EMPLOYMENT TRIBUNALS

Claimant: **Mr R Mason**

Respondent: **Jewson Limited**

Heard at: **Leicester**

On: **8 February 2018**

Before: **Employment Judge Ahmed (sitting alone)**

Representation

Claimant: **In Person**
Respondent: **Mr A Mellis of Counsel**

JUDGMENT

1. The Claimant was unfairly dismissed but contributed to his dismissal.

2. The basic award is reduced by 75 per cent for contributory conduct.

3. There shall be no compensatory award having regard to the principles in **Polkey v AE Dayton Services Ltd**.

4. The Respondent is ordered to pay to the Claimant £732.58 net as compensation for unfair dismissal.

5. The Recoupment Regulations do not apply.

6. The application for costs is refused.

REASONS

1. This is a complaint of unfair dismissal by Mr Richard Mason who was employed by the Respondent, a well-known supplier of building materials, as a Sales Adviser at the Loughborough branch from 1 October 2012 to 13 July 2017, the latter date being the 'effective date of termination'.

2. Mr Mason received a final written warning in November 2016 for misconduct. The warning was for engaging in a physical altercation with a colleague. The written warning was to remain on the Claimant's record for 18 months. Although the Claimant was dismissed during the period that warning remained live, the dismissal

was not on a "totting up" basis. He was subsequently dismissed for a single act of gross misconduct.

3. On 20 June 2017 the Claimant was at the counter serving customers. Two representatives from a local authority who had an account with the Respondent were being served namely Mr Hall and Mr Taylor. They requested entry into a part of the branch showroom where stored glass is kept. They asked the Claimant to unlock the area which is not unusual. The area was locked up. It should have been opened in the morning by one of the Claimant's colleagues. The Claimant was annoyed that it was not. His annoyance was at his colleague and not the customers. In the presence of Messrs Hall and Taylor, the Claimant, in clearly audible terms, said:

"tell that fucking arsehole that he was supposed to fucking open up this morning so he can fucking do it".

4. It is common ground that Mr Mason was referring to a colleague, Mr Muntaquim, who should have opened up the area that morning but apparently had not done so. There is a dispute as to the exact words by the Claimant. Mr Mason accepts that he did speak about his colleague in a derogatory way.

5. The Claimant was subsequently suspended. There was an investigation. Mr Mason was called to a disciplinary hearing before Mr Paul Driver on 13 July 2017, a Branch Manager at the Northampton site, who had no prior dealings with the Claimant.

6. Mr Driver will probably agree that the disciplinary hearing was not one he will remember with fondness. I am satisfied the Claimant's behaviour at the disciplinary hearing was aggressive and intimidating. He began by questioning why there was no note taker present. He then threw his papers on the floor. He claimed that the decision was prejudged. None of the circumstances leading to the hearing were properly discussed or addressed. For reasons which are not clear the Claimant mistakenly thought it was an appeal and not a disciplinary hearing. Despite the circumstances Mr Driver decided to proceed. At the end of what was a relatively short meeting Mr Driver communicated his decision to dismiss the Claimant for gross misconduct.

7. The Claimant appealed and the appeal. The appeal was dealt with by Mr Martin Beale, an Area Director. Having heard Mr Mason give his account of the events on 20 June Mr Beale decided to adjourn the meeting and went to speak Mr Muntaquim personally. Mr Muntaquim gave Mr Beale a slightly different account to the one that he had given earlier in his statement during the investigation. Mr Muntaquim admitted that the language that he had alleged in his original statement may not entirely have been that which he had alleged originally. Mr Beale did not think that affected the correctness of the decision to dismiss and on 4 August 2017 he wrote to the Claimant to dismiss the appeal.

THE LAW

8. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") contain the relevant provisions and they are as follows:

"(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 it is either 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.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

(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 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."

9. Section 122(2) of ERA 1996 deals with reductions of the basic award for contributory conduct and states:-

" Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the 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."

10. In **HSBC Bank plc v Madden** [2000] ICR 1283 the Court of Appeal confirmed that the correct approach to applying what is now section 98(4) of the Employment Rights Act 1996 should be as follows:

"(1) The starting point should always be the words of section [98(4) Employment Rights Act 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

11. A Tribunal may reduce the amount of compensation by the appropriate percentage to reflect the possibility that the employee could or would have been dismissed fairly in any event if the dismissal was only 'procedurally' unfair. This is the so-called '**Polkey'** principle (**Polkey v AE Dayton Services Ltd** [1987] IRLR 503). A **Polkey** reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for both **Polkey** and for contributory conduct (**Robert Whiting Designs Limited v Lamb** [1978] ICR 89). The tribunal must limit the Claimant's compensatory award if there is reliable evidence on which it can conclude that dismissal would have happened in any event (**Software 2000 Ltd v Andrews** [2007] ICR 825).

