



**EMPLOYMENT TRIBUNALS**

BETWEEN

CLAIMANT

AND

RESPONDENT

Mr Darren John Gibbs

National Car Parks Limited

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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Held at: Bristol

On Tuesday, the 22<sup>nd</sup> May 2018  
and Wednesday, the 23<sup>rd</sup> May 2018

Employment Judge: Mr David Harris

Representation:

For the Claimant: In person

For the Respondent: Mr Ian McGlashan (Employment Consultant)

## JUDGMENT

1. **The Claimant's claim of unfair dismissal is dismissed.**

## REASONS

### Introduction

1. By his Claim Form presented to the Tribunal on the 14<sup>th</sup> July 2017 the Claimant brings a claim of unfair dismissal against the Respondent.

### The Relevant Background

2. The Claimant commenced employment with the Respondent on the 18<sup>th</sup> March 2015. He was employed as a Customer Service Adviser and was based at the Respondent's multi-storey car park in Weston-Super-Mare. He worked part-time and his usual hours of work were from 5pm to 9pm.
3. His duties required him to provide customer service to people using the car park, to perform security controls of the car park and to clean the car park. Regrettably, the car park was a source of attraction for those engaged in criminal activities and anti-social behaviour (unlawful drug use in particular), which presented a risk to the health and safety of the Claimant as well as lawful users of the car park.
4. The Respondent was aware of this problem and had sought to address it in its training materials. Providing in the hearing bundle were information sheets for employees on dealing with the risks presented by "*sharps and needles*" and "*blood borne viruses*". Whether the Claimant was provided with those information sheets did not emerge during the evidence but what

was clear was that he had received training on “*how to stay safe on patrol when dealing with vagrants, drug users or gangs*”. The Respondent had produced guidance which it entitled “*removing undesirables*” (pages 70-73 in the bundle).

5. In addition to the measures identified by the Respondent as being necessary to protect the safety of the Claimant on patrol, he was also required to report serious incidents that occurred which was separate from the requirement that he complete a daily patrol log (see pages 67 to 69 in the bundle).
6. There is a dispute about whether the Claimant had received full and proper training from the Respondent, including training on how to stay safe during patrols and on the reporting requirements, about which more shall be said when the Tribunal’s findings of fact are set out.
7. There is no dispute that the Claimant regularly faced difficult and challenging situations involving criminal activity and anti-social behaviour on the part of trespassers in the car park.
8. An area of dispute that did arise in the evidence concerned the level of lighting in the car park. The Claimant’s case was that there were major lighting problems, which resulted in large areas within the car park being dark and unlit. The Respondent’s case, in essence, is that the Claimant has exaggerated that problem. The Respondent accepts that individual light units would fail from time to time but denies that the level of lighting in the car park was as poor as described by the Claimant. I shall return to this issue when dealing with the findings of fact.
9. Due to the lighting problem as he perceived it to be, the Claimant took to carrying a torch with him when he went on patrol of the car park. It was not part of the equipment provided to him by the Respondent but was his own torch that he brought in to work. On the evidence that the Tribunal heard, the Respondent takes no objection to the torch being used as a means of

illuminating darkened areas – but does take objection to the torch being used as a weapon against intruders in the car park.

10. Turning to the facts that led to the Claimant's dismissal on the 24<sup>th</sup> March 2017, the starting point is the investigatory interview that took place on the 10<sup>th</sup> March 2017 (see pages 174 to 183 in the bundle).
11. The reason the interview took place was because the Respondent had heard (from the Claimant) that he was going to be interviewed by the police regarding an assault allegation that had occurred in the car park. The allegation was that the Claimant had assault a member of the public with his torch.
12. The Claimant gave an account of the incident during the investigatory meeting (see pages 177 to 181 in the bundle).
13. He was then asked about any other similar incidents and he volunteered information about an incident that he said had occurred in August 2016 (see pages 181 to 182 in the bundle).
14. Following the investigatory interview, the Claimant was invited to attend a disciplinary hearing, which took place on the 24<sup>th</sup> March 2017. Ms Carly Edwards was the person who conducted the disciplinary hearing.
15. The focus of the hearing was on the two incidents that the Claimant had described during the investigatory interview. His account of the September 2016 incident is at page 207 in the bundle and the August 2016 incident is at page 212.

