw Slepowronski, a high lift driver. On the day in question, they had completed four tasks and they then went on a break at about 12.28. The claimant was due to be back on shift at 12.58.
  - 4.5 The movement control allocator, Mr Rajiv Teji, informed Mr Pearce that the claimant was going to be late arriving back to work after his break because he had gone to pray. The respondent's customer service level agreement requires key tasks to be completed 75 minutes prior to departure so it is a matter of some concern if the absence of a guide person/high lift banksman might put the loading of an aircraft behind the time schedule.
  - 4.6 Mr Pearce then went to the allocation office and requested movement control to contact the claimant to ascertain his whereabouts. At that point, however, the claimant attended the allocation office at Terminal 1. He told Mr Pearce that Mr Slepowronski was going to collect him and take him to the aircraft. As it happened, the claimant was then given a lift to the aircraft with the cleaning team. He arrived there at the same time as Mr Slepowronski.
  - 4.7 The claimant was annoyed because he believed that Mr Slepowronski had complained that he was late back from his break.
  - 4.8 When the claimant and Mr Slepowronski met at the stand they went into the body of the high lift. As Mr Slepowronski was pushing the buttons to raise the body of the vehicle up to the aircraft, the

claimant started shouting at him asking him why he had called Mr Pearce to tell him that he was praying.

- 4.9 The body of the vehicle failed to rise as the shutter door had not been closed properly. Mr Slepowronski then went to close the shutter. The claimant shouted at him and called him a “snitch” and said “I am going to fuck you up”. As Mr Slepowronski went to close the shutter, the claimant then came at him from his right hand side, grabbed his shirt, turned him towards him and headbutted him. He then punched him on the left cheek. Mr Slepowronski grabbed the claimant, pushed him away, opened the shutter and emerged from the high lift. Mr Slepowronski telephoned Mr Teji and as a result, both Mr Pearce and Mr Patankar were asked to attend the stand.
- 4.10 When Mr Patankar arrived at the stand, he discovered Mr Slepowronski sitting on the tail lift with his head lowered. Mr Slepowronski told Mr Patankar that the claimant had headbutted him and that he had got hold of his collar from the front and pushed him. Mr Patankar observed that Mr Slepowronski’s lips were a bit swollen and that his chest was red.
- 4.11 Immediately after the incident, the claimant had embarked the aircraft. He said that he had done so in order to have the aircraft doors opened. However, this did not make sense because at the time, the high lift was unable to elevate.
- 4.12 Mr Slepowronski was asked by Mr Pearce what had happened and was told that the claimant had assaulted him. Mr Pearce also observed that Mr Slepowronski’s lip looked bruised, that his polo shirt had been ripped and had buttons missing. Mr Pearce took three photographs which were contained in the bundle at pages 76-78. At the hearing, the claimant contended for the first time that the photograph at page 78 was not Mr Slepowronski. I accepted Mr Pearce’s evidence that it was. It was correct that the photograph showed the shirt Mr Slepowronski was wearing in a slightly different shade but this was because the photograph had been lightened in order to illustrate the missing buttons.
- 4.13 The police were called and they took the claimant to a police station. In the meantime, Mr Pearce interviewed Mr Slepowronski. He appeared visibly shaken and said that he was worried that a tooth had been cracked. He signed a statement on 20 May 2016. In that statement, he gave his account of the events.
- 4.14 The police decided not to charge the claimant and he has not been the subject of criminal proceedings.
- 4.15 On 31 May 2016, Mr Pearce interviewed Mr Patankar. Mr Patankar said that in his view Mr Slepowronski looked like he had been “manhandled”. He also said that Mr Slepowronski had a swollen lip, that his chest was red and that buttons were missing from his top.