CONCLUSIONS

12. The Respondent relies upon 'conduct' as the relevant reason under section 98 ERA 1996. I accept that the reason for dismissal was indeed 'conduct' and that

the Respondent has discharged its obligation to establish a potentially fair reason under section 98(2) ERA 1996. The principal issue is whether in all of the circumstances the dismissal was fair having regard to that reason.

13. The starting point is the disciplinary hearing conducted by Mr Driver. It was not fatal (as Mr Mason seems to think) that no notes were taken or that a note taker was not present. The ACAS Code does not require this nor do the Respondent's internal procedures. Notes are a good idea to prevent any subsequent dispute but they are not a legal or procedural requirement.

14. More significantly however, I am satisfied that:

14.1 Mr Driver had failed to properly read and absorb all of the material given to him prior to the disciplinary hearing and as such he had not taken into account the nature of the investigation;

14.2 Mr Driver failed to conduct a fair and reasonable disciplinary hearing. He was unable to control it with the result that there was no real discussion of incident;

14.3 There was no reasoned analysis of the decision or why dismissal was considered the appropriate sanction;

14.4 Mr Driver ended the disciplinary hearing largely to stop further aggressive behaviour from the Claimant rather than because there had been a proper consideration of the facts.

15. In those circumstances the dismissal was at least procedurally unfair. To dismiss the Claimant without a proper disciplinary hearing was a decision which fell outside the band of reasonable responses open to a reasonable employer.

16. Did Mr Beale's appeal remedy the defects of Mr Driver's flawed hearing? In my view it did not. Firstly, Mr Beale did not conduct a re-hearing in the usual sense. Secondly, he did not order a re-investigation of the matter or direct that a fresh disciplinary hearing should be undertaken by someone else. At the end of the day the Claimant had the benefit of an appeal hearing but no substantive disciplinary hearing. He is entitled to both.

17. However, applying the rule in **Polkey,** which is explained above**,** I am satisfied the Claimant would in all probability have been dismissed fairly in any event because:

17.1 His conduct on 20 June was appropriately regarded as gross misconduct. Despite a dispute as to the exact words used, the Claimant accepts that he used the word "prick" about a colleague. That was clearly inappropriate.

17.2 There were aggravating features in that the language was used in the presence of customers. The Claimant's conduct gave a poor impression of the business and would have brought it into disrepute.

17.3 The incident could have easily have led to more serious consequences, not least a complaint or grievance by Mr Muntaquim.

18. Accordingly, in my view Claimant loses the right to any compensatory award. He is still entitled to a basic award which is subject to a reduction for contributory conduct.

19. I am satisfied that the provisions of section 122(2) ERA 1996 are triggered in this case. The Claimant's conduct was such that it is just and equitable to reduce the basic award. The real issue is what should be the level of contribution in this case. According to **Hollier v Plysu [1983] IRLR 260,** reductions should generally be at the following levels: employee wholly to blame (100%), employee largely to blame (75%), employer and employee equally to blame (50%) and employee slightly to blame (25%).

20. In my view this is not a 'wholly to blame' case but certainly falls in the 'employee largely to blame' category. There were aggravating features. The Claimant had behaved badly in front of customers. He was aggressive and intimidating during the disciplinary hearing. The extent of the misconduct was significant but at the end of the day he was deprived of a fair disciplinary hearing.

21. The Claimant was employed for 5 full years. His gross weekly pay was £390.71 (I take that figure from the Respondent's ET3) and was aged 55 at the effective date of termination. His basic award is therefore 7.5 weeks x £390.71 which is £2,930.32. That is subject to the 75% reduction for contributory conduct under section 122(2) ERA 1996. The basic award will therefore be £732.58.

22. Following the announcement of the decision in open tribunal the Respondent applied for an order for costs on the grounds that the Claimant had behaved unreasonably because:-

22.1 He had failed to accept a 'without prejudice' offer of £780.00 made before the hearing;

22.2 He failed to comply with case management orders of the Tribunal.

23. I am satisfied that the Claimant has not acted unreasonably in refusing the offer. It was very close to what has ultimately been awarded. The relatively small difference does not necessarily imply unreasonable conduct. At no time has the Respondent actually conceded unfairness. A finding to that effect is important for a Claimant.

24. The Claimant did fail to comply with an order as to exchange of witness statements but he is a litigant in person and has had difficulty in understanding the process. Whilst I do not accept his contention that a member of Tribunal staff told him he did not need written witness statements for himself, he did fail to open up an e-mail from the Respondent which included their witness statements but still did not appreciate the need to prepare his own. But the fact is that a fair hearing was still possible and the absence of his witness statement has not caused the Respondent any prejudice. Costs order in the tribunals are an exception rather than the norm (see **Gee v Shell [2003] IRLR 82**). This is not an exceptional case. I do not find the Claimant has acted unreasonably nor is it appropriate to exercise the discretion to award costs against him. The application for costs is therefore refused.

Employment Judge Ahmed
Date: 26 March 2018

JUDGMENT SENT TO THE PARTIES ON

27 March 2018

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FOR THE TRIBUNAL OFFICE