16. Following the disciplinary hearing, the decision was taken by Ms Edwards to dismiss the Claimant. The dismissal letter is at page 216 in the bundle. The reason given for the dismissal was gross misconduct.
  
17. The Claimant subsequently appealed the decision to dismiss him and the appeal was heard by Mr Tristram Arnold on the 17<sup>th</sup> April 2018. The decision on the appeal was to uphold the dismissal decision for the reasons given in a detailed letter that was sent to the Claimant on the 8<sup>th</sup> May 2017 (see page 254 in the bundle).

#### Summary of the Evidence & the Tribunal's Findings of Fact

18. I had evidence from Carl Peckham, Carly Edwards & Tristram Arnold on behalf of the Respondent and I then heard evidence from the Claimant and his witness Mr Cotterell.
  
19. The following disputes of fact emerged from the evidence:
  - (1) it was alleged by the Claimant and his witness that paperwork regularly went missing between the Respondent's premises in Weston and Bristol;
  - (2) there was a dispute as to the level of training that the Claimant received;
  - (3) there was a dispute as to whether the Respondent's training material applied to the Claimant as a lone worker in Weston;
  - (4) there was a dispute as to the level of lighting in the car park.
  
20. The Tribunal made the following findings of fact:
  - (1) The Tribunal found, on the balance of probability, that incident report forms had not been completed by the Claimant in respect of the two index incidents. Had they been, the Tribunal was of the view that it was

likely that they would have been received and retained by the Respondent.

- (2) Though the Tribunal accepted the Claimant's evidence that there was a problem with the computer hardware that prevented him listening to the aural part of the training materials, it is clear that he received the written material dealing with (1) the reporting requirements of his job and (2) how to stay safe on patrol.
- (3) The Claimant said in his evidence that he did not pay much attention to the training materials because it was difficult to see how they applied to him as a lone worker. Whilst the Tribunal could see that any requirement to call an on-site colleague would not be possible for the Claimant as a lone worker, there was no reason to think that the other parts of the training (in particular, the reporting requirements and the training on how to stay safe) would not apply to a lone worker.
- (4) The Tribunal found that there were areas in the car park that were poorly lit due to problems with the artificial lighting but did not accept the Claimant's evidence that there were areas that were pitch black.

### The Claimant's Case

21. The Claimant's case is straightforward. He contends that he was acting in self-defence at the time of the two index incidents and that it was unfair to dismiss him in those circumstances. In support of his case that he was acting in self-defence he relies upon the fact that the police took no action against him in respect of the September 2016 incident.
22. The Claimant also contends that the Respondent's procedure was unfair in the following respects:
  - (1) there was inaccurate note taking by the Respondent at the fact-finding interview, the disciplinary hearing and the appeal;
  - (2) there was a failure on the part of the Respondent to disclose the patrol logs before the fact-finding interview – and the relevance of that is that they would have made clear that what was referred to as the August

2016 incident in the investigatory interview was in fact an incident that occurred on the 27<sup>th</sup> October 2016;

- (3) there was a failure on the part of the Respondent to disclose the incident report forms relating to the September 2016 incident.

### The Respondent's Case

23. The Respondent's case is equally straightforward. The Respondent contends that there was a reasonable basis for the finding of gross misconduct and that its procedure had been fair.

### The Relevant Legal Principles

24. For the purposes of the unfair dismissal claim, the starting point for the Employment Tribunal is section 98 of the ERA 1996, the relevant parts of which provides 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-**
  - (a) ...
  - (b) relates to the conduct of the employee,
  - (ba) ...
  - (c) is that the employee was redundant, or
  - (d) ...
- ...
- (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.**