- 4.16 On 2 June 2016, Mr Saad, a team leader, was interviewed. He did not witness the incident but saw the claimant shortly afterwards when he went into the aircraft. He said that the claimant said that he was looking for an engineer to open the doors.
- 4.17 Mr Pearce put together an investigation summary, summarising steps taken to investigate the alleged assault. In addition to the matters raised above, he made enquiries as to whether or not there was CCTV of the incident which there was not. There were cameras on the vehicle but they did not film in the body.
- 4.18 The claimant was invited to a disciplinary hearing by letter dated 6 June 2016. He was sent all the investigation notes and copies of three photographs. He was invited to attend a hearing on 10 June 2016 and was told he could be accompanied by a fellow employee or a trade union representative.
- 4.19 At the disciplinary hearing, the claimant was represented by Mrs Ahmed who was a Unite trade union representative. At the material time, Unite had four trade union representatives at the workplace in question. Two of those representatives were Somalian. Mrs Ahmed was not Somalian. The claimant did not ask Unite to send a representative who spoke Somalian and indeed, at the disciplinary hearing and at the appeal hearing, the claimant was able to fully engage with the process and to understand what was being said. This is apparent from the various transcripts and from the fact that the claimant did not at any stage make a complaint about not being able to understand the language being spoken.
- 4.20 At the hearing, an HR employee, Kavita Iyer, attended as a note-taker. She asked a number of questions herself in order to assist with clarifying the facts. Neither Mrs Ahmed nor the claimant objected to that at the time.
- 4.21 Having heard the claimant's account of events, Mr Lowes decided to speak to the key witnesses himself. He would have adjourned the hearing to another day, but the claimant and Mrs Ahmed were anxious to proceed, so he asked them to wait at the respondent's premises.
- 4.22 Mr Lowes then went to see Mr Slepowronski. Mr Slepowronski gave an account of the alleged assault to him. There were a couple of matters of difference. Firstly, Mr Slepowronski said that the claimant had laughed at him and said "be a man" and also he said that the claimant opened the shutter of the high lift whereas previously he had said that he had done so. Mr Lowes did not consider that these differences were material. In so far as the key incident was concerned, his evidence was consistent – he said that the claimant punched his left cheek and headbutted his lip.
- 4.23 Mr Lowes spoke on the telephone to the allocator, Mr Teji. Mr Teji said that he recalled a telephone call from Mr Slepowronski that day at which time Mr Slepowronski said that he was loading the high lift

on his own as the claimant had gone to Terminal 1 to pray. Mr Teji confirmed that it was well over break time when Mr Slepowronski had called. Mr Teji told Mr Lowes that after the telephone call, he informed Mr Pearce of the conversation so that he would be aware of the potential delay to a flight.

- 4.24 The disciplinary hearing was then reconvened. Mr Lowes told the claimant and Mrs Ahmed that he had conducted further enquiries and gathered information from Mr Slepowronski and from Mr Teji. Mr Teji's account of what happened was put to the claimant. There was a full discussion between the claimant and Mr Lowes and the claimant was given every opportunity to clarify the facts and put his case.
- 4.25 Having considered the evidence, Mr Lowes made various conclusions. He considered that on 20 May 2016, Mr Slepowronski had informed movement control that it might take him longer to load a high life vehicle at the stand in question because he had been left on his own, the claimant having not returned from his break. He concluded that the claimant was then located and instructed to travel with the cleaning team to the stand to join up with Mr Slepowronski, the driver. Mr Lowes found that a call was then made to movement control for a duty manager to attend and that Mr Pearce and Mr Patankar attended.
- 4.26 Mr Lowes concluded that the claimant had not been happy at being contacted by Mr Pearce to question his whereabouts and to be asked to attend the stand. He believed that Mr Slepowronski had "snitched" on him. Mr Lowes concluded that the claimant had physically assaulted Mr Slepowronski in the high lift vehicle.
- 4.27 He delivered a decision orally at about 4.00 pm on 10 June 2016. He told the claimant that he had concluded that he had assaulted Mr Slepowronski, that this was classified as gross misconduct and that he was being dismissed.
- 4.28 The claimant was written to on 13 June 2016 confirming that he was being dismissed and was told that he had the right of appeal. The claimant exercised that right and an appeal hearing was scheduled for 4 August 2016.
- 4.29 The claimant was sent the disciplinary hearing notes with the dismissal letter and his representative was given a copy of the notes at the conclusion of the hearing.
- 4.30 On the day of the appeal hearing, Mr Wilkes realised that the claimant had not seen the notes of the conversations Mr Lowes had had with Mr Slepowronski and Mr Teji. Accordingly, he gave him copies of those before the appeal hearing and during the appeal hearing he asked him if he wanted more time to read them. The claimant said that he did not.
- 4.31 There was an appeal hearing at which the claimant was again

represented by Mrs Ahmed. The claimant had a full opportunity to state his case. At one point the claimant said that he never went into the vehicle and that he went straight upstairs to find the engineer. Later the claimant changed his evidence and said that he had gone into the vehicle to press the shutter. At the employment tribunal hearing, the claimant's case was that he had not understood the "vehicle" to mean the body of the high lift. I disbelieved the claimant in relation to that point. It was clear to me that the part of the vehicle that the claimant and Mr Slepowronski were in at the time of the incident in question was known by different terms all of which were well known to the claimant.

