EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Jones	**v**	**Fly Light Air Sports Limited**

Heard at: Cambridge **On:** 30 April 2018
14 May 2018

Before: Employment Judge G P Sigsworth

Appearances
For the Claimant: Miss K Balmer, Counsel.
For the Respondent: Mr P Dewhurst, Director.

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent.

2. The claimant was wrongfully dismissed by the respondent.

3. If a fair procedure had been followed by the respondent, there was a 5% chance that the claimant would have been dismissed.

4. The claimant contributed to his dismissal to the extent of 50%.

5. The respondent is to pay to the claimant the total sum of £19,017.62 – for a breakdown of this figure, please see the schedule attached.

6. The claimant's application for costs will be determined on the basis of written submissions from the parties.

REASONS

1. The claimant's claims before this Tribunal are for unfair dismissal and wrongful dismissal (breach of contract and notice pay). The claims are

disputed by the respondent. The Tribunal heard oral evidence from the claimant. Called on behalf of the respondent were five witnesses. These were Mr Ben Ashman, Director; Mr Jack Dent, aircraft engineer; Mr Pat Gardner, engineer; Mr Phillip Osborne, maintenance and engineering; and Mr Paul Dewhurst, director. There was a small bundle of documents for the liability hearing, and a further bundle for the remedy aspect of the claim. At the end of the evidence, the Tribunal heard the oral submissions of and on behalf of the parties. An oral judgment with reasons was delivered.

Findings of fact

2. The Employment Tribunal made the following relevant findings of fact:

2.1 The respondent is a small business, with some six employees, including the directors. The business is a flying school at Sywell Aerodrome, Northamptonshire. The business also distributes and manufactures sport aviation products. The claimant was employed as the respondent's only fixed wing flying instructor from 20 July 2006 until his dismissal in August 2017. There is a dispute between the parties as to the date of the dismissal. The claimant asserts that he was summarily dismissed on 1 August 2017, with no reason given or hearing held. The respondent asserts that the claimant was summarily dismissed for alleged gross misconduct after a disciplinary hearing (the claimant not in attendance) on 21 August 2017.

2.2 The claimant had a clean disciplinary record, in a small company, where there was no Human Resources assistance on site. However, he had been threatened with a disciplinary written warning for alleged misconduct in December 2014. Further, there was some history of confrontation between the claimant and one of the directors, Mr Ashman. This seems to have stemmed from the claimant's wish to cut back his hours after a heart attack, from 40 hours per week to something less than that. There may have been some bad feeling between the claimant and Mr Ashman, but generally they got on reasonably well, and the claimant was regarded by respondent as a good instructor and employee.

2.3 On 30 July 2017, the claimant asked Mr Ashman to ensure that the aircraft he normally flew (a November Delta) required and should have a 50-hour service, and Mr Ashman said that he and Mr Gardner would carry out the service the following day. However, when the claimant arrived for work on the morning of 1 August the service had not been carried out. The claimant booked out the alternative aircraft – Tango India so he could carry on that day with his flying lessons. The claimant then saw Mr Ashman on or around the stairs leading from the hanger up to the engineering office. The claimant commented to Mr Ashman that this had not been done, and made what Mr Ashman interpreted as a sarcastic comment,

that it was a good job that Tango India aircraft had not been booked out privately as it would have cost the company money. Mr Ashman was cross about that remark and told the claimant to get off his back about the servicing. The claimant responded with "Ok don't shout at me", to which Mr Ashman responded, "I wasn't shouting". However, I find that voices were raised on both sides.

2.4 Thereafter, the evidence is fragmented and not entirely consistent with each side having a different version of events, and not all the respondent's witnesses saw or heard everything. I accept the evidence of Mr Aradi Balla, who gave a written statement to the respondent during an investigation, and who was a client and waiting for a flying lesson with the claimant. Mr Aradi's evidence was important because he was an independent witness, although he did not hear everything from his position, with his back to the hanger sitting in the aircraft with his hearing obscured by the canopy of the aircraft. Mr Dent and Mr Gardner in the engineering office, albeit with the windows open, and they were concentrating on other matters, and they did not hear or see everything.

