



# EMPLOYMENT TRIBUNALS

BETWEEN  
AND

Claimant  
Mr M Ward

Respondent  
Browns  
Distribution  
Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Newcastle-under-Lyme ON 19 & 20 July 2018  
22 August 2018 (Without Parties)

EMPLOYMENT JUDGE GASKELL

### Representation

For the Claimant: In Person  
For Respondent: Mr A Murphy (Consultant)

## JUDGMENT

**The judgment of the tribunal is that:**

The claimant was fairly dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.

## REASONS

### Introduction

1 The claimant in this case is Mr Mark Ward who was employed by the respondent, Browns Distribution Services Limited, as Fleet Engineering Manager from 4 July 2008 until 10 November 2017 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 17 December 2017, the claimant claims that his dismissal was unfair. The claimant denies that he is guilty of any misconduct; and asserts that he was dismissed for defending junior staff who were experiencing bullying at the hands of the respondent's Managing Director Mr David Brown Jnr.

3 In its response to the claim, the respondent maintains that the claimant was dismissed for a reason relating to his conduct; and that the dismissal was fair.

## **The Evidence**

4 The tribunal heard evidence from four witnesses. For the respondent, from the dismissing officer Mr Kevin Murphy - a director of Employment Law Solutions (ELS) - an Employment Law and HR Consultancy engaged by the respondent; and from Mr David Brown Snr, the former Managing Director of the respondent. For the claimant, from the claimant himself and from Mr Jan Cook a former colleague of the claimant who had departed the respondent's employment in April 2017. In addition, the tribunal had a witness statement from Ms Louise Steel and independent HR Consultant engaged to conduct the claimant's appeal. Ms Steel was unable to attend the hearing and give evidence: the respondent made no application for a postponement or for the issue of a witness summons. Both parties fully understood the limited weight which the tribunal could give to Ms Steel's witness statement.

5 There was an agreed trial bundle running to some 199 pages: and, in addition, a separate bundle prepared by the claimant – which, in any event, duplicated many of the documents in the agreed trial bundle.

6 I found the witnesses to be truthful and factual. Mr Brown Snr was only called to give evidence to counter part of the claimant's evidence relating to a conversation between himself and the claimant said to have taken place on 28 September 2017. (It was the claimant who had requested a witness order requiring Mr Brown's attendance at the hearing. With conspicuous fairness, the respondent's representative agreed to call Mr Brown; thus, allowing the claimant the opportunity to cross-examine him.) The claimant's account of the conversation places it in a very sinister light; suggesting that Mr Brown Snr was warning the claimant of his son's intention to dismiss him. Mr Brown rejected this interpretation of the conversation. I found Mr Brown to be the more credible witness on this point. I accept his evidence.

7 Much of the evidence given by the claimant, and the evidence of Mr Cook, was wholly irrelevant to the issues which I had to decide. The claimant was determined to give evidence about long-standing grievances against Mr David Brown Jnr he believed that these grievances were relevant because if something had been done about Mr Brown's behaviour towards the claimant then it is unlikely that Mr Brown would have gone on to bully other employees - Mr Mick Butcher and Ms Sue Jephcott. Had Mr Brown not bullied those two employees, claimant would not have committed the misconduct alleged against him.

8 I explained to the claimant that the issues to be decided by the tribunal were these: -

(a) What was the reason for his dismissal? Was it a potentially fair reason

under the provisions of Section 98(1) & (2) of the Employment Rights Act 1996 (ERA)?

- (b) Did the respondent, through the dismissing officer, Mr Kevin Murphy genuinely believe the claimant to be guilty of the misconduct.
- (c) Was there adequate material for Mr Murphy to reach the conclusion that he did?
- (d) Had there been an adequate investigation into the claimant's conduct?
- (e) Was the decision to dismiss the claimant for that misconduct within the range of reasonable responses?

9 There was one obvious omission in the evidence: namely that the investigation into the claimant's conduct appears to have started with a witness statement made by Mick Butcher some-time between June and October 2017. The statement is clearly not unsolicited; and yet no evidence was adduced by the respondent as to how it came to be made. It seems the person most likely to be able to explain this (other than Mr Butcher himself) would be David Brown Jnr; but the respondent made a conscientious decision not to call Mr Brown to give evidence.

