



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D A Young

**Respondent:** Urbaser Limited

**Heard at:** Southampton **On:** 5 March 2018

**Before:** Employment Judge Maxwell

## **Representation**

Claimant: Ms Walden, lay representative

Respondent: Mr Probert, Counsel

# REASONS

1. The Tribunal's decision and reasons having been given orally on 5 March 2018, and judgment having been sent to the parties on 21 March 2018, these written reasons are provided pursuant to the claimant's request made on 22 March 2018.

## Preliminary

2. The claimant and respondent each provided me with their own bundle of documents. Having gone through these with the parties it became apparent that most of the documents both parties wished to rely upon were in the respondent's bundle, save for a small number of additional pages which I took from the claimant's bundle and added to the respondent's, at pages 133-137.

3. I heard evidence from:
  - 3.1. Mr Derek Young, the claimant;
  - 3.2. Mr Simon Allison the respondent's Contract Manager and dismissal decision-maker;
  - 3.3. Mr Jose Sanchez, the respondent's Operations Manager and appeal decision-maker.
4. The claimant has difficulty reading and he confirmed the truth of the statements prepared on his behalf for use in these proceedings after they were read to him; save that he made an amendment to the effect that the other party to the altercation (Mr Woodman) was not already at his friend's house when the claimant arrived.

### Issues

5. The issues were explained to and discussed with the parties at the outset of the hearing:
  - 5.1. whether the respondent dismissed the claimant for a potentially fair reason;
  - 5.2. whether, to the extent the reason for dismissal was conduct, the respondent had a genuine belief in the claimant's guilt;
  - 5.3. whether the respondent had reasonable grounds for its belief;
  - 5.4. whether the respondent carried out a reasonable investigation;
  - 5.5. whether the respondent followed a fair procedure;
  - 5.6. whether the sanction of dismissal was fair;
  - 5.7. If unfairly dismissed:
    - 5.7.1. whether the claimant was guilty of contributory conduct;
    - 5.7.2. the prospect of a fair dismissal in any event.

### **Facts**

6. The respondent provides environmental services to local authorities. The claimant was employed by the respondent from at least 7 July 2003 as a refuse loader.
7. In an email of 11 August 2017, the respondent's Transport Manager, Nigel Walters, described an incident the day before when he reported seeing the claimant fighting in public with another man (later identified as a Mr Woodman). This was said to have occurred near the respondent's depot and

whilst the claimant was still wearing his uniform. On seeking to intervene, Mr Walters said the claimant responded to him in an aggressive and threatening manner. Mr Walters' account was reduced in to the form of a witness statement. Another employee of the respondent, Ms Horn, had been speaking with Mr Walters at the time of this incident and she too gave a statement.

8. On 17 August 2017, Richard Powell, Supervisor, interviewed the claimant about the incident in question. This was transcribed.
9. By a letter of 29 August 2017, the claimant was called to attend a disciplinary hearing. The letter enclosed the evidence management intended to rely upon and advised of his right to accompaniment. The allegations were stated as:
  - 9.1. fighting in public whilst wearing a company uniform;
  - 9.2. threatening behaviour towards Mr Walters.
10. Mr Allison conducted the claimant's disciplinary hearing on 7 September 2017. This was again transcribed. Although questions were asked about the incident, many of the claimant's answers related to other matters, including that:
  - 10.1. his boat had been interfered with;
  - 10.2. he had been accused of stealing bin bags;
  - 10.3. he had not been allowed time in lieu;
  - 10.4. he was only give 1 day off work in connection with moving house and arranging his mortgage;
  - 10.5. asked how these various matters were linked to the disciplinary, the claimant said "Fine, all of the other things are to do with the fighting, I am just saying about all of the pressure leading up to it, coming in to talk about my boat";
  - 10.6. in response to Mr Walters' account of the claimant being "on top of the bloke", the claimant said "Well if that's true then it's true".
11. Mr Allison upheld the allegations and decided to dismiss the claimant. His decision was confirmed in writing by a letter of 11 September 2017.
12. The claimant appealed against his dismissal in a letter of 7 September 2017, his main argument being that he had been assaulted (i.e. he was the victim in this incident).
13. The appeal was heard by Mr Sanchez on 19 September 2017. The claimant repeated that he had been assaulted. Mr Sanchez said "you were drunk and you went for Nigel as well on the day", in response to which the claimant

replied “I didn’t realise it was Nigel, till I got close to him”. Thereafter, Mr Sanchez struggled to relate the claimant’s observations to the appeal. Mr Sanchez did not uphold the appeal.

## Law

14. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** (“ERA”), it is for the respondent to show that the reason for the claimant’s dismissal was potentially fair and fell within section 98(1)(b).
15. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

**In any case 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 sufficient reason for dismissing the employee, and**

**(b) shall be determined in accordance with equity and the substantial merits of the case.**

16. Where the reason for dismissal is conduct the Tribunal will take into account the guidance of the EAT in **BHS v Burchell [1978] IRLR 379**. The employment tribunal must be satisfied:
  - 16.1. that the respondent had a genuine belief that the claimant was guilty of the misconduct;
  - 16.2. that such belief was based on reasonable grounds;
  - 16.3. that such belief was reached after a reasonable investigation.
17. The Tribunal must also be satisfied that the misconduct was sufficient to justify dismissing the claimant.
18. The function of the Tribunal is to review the reasonableness of the employer’s decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; see **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.
19. The band of reasonable responses test applies as much to the **Burchell** criteria as it does to whether the misconduct was sufficiently serious to justify dismissal; see **Sainsbury’s Supermarkets v Hitt [2003] IRLR 23 CA**.