- 4.32 At the tribunal hearing, the claimant gave his evidence with the assistance of an interpreter. However, during the internal process, he had at no time asked for an interpreter, and had at no time indicated that he was struggling to understand what was being asked of him. I did not accept that the claimant's command of the English language was poor, nor did I accept that the reason why he apparently contradicted himself at the appeal hearing was because of a lack of comprehension of English. I concluded that in telling Mr Wilkes that he had not gone into the vehicle and that he had gone straight upstairs to find the engineer, the claimant was intending at that point to distance himself from having been in a closed space with Mr Slepowronski.
- 4.33 In addition, at the tribunal hearing, the claimant alleged for the first time that one of the photographs taken by Mr Pearce was not Mr Slepowronski. I considered that his assertion was a disingenuous one and it was made only in an attempt to try and muddy the waters and assist the claimant in his claim. The suggestion was that Mr Pearce had deliberately fabricated evidence because he had a grudge against the claimant. I rejected that suggestion and found as a fact that Mr Pearce had not fabricated evidence and that the photographs in question were all of Mr Slepowronski.
- 4.34 Having heard the appeal, Mr Wilkes decided to dismiss it. The appeal was not a rehearing. Mr Wilkes had reviewed papers and heard argument from the claimant. The claimant did not present any new evidence but having listened to what the claimant had to say and having reviewed matters, Mr Wilkes concluded that the decision that had been reached by Mr Lowes was a reasonable one in the circumstances and that it had been based on a full investigation. He also concluded that the claimant's evidence was not credible and his behaviour on the day of the incident did not seem plausible. Mr Wilkes did not consider that the fact that the claimant was a good worker was a material consideration because the offence of assaulting a colleague was so serious that the respondent could not tolerate such behaviour under any circumstances. Accordingly, the appeal was dismissed.

### **Submissions of the parties**

5. On behalf of the claimant, Mr Khalid submitted that there were no

reasonable grounds upon which to sustain a belief in the claimant's guilt. He argued that it was unfair not to have interviewed Mr Patankar until 11 days after the incident and that Mr Pearce had made up his mind at an early stage that the claimant was guilty. He said that a reasonable employer would have concluded that there were no reasonable grounds to suggest that an assault had taken place as there was no blood, no first aider was called, no ambulance was called and because the alleged victim had continued working. He also pointed out that there was a contradiction in Mr Slepowronski's evidence about who opened the shutter after the incident. Mr Khalid also was heavily critical of the fact that the note-taker and HR representative had asked questions at the disciplinary hearing. He said that this was unfair.

6. On behalf of the respondent, it was submitted that there was a reasonable investigation and that the decision makers had a reasonable belief based on reasonable grounds that the claimant had been guilty of misconduct. It was pointed out that Mr Lowes' belief was formed on the basis of the photographs, Mr Slepowronski's evidence, and the evidence of Mr Patankar, and in particular, his evidence that it appeared as if Mr Slepowronski had been manhandled. He said that the evidence of Mr Patankar tipped the balance.
7. Mr Baran for the respondent also argued that the procedure was substantially fair and that it was not credible to suggest that the claimant's command of the English language meant that he needed assistance with interpretation at the various internal hearings. Unite the union had Somali representatives on hand who the claimant could have called on to interpret had he needed assistance in this regard. Moreover, the claimant was able to engage with the questioning in a normal manner and on the only occasion when he said he did not understand, that was not because of a language difficulty but because of a difficulty understanding the terminology being used.

### **The law**

8. It was for me to consider whether the respondent genuinely believed that the claimant had been guilty of misconduct on reasonable grounds following a reasonable investigation. I reminded myself that when deciding the unfair dismissal claim I was to take care not to substitute my view for the view of the respondent. I bore in mind that the band of reasonable responses test applies just as much to the procedural aspects of the decision as it does to the substantive parts.

### **Conclusions**

9. I concluded that the respondent genuinely believed that the claimant had been guilty of misconduct in that he had assaulted a co-worker. I accepted Mr Lowes' evidence as to the reason why he took the decision to dismiss. I also accepted Mr Wilkes' evidence about the reason why he dismissed the appeal.
10. In my view, the investigation was reasonable. The key individuals were interviewed and the claimant was sent copies of the interview notes before the disciplinary hearing. Mr Lowes, the decision maker at the disciplinary

hearing took it upon himself to go and re-interview Mr Slepowronski and to speak to Mr Teji, the controller, in order to clarify facts. It appeared to me that he took the job of establishing the facts seriously.

