



EMPLOYMENT TRIBUNALS

Claimant: Mr M Diniz

Respondent: Sutton's Nurseries (2000) Ltd

Heard at: Liverpool **On:** 22 January & (in chambers) 25 May 2018

Before: Employment Judge Wardle

Representation

Claimant: In person (Assisted by Mr J Ferreira – Interpreter)

Respondent: Ms S Bibi - Counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded.

REASONS

1. By his claim form the claimant complains that he was unfairly dismissed.
2. By its response the respondent denies his complaint .
3. The Tribunal heard evidence from the claimant and on behalf of the respondent it heard from Mr Michael Francis, Director; Mr Michael Madden, Operations Manager and Mr David Francis, Retail Manager. In so far as the format of this evidence was concerned the claimant had not prepared a written statement but was permitted to rely on the grounds of his complaint as set out in his ET1 as his evidence in chief, whereas each of the respondent's witnesses gave their evidence by written statements. All written evidence was supplemented by oral responses to questions posed. In addition the Tribunal had before it a bundle of documents, which was marked "R1".
4. There was insufficient time on the day to take closing submissions and the parties agreed to submit these in writing, which was to be done sequentially, for consideration by the Tribunal. Having since had the opportunity to consider the evidence, the written submissions and the

applicable law in chambers on 25 May 2018 the Tribunal has been able to reach conclusions on the matters requiring determination by it.

5. Having heard and considered the evidence the Tribunal found the following facts.

Facts

6. The claimant, who is Portuguese was continuously employed by the respondent as a General Nursery Assistant from 25 January 2010 until 26 July 2017 when he was dismissed with pay in lieu of notice for misconduct involving disruptive and threatening behaviour.
7. The respondent is a small family-run market business operating wholesale nurseries supplying nursery stock to independent garden centres, small independent chains and landscapers nationwide. It employs about 20 people in total.
8. The events which gave rise to the claimant's dismissal unfolded as follows. On 12 June 2017 a female employee by the name of Bobbi Carlisle came to see Mr Michael Madden and Mr David Francis and advised them that whilst she was standing in the car park to Premier Plants of Ledsham (Premier Plants), which is a sister company of the respondent, on 11 June 2017 the claimant had behaved aggressively towards her by rolling down his car window and shouting at her repeatedly that she was a liar whilst at the same time threateningly pointing his cigarette towards her.
9. Prior to this Mr Nick Evans, Plant Area Supervisor with Premier Plants, had towards the end of May 2017 approached Mr David Francis to report to him that he had witnessed Mr Bernardo Diniz, the claimant's son, giving Ms Carlisle some verbal abuse. Mr Francis subsequently spoke with her and she told him that since they began working together, following his transfer from dispatch to the retail side of the business he had made threats and inappropriate comments to her on a daily basis and that one incident included physical threats of stabbing her with scissors. Having then taken advice from ACAS he spoke with Bernardo about what Ms Carlisle had reported to him and informed him that this kind of behaviour was unacceptable and that from now on they would have to work separately and were not to speak to each other.
10. The incident, which appeared to be linked to this complaint having been made, was subsequently investigated by Mr David Francis, during the course of which investigation, on his evidence, the claimant admitted to his behaviour towards Ms Carlisle, which led to the claimant being interviewed by Mr Michael Francis later that day on 12 June 2017, at which meeting he was accompanied by his son. The outcome of this meeting was that the claimant was issued with a final written warning as evidenced by a letter at page 42 of the bundle bearing the date 10 July 2017 on the basis of his admission that he had behaved towards Ms Carlisle in the manner alleged. Quite why the letter was not on the face of things prepared until 4 weeks after the meeting was not able to be answered by Mr Michael Francis. According to the letter the warning was active for a period of 12 months, although it was noted that the respondent's disciplinary procedure

at pages 62-63 provides for final warnings to be only disregarded after 2 years. The letter also made it clear that any future similar incidents of misconduct could result in his dismissal and advised of the claimant's right of appeal against the decision, which he did not take up.