2.5 Doing the best that I can, however, these are my findings of what happened next. The claimant walked away from the incident on the stairs towards the aircraft, to begin his flying lesson. He was therefore not waiting or willing to continue the argument. However, Mr Ashman decided to carry on with it, because he came back down the stairs and followed the claimant out of the hanger onto the airfield where the aircraft was waiting. He was clearly angry at being called a "twat" by the claimant, which the claimant said as he walked away. "You can be a real twat sometimes, Ben". Maybe it was simply – "you twat". Whatever it was, the claimant admits to it. Mr Ashman followed the claimant out of the hanger, and went round in front of him to stop him moving on and said "bollocks Phil don't call me twat". I also find that Mr Ashman, carrying a cup of tea as he admitted, then threw it towards the claimant although it missed him. That in itself, I find, was an aggressive act, from a director towards an employee. This led to an inappropriate response from the claimant to a director, or indeed to anyone, which was I find, "Don't say bollocks to me or I will fucking hit you". I found Mr Dent to be a believable witness and I accept his evidence about what he heard here. He and Mr Gardner did not hear everything and were candid in saying that, and indeed did not hear the same things, which makes their evidence all the more believable. In other words, they did not put their heads together and concoct a false story for the respondent. Mr Gardner did not hear this threat from the claimant, because he makes no reference to it, which gives the rest of his account credibility. Mr Ashman then said, "come one then, if you want to hit me". This statement was heard by Mr Gardner, Mr Dent and Mr Aradi, and really it only makes sense if the claimant had first of all threatened Mr Ashman. Then, the claimant realising that he had gone too far, instantly backed down, saying that he was

not going to hit Mr Ashman. Mr Ashman responded, "You haven't got the guts" – in other words the claimant's threat was an empty one. Mr Ashman then said, "Right, I don't want you flying my aircraft. Pack your stuff and leave.", I find that the claimant has not established, as is his case, that Mr Ashman said to him, "You're sacked". No one else heard it, importantly Mr Aradi's evidence is that the claimant told him that he believed that he had been dismissed, when he told that he would never fly Mr Ashman's aircraft again. In other words, the claimant did not say to Mr Aradi "Mr Ashman told me I had been sacked".

2.6 Then, the claimant believing that he had been sacked said, "See you in court". He then obtained some cardboard boxes and removed the contents of his office, packing them up and putting them in the boot of his car. He then left, leaving the keys to the premises on the desk. Although employees saw him doing this, and must have seen him collecting his belongings and leaving his keys behind, no one then contacted him to say that he had not been sacked, simply that he had just been sent home for the day to cool down, because he was not safe to fly aircraft. It was not until two days later – on 3 August – after the respondent had taken HR/legal advice, that the respondent wrote to the claimant notifying him that a disciplinary investigation would take place, in the meantime the claimant was suspended. Mr Osborne then took witness statements (he is a former senior police officer), and a disciplinary hearing chaired by Mr Dewhurst was set up for 21 August. At this point, the respondent was doing what was required of it correctly. They formally invited the claimant to a disciplinary hearing, advised him what the allegation of misconduct was, enclosed all the witness statements and other relevant documentation, indicated that a consequence of the meeting could be dismissal, said that he was entitled to be accompanied by a work colleague or Trade Union representative, that in the meantime he would continue to be suspended on full pay. The claimant spoke to Mr Dewhurst on the telephone on 15 August. He initially said that he would attend at the disciplinary hearing, but after legal advice his solicitors on his behalf wrote to the respondent, saying that he would not do so, as the disciplinary hearing was a sham, saying that the claimant had been summarily dismissed on 1 August.

2.7 Nevertheless, the disciplinary hearing went ahead on 21 August, in the claimant's absence. At that hearing, the respondent purported to summarily dismiss the claimant for gross misconduct, namely serious insubordination (calling Mr Ashman a "twat"), and threatening to hit Mr Ashman. The respondent viewed this as gross misconduct in accordance with the ACAS Code. A letter confirming the outcome was sent to the claimant on 21 August, confirming the summary dismissal and giving him the right of appeal. That right was not taken up by the claimant.

2.8 The claimant is a specialist microlight flying instructor. The BMAA has vacancies for such instructors, as the relevant body/association. However, there were no vacancies within reasonable travelling distance of the claimant's home in the aftermath of his dismissal. On checking with BMAA records, the claimant was told that there were just two or three vacancies in the last twelve months. The claimant therefore decided to explore the possibility of setting up his own flying school, but that did not go anywhere. The claimant conceded in cross examination that he did not try flying schools local to him first to find out if there were vacancies. The respondent asserts, albeit without evidence, that there were such vacancies, at Leicester and Sackville Farm (near Bedford). The claimant told this Tribunal however, that his focus was on becoming a self-employed flying instructor, after his bad experience with the respondent. He had already reduced his hours with the respondent after a heart attack in 2013, and wanted a better work-life balance, working perhaps 5 days a week and 5 hours per day. However, when he decided to set up his own business, he believed that there were no jobs available.