11. I considered that the standard that the investigation was well within the range of reasonable responses and, in the circumstances, concluded that the respondent's decision to dismiss was based on reasonable grounds following a reasonable investigation.
12. I rejected the claimant's case that he had a poor command of the English language and that it was unfair not to provide an interpreter for him at the various stages of the internal process. He was interviewed on 23 May 2016, there was a disciplinary hearing on 10 June 2016 and an appeal hearing in August 2016. During all of those meetings, he was able to communicate effectively and never once said that he was in difficulties with understanding what was being said to him. I considered that the assertion made about his lack of command of the English language was a dishonest assertion and I rejected it.
13. Moreover, I did not think that it was unreasonable to wait 11 days before interviewing Arshad Patankar. 11 days was not a significant period of time and there was no indication that Mr Patankar's memory had been affected.
14. I did not accept the suggestion that Mr Pearce had made up his mind that the claimant should be dismissed at an early stage. It is true that he had referred to a "potential" disciplinary hearing but that was not pre-judge matters, and indeed, it was not Mr Pearce who made the decision to dismiss in any event.
15. Mr Khalid complained about the contradiction in the evidence of Mr Slepowronski about who opened the shutter after the assault. In my judgment, that contradiction which was in any event noted by Mr Lowes, was immaterial and did not affect the fairness of the decision to dismiss.
16. As to the questioning by Kavita Iyer, the note-taker and HR representative, Mr Lowes himself agreed that it was not ideal that she asked questions. She was supposed to be there as the note-taker. However, I was not able to discern any unfairness whatsoever and Ms Iyer's interjections were not objected to by Mrs Ahmed or the claimant at the time.
17. Mr Khalid also complained that no regard was given to the fact that the police had taken no action. In my judgment, it was open to the respondent to proceed with its own investigation and to form its own views which would have been the subject of a lower standard of proof. Accordingly, the fact that the police took no action was not a factor which rendered the decision to dismiss unfair.
18. In the circumstances, my view was that the claimant was not unfairly dismissed.
19. In so far as the complaint of wrongful dismissal was concerned, it was for me to form a view, having heard the evidence, as to what occurred. I did not have the benefit of evidence from Mr Slepowronski or from Mr



Patankar. However, I read their statements which I found to be compelling and credible. Further, I simply did not believe the claimant. He was not a credible witness. I considered that he gave dishonest evidence to the tribunal about the incident in question. I consider that the facts are as set out above, i.e. the claimant was angry because he considered that Mr Slepowronski had complained that he was late back from his break. In retaliation, the claimant headbutted Mr Slepowronski and punched him. I did not find the photographs particularly helpful save that I did accept that the photograph at page 78 of the bundle was of Mr Slepowronski and that it did show that two buttons were missing from his shirt.

20. I did not consider that the other photographs were of assistance with the issue of whether or not Mr Slepowronski had been injured. Mr Patankar's evidence and the evidence of Mr Pearce was that they witnessed a swollen or bruised lip and red marks on Mr Slepowronski's chest. In the circumstances, I was more than satisfied (having applied a balance of probabilities test) that the claimant had assaulted Mr Slepowronski in the manner alleged. In the circumstances, he was guilty of repudiatory conduct which was categorised in the disciplinary procedure as gross misconduct – see page 49 of the bundle where gross misconduct is defined as including “assault on another person or other physical violence”.
21. Accordingly, the complaint of wrongful dismissal was also not well founded and was dismissed.
22. At the end of the hearing after the Judgment had been delivered, the respondent applied for costs on the basis that the claimant had acted vexatiously and/or unreasonably within the meaning of rule 76(1)(a) of the Employment Tribunals Rules 2013. The case was put on the basis that I had found as a fact that the claimant had lied about the assault which was the core feature of the case.
23. In addition, letters had been sent to the claimant by the respondent's solicitors on 9 November 2016 and 11 October 2017. The second of those letters referred to the first and in that letter the respondent's solicitor set out in full the reason why the claimant's actions amounted to gross misconduct. The claimant was put on notice as to costs. He chose not to heed the warnings in those letters.
24. Mr Khalid submitted that the tribunal was wrong in its findings and that the claimant had not lied. However, my view was that rule 76(1) was engaged and that the claimant had in fact acted unreasonably in bringing these proceedings when he knew that he had assaulted Mr Slepowronski.
25. Accordingly, I addressed the question of the claimant's means and I heard evidence on this subject. The claimant said that he was not working and that he was not on benefits. He lives with his wife who has a part time job and his five children who are all between the ages of 4 and 14. However, he had paid a hearing fee and an issue fee to the tribunal in the total sum of £1,200.00. He said that he had saved money from his last pay cheque to do so. Those sums will be repaid to the claimant at some point following the recent decision of the Supreme Court. Accordingly, the claimant will

have some resources with which to meet a costs order. The respondent claimed costs in the sum of over £10,000.00 which comprised solicitor's fees, the cost of two adjourned hearings, and Counsel's fees. In the exercise of my discretion, I considered that it was appropriate to make an order that the claimant do pay some of the respondent's costs. I considered that the appropriate sum was £1,000.00.

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Employment Judge Chudleigh

Date: 26/1/18.....

Reasons sent to the parties on

.26/1/18.....

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For the Tribunal office