25. The Respondent puts its case on the basis that the reason for the Claimant's dismissal was gross misconduct. It is for the Respondent to discharge the burden of proving the reason for the Claimant's dismissal and that it was a reason that was capable of being fair for the purposes of section 98(1) and (2).
26. Where there is a dispute as to the reason for the dismissal, it is for the Employment Tribunal to determine the real reason for the dismissal: i.e. the set of facts known to the employer or beliefs held by it that caused it to dismiss the Claimant (*Abernethy v. Molt, Hay and Anderson* [1974] ICR 323).
27. The Claimant bears no burden of proof as to the reason for his dismissal.
28. If the employer is able to demonstrate a potentially fair reason for the dismissal, the Employment Tribunal will consider the question of fairness under section 98(4) of the Employment Rights Act 1996, at which stage the burden is neutral as between the parties.
29. In the case of a conduct dismissal, which is alleged in this case by the Respondent, the Employment Tribunal will be guided by the leading case of *British Home Stores Ltd v. Burchell* [1980] ICR 303, which will require it to consider whether the Respondent had reasonable grounds for its belief in the employee's misconduct, founded upon a reasonable investigation. The test that the Employment Tribunal is to apply at all stages of its determination of the question of fairness for the purposes of section 98(4) is whether the Respondent's decision fell within the band of reasonable responses of the reasonable employer (see *Iceland Frozen Foods Ltd v. Jones* [1982] IRLR 439 and *Sainsbury's Supermarkets Ltd v. Hitt* [2003] IRLR 23).



30. I should add that it is not for the Tribunal to form its own view as to what it might or might not have done in the situation facing the Respondent. The task for the Tribunal is to assess the fairness and reasonableness of the Respondent's actions in light of the legal principles I have summarised above.

### The Decision

31. On the evidence that it heard and read, and directing itself on the law as summarised above, the Tribunal concluded that the Respondent had reasonable grounds for its belief in the Claimant's misconduct, which amounted to gross misconduct.
32. The issue for the Respondent was not simply whether the Claimant's actions were criminal or lawful by reason of self-defence. That was the question being investigated by the police. The Respondent considered broader implications arising from the events that occurred, which included the question whether the Claimant had complied with his training.
33. On the information before the Respondent following its fact-finding inquiry, it was reasonable for the Respondent to conclude that the Claimant had not properly reported the index incidents and had not complied with his training on how to deal with potentially violent third parties. Based on the Claimant's account of the two incidents (at the fact finding interview and the disciplinary hearing), it was reasonable for the Respondent to conclude that the Claimant had used violence (namely, the use of his torch as a weapon) to cause what appeared to be really serious injury in situations that could have been avoided if he had followed his training. In those circumstances, there was a reasonable basis for the Respondent's belief that the Claimant's use of violence resulting in serious injury to intruders whilst on duty in the car park amounted to gross misconduct.

34. In respect of the procedure used by the Respondent that led to the decision to dismiss the Claimant, the Tribunal was satisfied that the procedure was fair. The Claimant had been given a reasonable opportunity to check, amend and sign the notes made at the fact-finding interview. It was a matter for him as to whether he availed himself of that opportunity. On the evidence before the Tribunal, it was clear that the Claimant had decided not to check the notes. As to the notes made at the disciplinary hearing and the appeal hearing, they appeared to be reasonably full. The Tribunal was not persuaded that they contained any material errors or that there had been any material omissions.
  
35. The Tribunal was also of the view that the Claimant had not been prejudiced by the failure on the part of the Respondent to provide him with the patrol logs prior to the fact-finding interview. The point that the Claimant sought to make was that the incident he had described as the August incident was in fact an October incident. Assuming that those two incidents were one and the same (which did not appear to the Tribunal to be a particularly safe assumption given the content of the patrol logs), the issue that concerned the Respondent was the violence that had been used by the Claimant and not the date or dates on which the violence had been used. The fact that the Claimant had not received the logs prior to the fact-finding interview did not materially prevent or restrict him giving his account of the circumstances in which he had used torch as a weapon whilst on duty in the car park.
  
36. As to the fairness of the disciplinary and appeal hearings, it was clear to the Tribunal that the Claimant had been given a reasonable opportunity to set out his case for the Respondent to consider. He was aware of the allegations made against him and he responded to those allegations. In the judgment of the Tribunal there was no procedural unfairness in this case.
  
37. Lastly, the Tribunal was satisfied that the sanction of summary dismissal for the misconduct as found by the Respondent was within the band of reasonable responses.

38. Accordingly, the claim of unfair dismissal shall be dismissed.

Employment Judge David Harris

Bristol

Dated the 10<sup>th</sup> June 2018

Judgment entered in Register  
and copies sent to parties on

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for Secretary of the Tribunals