2.9 The claimant then set up two businesses. The first of these was called PJ Services?, and provided general labour (ripping out and first fixing in various locations on a self-employed basis). He knew someone who would give him some work of this type and he started that in November 2017. He has earned from that a total of £8,335.75 (before Income Tax and National Insurance contributions). The second business that he has set up is as a private hire taxi business. However, this has been expensive to set up, because he has had to buy a car on hire purchase, and incurred other setting up expenses, and his expenses have outstripped any earnings of the business so far. He believes it will take a further twelve months to replace the income that he has lost with the respondent, in overall terms. Looking at the schedule of loss, some costs expenses of setting up are long term in any case, with the major cost of purchasing the vehicle over three years. The latter part of the hire purchase agreement will take place when the claimant believes and accepts that he will not be incurring future loss, so some discount must be given for that. For the purposes of the calculations I may have to make in terms of any compensation, I assume that the figures for average, gross and net pay, Employer's pension contribution, and for the basic award, are correct arithmetically.

The Law

3. By s.94(1) of Employment Rights Act 1996, an employee has the right not be unfairly dismissed by his employer.

By s.95(1)(a), for the purposes of the unfair dismissal provisions an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (with or without notice).

By s.98(1) and (2), it is for the employer to show the reason (or if more than one, the principle reason) for the dismissal, and in the context of this case that it related to the conduct of the employee. That is the reason relied upon by the respondent. In Abernethy v Mott, Hay and Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or believed by him that caused him to dismiss the employee.

By s.98(4), where the employer has shown the reason for dismissal, the determination of the question whether the dismissal is fair or unfair having regard to that reason;

a) Depends 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.

The law to be applied to the reasonable band of responses test is well-known. The Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area, namely; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; and Foley v Post Office; HSBC Bank plc v Madden [2000] IRLR 827, CA.

The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA. In so far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, there I have in mind, of course, the well-known case of British Home Stores Ltd v Burchell [1978] ICR 303, EAT. Did the respondent have a reasonable belief in the claimant's conduct, formed on reasonable grounds, after such investigation as was reasonable and appropriate in the circumstances?

In Taylor v OCS Group Limited [2006] ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. The purpose in so doing would be to determine, whether, due to the fairness or unfairness of the

procedure adopted, the thoroughness or lack of it in the process and the open mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage.

4. The compensation provisions of the Employment Rights Act 1996 are from s.118 to s.124A. The claimant does not seek an order for re-instatement or re-engagement.

S.122(2) provides that where the Tribunal considers that any conduct of the complainant before the dismissal (or, whether dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

S.123(1) provides that the amount of the compensatory award shall be such amount as the Tribunal considers it just and equitable in the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

S.123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it finds just and equitable having regard to that finding.

S.124(1) limits the amount of the compensatory award or caps it at lower of the sum of £80,541 or 52 multiplied by a weeks' pay of the person concerned.

S.124A provides that where an award of compensation for unfair dismissal falls to be reduced or increased under s.207A of Trade Union and Labour Relations (Consolidation) Act 1992 (effective failure to comply with code: adjustment of awards), the adjustment shall be in the compensatory award and shall be applied immediately before any reduction for s.123(6).

In Polkey v AE Dayton Services Limited [1987] IRLR 503, HL, it was held that in considering whether an employee could still have been dismissed if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have left his employment.

In Nelson v BBC (No 2) [1979] IRLR 346, CA, it was held that in determining whether to reduce an employee's unfair dismissal compensation on grounds of his fault, an Employment Tribunal must make three findings. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second, there must be a finding that the matters

to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

5. The claimant brings a claim of wrongful dismissal in respect of his notice pay. An action for a wrongful dismissal is a common law action. Action based on a breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant. All the Tribunal has to consider is whether the contract has been breached. The actual question is; Was the employee guilty of conduct so serious to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

   S.207A of Trade Union and Labour Relations (Consolidation) Act 1992 provides that where there is failure to comply with the relevant code of practice – here the code on disciplinary and grievance procedures – then in a case such as unfair dismissal if the employer has failed to comply with the code in relation to a matter to which the code applies and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