11. The following day Mr Madden was made aware that Ms Carlisle had also reported the matter to the police, who attended at the respondent's premises on 14 June 2017 in connection with the complaint and who later confirmed that they had visited the claimant and his son at their home address.
12. At some point subsequently Mr Bernardo Diniz's employment was terminated for verbally abusing and physically threatening co-workers.
13. On 12 July 2017 Mr Michael Francis received a text from the claimant threatening legal action, in which he also accused him of pushing Mr Kamil Hawrylo, a Dispatch Supervisor in the business. The same day Mr Karol Roszycki, General Nursery Assistant, informed Mr Madden that the claimant had been telling colleagues the same thing. He subsequently spoke with Mr Hawrylo who dismissed the accusation and stated that he was extremely unhappy with the claimant for having made up this story. The next morning Mr Madden went to see Mr Michael Francis about the matter, who confirmed that he had no idea what the claimant was referring to and that he had received a text from him to the same effect.
14. On 20 July 2017 Mr Madden overheard the claimant talking to Leon Armour, Dispatch Manager, about the family. Mr Madden is an in-law of Mr Michael Francis. He heard him say that Michael Francis was in big trouble and that he was going to break the family and decided to intervene by asking him to stop talking about his family in this way and to carry on with his work. On Mr Madden's evidence the claimant reacted by shouting at him and calling him a liar and claimed that he had tried to make him eat dog shit, which Mr Madden stated was wholly untrue. As he was unable to diffuse the situation he decided to send the claimant home on pay for the remainder of the day.
15. After doing so he asked Mr Armour to accompany him to his office to establish exactly what the claimant had said to him, where he confirmed that the claimant had said what Mr Madden thought he had overheard. In the light of this confirmation he thought that he had no other option but to report the incident to Mr Michael Francis, who upon being told of it decided that the claimant should be suspended on pay, which he did by a letter dated 24 July 2017 at page 54, effective from 25 July 2017. In the meantime he had asked Mr Madden to carry out an investigation into the matter.
16. On Mr Madden's evidence after speaking to other members of staff it emerged that the claimant had been causing a lot of trouble within the team, which caused him to take statements from those employees who had direct day-to-day contact with him.
17. The claimant was also written to separately by Mr Michael Francis on 24 July 2017 at page 52 inviting him to a disciplinary hearing on 27 July 2017 to discuss his disruptive and threatening behaviour on 20 July 2017

following his having been issued with a final written warning on 10 July 2017. The letter also advised him that dismissal was a potential outcome and that he had the right to be accompanied at the meeting by a work colleague or union representative and referred to the enclosure of witness statements arising from the investigation.

18. On 25 July 2017 the claimant telephoned Mr Michael Francis to ask if the hearing could be re-arranged as he was in court on the scheduled date, which saw it being brought forward to 26 July 2017. It was also agreed during this conversation that the claimant's son could attend as his interpreter.
19. The disciplinary hearing went ahead as re-scheduled. It was conducted by Mr Michael Francis, who had Mr Madden and Mr David Francis present as joint note-takers and the claimant was accompanied by his son. In relation to the witness statements that had been collected by Mr Madden it was Mr Michael Francis' evidence that he gave the claimant and his son the opportunity to read these at the start of the hearing, in respect of which there is a handwritten annotation to the notes of the hearing to this effect. The statements were made by Mr Roszycki, Mr Grzegorz Kielian, Mr Armour, Mr Hawrylo and Ms Carlisle. Mr Madden had too made a statement himself. Each of Mr Roszycki and Mr Kielian recounted problems that they had had when working with the claimant stating that he was argumentative, disrespectful, abusive and threatening. Mr Armour dealt with the conversation that the claimant had had with him on 20 July 2017, in which he confirmed that he had said that Michael Francis was going to be in big trouble and that he was going to break the family. Mr Hawrylo dealt with the claimant's allegation that Michael Francis had pushed him confirming that there was no truth in it. Ms Carlisle dealt principally with the claimant's son's behaviour towards her but also confirmed the events involving the claimant on 11 June 2017 when he had been abusive and threatening towards her. Mr Madden dealt with the conversation that he had overheard between the claimant and Mr Armour on 20 July 2017 and among other things the unwillingness of other staff to work with him because of his aggressive and unpleasant attitude.
20. In the hearing the claimant asked why he had been sent home on Thursday 20 July 2017, in response to which Mr Michael Francis explained that it was because of the comments he had made about breaking the family. He proceeded to ask him why he had said this and why he had alleged that he had pushed Kamil Hawrylo pointing out that Kamil had himself confirmed that this had not happened. In response the claimant stated that it was Kamil's lie and that he had texted Michael about it because it was the same untruth that Leon (Mr Armour) was telling about his saying that he was going to break the family.
21. According to the notes Mr Francis moved on to say that he did not think that this could be resolved when he has too many members of staff saying that the claimant acted aggressively and intimidated them not once but several times, to which he responded that he did not understand why people were saying that he was intimidating, which Mr Francis answered by saying when a young girl of 18 (Ms Carlisle) cries her eyes out after you have shouted and pointed aggressively at her, she is bound to find that behaviour intimidating. He went on to say that since the incident with

her it had been reported that he had been referring to her as bitch and that he had been openly saying to staff that he was going to take him to court, which was causing problems in the workplace and which was now becoming personal with his threats to take his family apart. At this point the notes record the claimant responding "fucking shit", "fucking liar", which led Mr Francis to say to him that on a daily basis he was disrespectful and would not take it from his bosses and that despite having been given a final warning for unacceptable behaviour he would not back off or follow the rules and that unless he could convince him otherwise he had no choice, in response to which the claimant said you do what you want and that nothing that has been said was true before the meeting ended with his saying its going to court so buzz off.

22. On his evidence Mr Francis concluded that the claimant's threat to break his family was unacceptable and that the situation had deteriorated rather than improved since his being given a final written warning. He also felt that the claimant's lack of contrition suggested that there would be further altercations and abusive and threatening behaviour from him, which he could not allow to continue. He accordingly determined that the claimant's employment should be terminated but whilst deeming his conduct to amount to gross misconduct, which would have justified summary dismissal he decided that he would make a payment in lieu of notice in recognition of his hard work over the years. He communicated this outcome in a letter to the claimant dated 27 July 2017 confirming that his last day of employment was 26 July 2017 but that he would be paid his notice in lieu along with any accrued holidays. The letter also referred to the claimant's right to appeal the decision and the arrangements for this but he did not avail himself of this opportunity.
23. The claimant presented his claim to the Employment Tribunals on 18 August 2017, which was responded to by the respondent within the prescribed time-frame on 20 September 2017.

