



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr J Amos

Respondents
Asda Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 25 April 2018

EMPLOYMENT JUDGE Anstis (sitting alone)

Representation:

Claimant: In person

Respondent: Ms S Ashberry (solicitor)

JUDGMENT

The Claimant's claims of unfair dismissal and automatically unfair dismissal fail and are dismissed.

REASONS

1. The Claimant was employed by the Respondent from 18 September 2012 until his dismissal with immediate effect on 28 April 2017. He was employed at the Respondent's Nuneaton store, and was a representative of the GMB trade union at that store.
2. The incident which lead to the Claimant's dismissal occurred around 3 am on 10 February 2017 at the store. The Claimant was off duty at the time. He bought a ready-meal and took it to the staff canteen to heat it up and eat it. The Respondent says that it is against its rules for staff to be in the staff canteen when off duty.
3. A security guard had noticed the Claimant's behaviour on CCTV and alerted the Respondent's night trading manager. Both of them went to see the Claimant in the canteen and challenged him about this, whereupon, on their evidence, he became threatening and abusive, so that the police had to be called to remove him from the store. Their impression was that he was drunk. An investigation and disciplinary process followed, as a result of which he was dismissed.

4. The Claimant claims that he was unfairly dismissed. He says that he was at the store on the night in question for the purposes of carrying out his activities as a representative of the GMB trade union, and that he was dismissed for carrying out those activities. If so, this would be a dismissal that was automatically unfair under section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992.
5. He also claims to have been unfairly dismissed under normal unfair dismissal principles. In his argument before me he put this on the basis that dismissal was too harsh a sanction in the circumstances.
6. I heard oral evidence from the Claimant, along with the Respondent's investigating, disciplinary and appeal managers.
7. As regards the events of the night in question, the night trading manager and security guard gave statements which were recorded in writing shortly after the event. It is not necessary for me to set out their statements in detail, but they give an account of the Claimant being "*very drunk*" and swearing at them to the extent that they called the police to remove him from the premises. The police did so, although he was not arrested and no further police action was taken against him. An indication of their impression of events is given by one of the witnesses who says in his statement, "*In all my time working for Asda as a security guard I have never felt so belittled and intimidated by a person*".
8. Mr Amos suggested that this phrase held little meaning without an indication of the security guard's experience or length of service. There is something to that, but it is striking that a security guard should describe his most difficult experience as being with a work colleague rather than a member of the public, and also that both felt the situation was so bad that the police needed to be called. I also note that one of the witnesses records the Claimant as saying, "*I can come in whenever I like I am the GMB rep*".
9. Following the incident, the Claimant has a period of time off sick. He was provided with the witness statements at an early stage of matters. On his return to work an investigation meeting was held with him on 24 March 2017. This records him as being asked "*What are your initial thoughts after reading these statements?*" and replying, "*I don't have any*".
10. When the investigation meeting resumed on 13 April 2017 his trade union representative is recorded as saying:

"... having spoken to John, he cannot confirm or deny what is in the witness statements. As on the night in question he had consumed some alcohol in conjunction with his prescription medication."
11. In his evidence at the tribunal hearing, he said that although he was the trade union representative for the day shift he was intending to speak to

members and prospective members on the night shift as his colleague who was the trade union representative on the night shift had been off sick. He also said that he had not intended to meet colleagues in the canteen but was having his meal there before going down to the shop floor to speak to other members of staff.

12. The Respondent adopted what appears to be a full investigatory and disciplinary procedure, led by different managers. The dismissing officer set out her findings and decision in a letter of 29 April 2017. This gives her conclusion that the Claimant should be dismissed (without notice) for gross misconduct – specifically “*using threatening behaviour and serious provocation towards other colleagues*”. That same phrase appears in the Respondent’s disciplinary procedure as something that could amount to gross misconduct. The Claimant accepted that in his role as a trade union representative he was well aware of the disciplinary procedure.
13. The Claimant was accompanied throughout the process by trade union colleagues including, it seems, full time officials. This continued through to the appeal process, which concluded (by a letter dated 10 November 2017) that the decision to dismiss would be upheld.
14. The Claimant says that the reason for his dismissal was his trade union activities. These union activities were said to be the reason why he was in the store canteen on the nightshift, which was where the trouble started. There are two difficulties with this.
 - a. First, as it emerged in evidence today, he did not ever intend to or actually carry out any union activities in the canteen. On his evidence given today he was having his meal in the canteen prior to carrying out his union activities which he was intending to do on the shop floor. He was not carrying out any union activities when the trouble started.
 - b. Second, although it appears that being in the canteen when off-duty was against the rules, that has never been the disciplinary case against him. The disciplinary case has been about what was said to be his threatening and provocative behaviour on being challenged about being in the canteen. This threatening and provocative behaviour was not part of his trade union activities.
15. Beyond that, he has sought to suggest that the company was generally biased against the activities carried out by the GMB union. I am not in any position to make a decision on those broader matters, but what was clear from the evidence they gave is that the individuals who conducted the investigation, disciplinary and appeal did not hold any grudge against the Claimant on account of his union activities. None of them had witnessed those activities first hand or been on the receiving end of any difficulties caused by the Claimant’s activities on behalf of his union members. There was nothing in the materials before me that I considered to give rise to a proper suspicion that his dismissal was a result of his trade union activities.

16. In the context of the Claimant's "ordinary" unfair dismissal claim I will set out below what I find to be the actual reason for his dismissal.
17. As regards the Claimant's case on "ordinary" unfair dismissal, this first requires the Respondent to show the reason for dismissal. The Respondent says that the reason for dismissal was misconduct, and I find that to be correct. Except for the Claimant's argument that this was a dismissal for his union-related activities, which I have dealt with above, everything else points to this being a dismissal for misconduct.
18. Whether the dismissal was fair then requires a consideration of the well-known *Burchell* principles (BHS v Burchell [1980] ICR 303).
19. *Was there a reasonable investigation?* I find that there was. The Claimant has not suggested there was any failure in the manner the investigation was carried out, or any further steps that should have been taken by the Respondent. Indeed, he seemed to respect the efforts made by the investigating officer. I cannot see any fault with the investigation.
20. *Did the relevant officer or officers believe that he had been guilty of misconduct?* I find that they did. Apart from his mention of ulterior union-related motives (which I have dealt with above) this point was not substantially challenged by the Claimant in the course of the hearing. As I will set out below, there was substantial evidence to show that he was guilty of misconduct, and it is hard to see how the officers involved could have come to any other conclusion.
21. *Was that belief held on reasonable grounds?* There were ample grounds for this belief. The two witnesses had given powerful statements as to what occurred, and during the investigation the Claimant specifically said that he could neither confirm nor deny what was in the witness statements. In circumstances such as that it is abundantly clear that the officers were entitled to rely on the account given by the witnesses, which plainly demonstrated misconduct by the Claimant.
22. The remaining point is whether the decision to dismiss was within the range of reasonable responses. I asked the dismissing officer why she had considered that this was a case that required dismissal rather than a warning. She told me that she viewed his behaviour on that night as amounting to "threatening behaviour" under the terms of the Respondent's policies and that he had shown no remorse for what had occurred. I accept this and also that the decision to dismiss was within the range of reasonable responses open to this employer. It was notable that even during this hearing the Claimant continued to insist that he was not sorry and had nothing to be sorry about as he had done nothing wrong.
23. The claim of unfair dismissal fails and is dismissed.

24. I gave my judgment and reasons orally at the end of the hearing. The Claimant requested written reasons at the time, hence these reasons now being produced together with the written judgment.

Employment Judge Anstis
26 April 2018