### **The Facts**

10 Having considered the evidence carefully, including the omission identified at Paragraph 9 above, my findings as to the relevant facts are as follows: -

- (a) The claimant first commenced employment with the respondent more than 20 years ago. At that time, the Managing Director was the father of Mr Brown Snr. The claimant evidently had a good working relationship with Mr Brown Snr and with his father before him. There were two occasions where the claimant resigned his employment with a view to relocation on each of those occasions when the relocation plans fell through the claimant was asked to return to the respondent's employment. When giving evidence before me, Mr Brown Snr described the claimant as a hard-working loyal employee. The claimant's final period of continuous employment commenced on 4 July 2008.
- (b) Sometime between 2008 and 2010, Mr Brown Snr retired as Managing Director and handed over to his son, Mr Brown Jnr. It is evident that the claimant enjoyed a much less happy relationship with Mr Brown Jnr than he had with his father.
- (c) The respondent is a small organisation: The Senior Management Team comprised Mr Brown Jnr, Managing Director; Mr Mick Stirzaker, Operations Director; and the claimant. ELS were retained by the respondent to provide all HR services.
- (d) The claimant gave evidence of an incident in December 2010 when he claims to have been the victim of Mr Brown Jnr's aggression and bullying. He produced a letter of grievance which he prepared at the time, but it

- appears that the grievance was never pursued.
- (e) The claimant gave further evidence of what he described as bullying behaviour by Mr Brown Jnr and unacceptable behaviour by Mr Brown and others in the period from 2013 to 2017. This evidence was partly supported by the evidence of Mr Cook who worked in the business from 2015 until April 2017.
  - (f) On 24 June 2017, the claimant raised a grievance by email to Mr Brown Jnr regarding offensive language used by a colleague Ms Sarah Boote. When the matter could not be resolved informally, Mr Brown appointed Ms Jennifer Ormond of ELS to deal with the grievance. There was a grievance hearing on 11 July 2017: the record shows that the claimant simply did not cooperate - essentially because he refused to accept Ms Ormond's impartiality.
  - (g) Almost contemporaneous with the grievance, Mr Brown Jnr was concerned that, in an email dated 3 July 2017, the claimant had been insubordinate towards him using an inappropriate tone and language. Mr Brown was also concerned that this email had been copied to Mr Stirzaker. Mr Brown asked Ms Ormond to investigate this is a disciplinary matter: the disciplinary hearing took place on 11 July 2017 immediately after the grievance hearing. Again, the record shows that the claimant did not co-operate - making no comment in response to the majority of Ms Ormond's questions.
  - (h) By separate letters dated 12 July 2017, Ms Ormond dismissed the claimant's grievance and upheld the disciplinary charges against the claimant. Her decision was that he should be issued with a written warning to remain on file for a period of 12 months. Although told of his right to do so, the claimant did not pursue an appeal.
  - (f) On 23 June 2017, the claimant attended a senior management meeting with Mr Brown Jr and Mr Stirzaker. Also present was Mr Alf Murphy of ELS. At the outset of the meeting, Mr Brown made clear that the content of this meeting was confidential to those present and must not be disclosed outside. Mr Brown expressed concern, and sought advice from ELS, about the performance of two employees - Ms Jephcott and Mr Butcher. In Ms Jephcott's case the concern was that her telephone manner towards customers was too informal which Mr Brown considered to be unprofessional. Mr Murphy gave what appears to be wholly uncontroversial advice that Mr Brown could issue a management instruction requiring a degree of formality in such conversations; if Ms Jephcott did not comply then this could ground disciplinary proceedings against her. The claimant was clearly unhappy at such a proposition. Regarding Mr Butcher, the concerns were general performance issues: again, Mr Murphy gave what appears to be wholly uncontroversial advice about the necessity to establish a performance management programme before any disciplinary proceedings could be considered in respect of under-performance.