Law

24. The relevant law in relation to the complaint of unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) provides that an employee has the right not to be unfairly dismissed by his employer.
25. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and, if more than one, the principal one and that it is a reason falling within section 98(2) or some other reason of a kind to justify the dismissal of an employee holding the position which the employee held. The reasons contained in section 98(2) include the conduct of the employee. Section 98(4) provides that where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 this shall be determined in accordance with equity and the substantial merits of the case.

26. The Tribunal also had regard to the principles laid down in *British Home Stores v Burchell* [1978] IRLR 379 and *Polkey v AE Dayton Service Limited* [1988] ICR 142 HL. In the *Burchell* case the EAT set out a three stage test in cases of dismissal for misconduct. The employer must show that he had a reasonable belief based on reasonable grounds after reasonable investigation that the employee was guilty of misconduct. He need not have conclusive proof of the employee's misconduct only a genuine and reasonable belief, reasonably tested. For a dismissal to be procedurally fair in cases of misconduct it was said in *Polkey* that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.

Conclusions

27. Applying the law to the facts as found the Tribunal reached the following conclusions. It considered first of all if the respondent had demonstrated a potentially fair reason for the dismissal of the claimant. The reason relied upon by it was conduct namely that despite being on a final written warning for having behaved in an intimidating and threatening manner towards a young female employee he had been overheard threatening to break the family that ran the business in which he was employed.

28. In regard to the final written warning the Tribunal took account of the guidance given by the EAT in *Wincanton Group PLC v Stone* [2013] IRLR 178 as to how tribunals should handle the situation of prior disciplinary warnings noting that they found that in the case of a final written warning the usual approach would be to regard any further misconduct as usually resulting in dismissal, though not necessarily inevitably so, whatever the nature of the later misconduct and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often usually be met with dismissal and that it is likely to be by way of exception that this will not occur. The EAT went on to say that tribunals should take into account the fact of the warning, the fact of any proceedings that may affect the validity of that warning such as an internal appeal, but should not go behind the warning to hold that it should not have been issued at all or should not have been issued as a final written warning unless a tribunal is satisfied as to the invalidity of the warning i.e. that it was manifestly inappropriate or oblique.

29. Having regard to the circumstances in which the claimant's final written warning came to be issued where he admitted to having behaved in an intimidating and threatening manner towards Ms Carlisle the Tribunal did not consider that this final written warning was an invalid one as being neither manifestly inappropriate or oblique.

30. This led the Tribunal on to apply the *Burchell* three stage test to the finding that Mr Michael Francis made in respect of the further misconduct committed by the claimant, which gave rise to his dismissal. In this regard the Tribunal concluded that Mr Francis did genuinely believe that the claimant had issued the threat that he was going to break his family. The facts of the matter were that both Mr Armour and Mr Madden gave unequivocal evidence of what they had heard and that it was clear that the

claimant had said something on 20 July 2017 as otherwise Mr Madden would not have seen fit to intervene in the conversation and to send the claimant home for the rest of the day.

31. It next concluded that Mr Francis had reasonable grounds for his belief and that at the time he formed it there had been carried out a reasonable investigation. It did so because the documents show that following the overhearing of the remarks on 20 July 2017 steps were taken immediately to get Mr Armour to relate what the claimant had said during their conversation, which confirmed what Mr Madden had heard and then to provide a signed statement, which demonstrated that the claimant had a case to answer; that the claimant was given notice of the allegation against him in the invitation letter to his disciplinary hearing, enclosed with which were copies of the statements that the respondent had obtained in support of the allegation; that with reference having been made to his being on a final written warning he was warned of the possibility of his dismissal and that at his disciplinary hearing at which he was accompanied by his son he was given the chance to say what he wanted to say in explanation or mitigation of his conduct, which was essentially that the case against him was a conspiracy of lies.
32. The next question for the Tribunal was whether the respondent was reasonable or unreasonable in treating such misconduct as sufficient to justify the claimant's dismissal. In answering questions of fairness the Tribunal continued to have regard to the terms of section 98(4) ERA and it strove not to substitute its judgment for that of the respondent. The issue for it throughout was not whether it would have done as the respondent did but whether its actions fell within the range of options reasonably open to it. Having approached the question in this way the Tribunal concluded that dismissal was a penalty that was reasonably open to the respondent in that the claimant had been freshly and finally warned about his intimidating and threatening behaviour and yet within a matter of days he was heard making a threat about breaking the family that employed him through their business, which they were entitled to treat seriously
33. The Tribunal therefore concluded that the claimant's complaint of unfair dismissal is not well-founded, fails and is dismissed.

Employment Judge Wardle

Date 1 June 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
27 June 2018

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FOR EMPLOYMENT TRIBUNALS