6. In regard to my findings of relevant fact, and applying the appropriate law, and taking into account the submissions of the parties I have reached the following conclusions:

   6.1 The first issue is when was the claimant dismissed? Was it on 1 August 2017 as he asserts? Or on 21 August 2017, as the respondent contends? I conclude that the claimant was summarily dismissed by Mr Ashman on 1 August 2017. Although Mr Ashman did not say – "You're sacked" – there is no dispute that he did say – "You are not flying my aircraft – pack or/get your things and leave". Thereafter the claimant did just that, to the knowledge of the respondent, and he packed up his office belongings and left his keys on the desk, and did not return to work either on the next day or thereafter. The respondent did not contact him and say – you are not dismissed, you are suspended pending an investigation or words to that affect. I conclude that Mr Ashman intended to dismiss the claimant on that day. However, having spoken to the absent Mr Dewhurst on the telephone, having taken legal or HR advice, the respondent realised that it could not do this, and should have followed a process. Thus, they purported to start a disciplinary process and follow it through. However, this was too late. ?, because Mr Ashman had already dismissed the claimant. I conclude that that is how a reasonable employee having understood the position. I look at all the circumstances of the

incident and its aftermath, and apply an objective test. Thus, even if Mr Ashman had not intended to dismiss the claimant his intention was irrelevant.

6.2 Because there was no procedure for the dismissal on 1 August, and a fair procedure is an essential part of a fair dismissal, the dismissal is inevitably unfair. Therefore, I point to the Polkey point. If a fair procedure had been followed, is there a chance that the claimant would have been fairly dismissed and, if so, what was that chance in percentage terms? I conclude that the chance of a fair dismissal because of the claimant's insubordination to Mr Ashman and his threat to hit Mr Ashman (albeit in extreme circumstances and under extreme provocation). However, I believe that chance is less than 50%, because of the context of in particular the threat to hit Mr Ashman, which in the circumstances was a retaliation to Mr Ashman threatening the claimant, and walking after him out of the hanger to continue the confrontation, facing up to him outside the hanger, and throwing his cup of tea in his direction. However, the claimant backed off his threat immediately, saying that he was not going to hit Mr Ashman. Further, the respondent would be bound to consider the claimant's substantial mitigation, in addition to Mr Ashman's fault and the incident itself, namely his length of service and his clean (or almost) disciplinary record. I conclude that there was a 25% chance of a fair dismissal.

6.3 I turn now to contributory fault. The claimant concedes 25%, for the "twat" comment. However, I conclude that it is more than that, and is 50%. The claimant started the incident, by calling the director "a twat" and he did threaten to hit Mr Ashman, albeit under substantial provocation, or even in defence.

6.4 I conclude that there was a wrongful dismissal here. The claimant was guilty of misconduct, but not gross misconduct such as to repudiate the contract of employment, in the context set out in the findings of fact. Therefore, he is entitled to notice pay, but he must set that off against the compensatory award and the pay he received between 1 August and 21 August. I therefore make no separate calculation for the wrongful dismissal.

6.5 The claimant has not fully attempted to find work, with Mr Jones at Leicester, at Sackville Farm aerodrome or elsewhere, as an instructor. But, the respondent has not adduced evidence that there was such work available, and there is no guarantee that there was. The claimant reasonably looked at advertised jobs with the BMAA. However, in reality the claimant wanted to work for himself, because of his experience with the respondent and no doubt because of his health and his age etc. Such is not an unreasonable aspiration. There is expense in setting up a new business, which the claimant is not claiming in entirety from the respondent. The claimant says it would take him a further year to get back to the

position he was in with the respondent financially. That is not unreasonable on his part, he is not claiming three years or more. I feel I should reflect in the award that the claimant's costs of setting up a new business should be discounted, because they are on the basis of up to three or five years. Those expenses will no doubt be set off against his earnings in the future, and should not all be paid for by the respondent now.

6.6 Thus, I take a fairly broad-brush approach to all of this. I award loss of earnings to date, another 9 months into the future to reflect the discount, without having to undergo a detailed arithmetic. Refer to the schedule attached hereto. I also award an ACAS uplift of 20%. This is not the full sum claimed of 25%, because the respondent is a small business, with no experience of disciplinary proceedings and limited HR support.

6.7 The total compensation I award is £18,210.77.

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Employment Judge G P Sigsworth

Date: 30 / 5 / 2018

Sent to the parties on: .....

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For the Tribunal Office