- (g) In the absence of evidence from Mr Brown Jnr or from Mr Alf Murphy, it is unclear how the subsequent concerns arose. But, it appears that in mid-October 2017, Mr Brown Jnr contacted Mr Alf Murphy with concerns about the claimant's behaviour. He asked Mr Murphy to conduct an independent investigation. Mr Murphy completed his investigation by the end of October 2017: he concluded that there was a disciplinary case against the claimant. Mr Brown then commissioned Mr Kevin Murphy of ELS to conduct disciplinary proceedings.
- (h) I heard evidence from Mr Kevin Murphy, which I accept, that he only accepted the brief to conduct the disciplinary proceedings on the understanding that his decision would be accepted by the company; that he had a complete free-hand in determining firstly, whether there had been any misconduct; and secondly, in the event of a finding of misconduct, what the appropriate sanction would be.
- (i) On 17 October 2017, Mr Brown Jnr suspended the claimant from work pending Mr Alf Murphy's investigation. He made clear in the suspension letter that two employees had made statements relevant to the investigation; and he was concerned that, if the claimant were present in the workplace, there was a danger that the employees may feel intimidated.
- (j) The documentation generated by Mr Alf Murphy's investigation and which was submitted to Mr Kevin Murphy for consideration was the following: –
  - (i) A statement from Mr Brown Jnr.
  - (ii) A statement from Mr Butcher
  - (iii) A statement from Ms Jephcott
  - (iv) A note of the meeting of 23 June 2017
  - (v) Documentation relating to the July 2017 grievance and disciplinary hearings
  - (vi) A letter of grievance from Ms Jephcott second of October 2017
  - (vii) Copies of draft of a grievance letter evidently prepared by the claimant for Ms Jephcott following a disciplinary hearing on 3 October 2017 which the claimant had attended as Ms Jephcott's companion
  - (viii) Notes of an investigation meeting between the claimant and Mr Alf Murphy on 16 October 2017. The claimant had made no comment in response to any of the matters which Mr Murphy wished to discuss.
- (k) Mr Kevin Murphy concluded that the documentation suggested misconduct on the claimant's part as follows: -
  - (i) The claimant had not maintained the confidentiality of the senior

- managers' meeting on 23 June 2017. It appeared that, after the meeting, the claimant had told Mr Butcher that Mr Brown had brought in solicitors to discuss ways to "get rid of him".
- (ii) The claimant had repeatedly attempted to persuade Mr Butcher and Ms Jephcott to raise grievances against Mr Brown. Not for the benefit of the employees concerned; but to further his own grievances against Mr Brown. Both employees had indicated in their witness statements that they felt the claimant was manipulating them for his own ends.
- (l) On 30 October 2017, Mr Kevin Murphy wrote to the claimant inviting him to a disciplinary hearing and setting out the above charges. The hearing was scheduled for 2 November 2017; it was later rearranged for 7 November 2017; the claimant attended with his trade union representative Mr Andy Jennings.
  - (m) The claimant read a pre-prepared statement in response to the disciplinary charges. He claimed that he had told Mr Butcher that solicitors had been brought in to get rid of him (the claimant) - he did not recall being asked to keep the contents of the meeting confidential.
  - (n) The claimant admitted encouraging Mr Butcher and Ms Jephcott to raise grievances against Mr Brown because he felt they had both been bullied by him. He denied pressurising them to do so; or doing so for his own ends.
  - (o) After the disciplinary hearing, Mr Murphy made further enquiries with Mr Stirzaker, in particular as to whether the claimant had raised with him concerns about the bullying of Mr Butcher or Ms Jephcott. Mr Stirzaker denied that he had.
  - (p) Mr Murphy's conclusions were that the claimant had not respected the confidence of the senior managers meeting and disclosed information from that meeting to a subordinate employee without authority. He had done so to cause difficulty for Mr Brown Jnr. He further concluded that the claimant had attempted to agitate to employees to raise grievances which they otherwise did not wish to raise; and that he did this in order to further his own grievances against Mr Brown.
  - (q) Mr Murphy concluded that this conduct on the part of the claimant fundamentally undermined the requirement of trust and confidence between the claimant as a senior employee and the Managing Director. He regarded this as gross-misconduct and concluded that the appropriate sanction was summary dismissal.
  - (r) Mr Murphy wrote to the claimant on 10 November 2017 advising him of the decision. On 14 November 2017, he wrote a longer letter setting out the reasons for the decision; and how he had reached his findings. The claimant was told of his right of appeal.