20. Where an appeal hearing is conducted then the **Burchell** criteria must also be applied at that stage, in accordance with the decision of the House of Lords in **West Midlands Co-operative Society v Tipton [1986] IRLR 112** and the speech of Lord Bridge:

**“A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal.”**

21. After an appeal, the question is whether the process as a whole was fair ; see **Taylor v OCS Group Limited [2006] IRLR 613 CA**, per Smith LJ:

**46. [...] In our view, it would be quite inappropriate for an ET to attempt such categorisation. What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.**

**47. [...] The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**

## Conclusion

### Generally

22. The claimant did not engage directly with most of the issues identified as being relevant to his claim, despite attempts by the Tribunal to explain those to him. His case as articulated at this hearing primarily comprised:

22.1. he would not have started a fight as he didn't want to go to prison and had been the victim of an unprovoked assault;

22.2. he had been loyal to the company over his long employment;

22.3. managers had variously been unhelpful in connection with matters such as the mooring of his boat, stealing bin bags and time off work to sort out his mortgage.

### Reason

23. Whilst no challenge was made to Mr Allison in the course of his evidence, in closing submissions Ms Walden suggested the claimant was dismissed

because the respondent wished to retain “non-contract labour”. I do not agree with that wholly unsubstantiated suggestion.

24. I found Mr Allison to be a credible witness and accept his evidence that the reason he decided to dismiss was his belief that the claimant was guilty of misconduct, namely:

24.1. fighting in public whilst wearing a company uniform;

24.2. threatening behaviour towards Nigel Walters,

25. With respect to the first alleged misconduct, whilst Mr Allison accepted the claimant may have been assaulted by Mr Woodman in the premises of a mutual friend, by the time the dispute had been carried into the street he preferred the evidence of Mr Walters and Ms Horn to the effect that the claimant was far from passive and the incident appeared to be fuelled by alcohol.

### Grounds

26. I am satisfied there were reasonable grounds for Mr Allison’s belief, indeed the evidence in support was considerable:

26.1. Mr Walters account included:

26.1.1. the claimant on a public road, wearing his work uniform, “squaring up” to another man;

26.1.2. the other man using a bicycle “to distance” the claimant;

26.1.3. they “fell into the bush” and the claimant was “on top of the other bloke”;

26.1.4. the claimant “was very drunk”;

26.1.5. following his own intervention, the claimant said to Mr Walters “come on then”, in an “aggressive manner”, “as to indicate if I want to fight him”;

26.1.6. the claimant’s face was covered in blood;

26.2. Ms Horn’s account included:

26.2.1. “the man in the orange [Urbaser] uniform pushed the other man into the bush”;

26.2.2. “the man dressed in orange was swearing”.

- 26.3. no reason was advanced by the claimant during the internal proceedings for the respondent not to believe Mr Walters or Ms Horn;

26.4. during the investigatory interview the claimant's account included admissions and others evidence which supported the conclusions reached:

26.4.1. "I had a dispute with my new neighbour and he assaulted me, we had a dispute over noise, I went to jail and I didn't get into trouble, I was released with no charge";

26.4.2. "I had 2 beers as I was stressed";

26.4.3. when it was put that he had been aggressive to Mr Walters, "I was just really stressed...I can't deny what happened";

26.4.4. when it was put that he had threatened Mr Walters, "I was stressed and had a few drinks";

26.4.5. when it was put the he had engaged in threatening behaviour toward Mr Walters whilst still wearing his uniform, "I am not disputing the fact";

26.4.6. "If someone hits me I am going to defend myself".

#### Investigation

27. Whilst no complaint appears to be made under this heading, I am satisfied the investigation was reasonable:

27.1. statements were taken from all relevant employee witnesses;

27.2. the claimant did not suggest any other witness;

27.3. the claimant attended an investigatory interview;

27.4. the claimant had a further opportunity to give his account at the disciplinary hearing;

27.5. there was no relevant documentary evidence;

27.6. there were no other investigatory avenues it was reasonable for the respondent to have to explore.

Procedure

28. Whilst no complaint appears to be made under this heading, I am satisfied that a fair procedure was followed:
- 28.1. the claimant had a full opportunity to understand and respond to the alleged misconduct at the investigatory interview;
  - 28.2. the claimant was provided with the witness evidence prior to the disciplinary hearing;
  - 28.3. the claimant did not say at the disciplinary hearing that he needed any more time;
  - 28.4. the claimant had a further, full opportunity to give his account at the the disciplinary hearing;
  - 28.5. the claimant was afforded and exercised a right of appeal.

Sanction

29. The respondent's handbook includes fighting with staff or the public in the examples of gross misconduct. Whilst the claimant was finished for the day, he was in the vicinity of his workplace and wearing his brightly coloured uniform, which factors provided a close association with his employment. The gross misconduct examples also include bringing the company into disrepute. The claimant's conduct, as found by his employer, could easily fall within both of these examples. Whilst it was accepted that he had been assaulted in private, by the time the claimant's altercation spilled out into a public place, the evidence supported and the employer found that he was actively participating in a drink-fuelled fight. Being easily identified as an employee of the respondent, both by uniform and geographical proximity, anyone observing this incident would be likely to think less of the respondent and its employees. This alone could reasonably have been considered as amounting to gross misconduct.
30. Thereafter, on the case as found, the claimant sought to embroil Mr Walters in a violent altercation, making a threatening remark, and only backing away from this when recognition dawned as to the identity of this person newly on the scene.
31. Beyond long service and saying that he had been under stress, the claimant offered little by way of mitigation.
32. In all the circumstances, the sanction of dismissal was well within the band of reasonable responses.



**Conclusion**

33. The claimant's claim is not well-founded and is dismissed.

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Employment Judge Maxwell

Date: 13 April 2018

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REASONS SENT TO THE PARTIES ON

27 April 2018

FOR THE SECRETARY TO THE TRIBUNALS