- (s) On 14 November 2017, the claimant submitted a written appeal. The respondent commissioned another independent HR Consultant (independent of ELS), Mrs Louise Steel to conduct the appeal. On 22 November 2017, the claimant was invited to an appeal meeting. Mrs Steel took steps to obtain confirmation of the veracity of the statements of Mr Butcher and Ms Jephcott by asking that statements of truth be appended to the statements. The appeal hearing was scheduled for Thursday 30 November 2017, but the claimant did not attend. Mrs Steel therefore considered the appeal on the papers. On 14 December 2017 she wrote to the claimant advising him that his appeal was dismissed.
- (t) When the claimant gave evidence, he told me of a conversation he claimed to have had with Mr Brown Snr on 28 September 2017 (before Mr Alf Murphy's investigation was commissioned). He claimed that Mr Brown had effectively told him that his son had decided that he no longer wish the claimant to be employed in the business. On the basis of this conversation, the claimant alleges that the whole disciplinary process was a sham; prejudged to dismiss him. As I have already indicated, I reject the claimant's evidence on this conversation. I also find that the disciplinary process was conducted in good faith: Mr Brown Jnr conscientiously involved independent consultants because of his close and difficult relationship with the claimant.

## **The Law**

### **11 Employment Rights Act 1996 (ERA)**

#### **Section 94: The right [not to be unfairly dismissed]**

- (1) An employee has the right not to be unfairly dismissed by his employer.

#### **Section 98: General Fairness**

- (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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

## 12 Cases on Unfair dismissal

### **British Homes Stores v Burchell [1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

### **Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)**

### **Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.



**Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

**13 The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

**Discussion & Conclusions**

***The Reason for the Dismissal***

14 I find without hesitation that the reason for the claimant’s dismissal was a reason relating to his conduct which is a potentially fair reason for the purposes of Section 98 ERA. I reject the claimant’s assertion that he was dismissed simply because Mr Brown wanted rid of him or because Mr Brown did not wish him to give support to employees who were being bullied.

15 It is important that I am precise as to the conduct found by Mr Kevin Murphy: his findings were: –

- (a) That the claimant had breached the confidentiality of the senior managers meeting by telling Mr Butcher what transpired. He did so for his own purposes.
- (b) That the claimant had persistently agitated for employees to raise grievances against Mr Brown Jnr. Again, to further his own grievances rather than for the benefit of the employees concerned.

***General Fairness***

16 Applying the **Burchell** test, I am quite satisfied that Mr Murphy genuinely believed that the claimant was guilty of the misconduct found against him. Mr Murphy had ample material from which to reach that conclusion: not least, the detailed witness statements of Mr Butcher and Ms Jephcott and emails produced by them. I am also satisfied that Mr Alf Murphy; Mr Kevin Murphy; and ultimately Mrs Steel; between them, conducted a thorough investigation and gave the claimant every opportunity to contribute to that investigation. The claimant failed to co-operate with Mr Alf Murphy or with Mrs Steel.

***Procedural Fairness***

17 The respondent followed a fair procedure which, in my judgement, was fully compliant with the ACAS Code. Because the respondent is a small organisation; because the claimant was a senior figure within the organisation; because he worked closely with the Managing Director; and because he had a difficult relationship with the Managing Director; the decision to bring in external consultants and give them the necessary authority to conduct the investigation the disciplinary and the appeal processes was, in my judgement, sensible and within the spirit of the Code.

***Sanction***

18 The claimant was employed as a senior manager in the respondent's business. There was clearly a need for trust and confidence between him and the Managing Director. In my judgement, Mr Murphy was right to conclude that the claimant's behaviour fundamentally undermined that requirement. Accordingly, in my judgement, the decision that the claimant should be summarily dismissed was within the range of reasonable responses. It is not one with which the tribunal could interfere.

***Decision***

19 Accordingly, and for these reasons, I find that the claimant was fairly dismissed: his claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Gaskell  
4 October 2018