



aggressive behaviour towards other members of staff in particular a female and on occasion behaving in an aggressive and intimidating way to his work colleagues.

3. It should be stated at the outset that as this troubling case progressed it became apparent that the Claimant was not in the best of mental health.

### **The Issues**

4. When consideration was given to the issues it became apparent that the issue whether the dismissal was for a potentially fair reason was not straightforward. The Claimant made clear that although the Respondent contended the reason was conduct the Claimant considered the true reason for his dismissal was that his brother wished to have him removed from the work place and that a conspiracy had taken place to bring his employment to an end.

5. I explained that further issues arose after the reason had been established, namely:

Did the Respondent act reasonably in treating the reasons shown as sufficient to dismiss the Claimant?

Did the Respondent honestly believe in the misconduct alleged?

Was that belief on reasonable grounds?

And were the grounds supplied after such investigation as a reasonable employer would undertake?

Was the sanction of dismissal within the band of reasonable responses to the misconduct identified?

If the dismissal was procedurally unfair was there a probability that a fair dismissal would have resulted?

Did the Claimant contribute by his culpable conduct to the dismissal if it was found to be unfair?

6. The Claimant is an aware and intelligent individual who readily understood these issues and accepted my point that this was a troubling and difficult case because of the interaction between the family issues and difficulties which had arisen at the employment.

### **The Evidence**

7. I heard evidence from the Claimant and on the Respondent's side from the Managing Director, Mr Jarle Tatt from the appeal manager, Mrs Diane Tatt and also from the investigation manager, Mr Richard Parsons.

8. I made the following findings of fact.

### **Findings of Fact**

9. It is clear from the evidence of the Managing Director, Mr Jarle Tatt that the Respondent is a long established family business publishing greeting cards. The Claimant was employed on a temporary basis from 6 July 2015 to 22 December 2015. In light of his satisfactory performance he was taken on as a permanent member of staff from 1 January 2016 and remained in employment until dismissal on 4 October 2017.
10. The Claimant was employed after an interview and taken on initially for seasonal work on a temporary basis. The Claimant's brother, who is a permanent member of staff, asked if the Claimant could be taken on permanently. Mr Tatt said that the he spoke to Mr Luke Ansell to ask him to be understanding as warehouse manager because working with family was difficult. The Claimant was also required to accept that his younger brother was his manager while at work and he would need to be treated as such.
11. The Claimant was supplied with a full set of contractual documentation and an employee handbook found in the bundle. In March 2017 the Claimant was awarded a pay increase of 40 pence per hour on the annual pay review. Mr Tatt commented that the Claimant could be an asset to the business, but he had let his personal life interfere and this affected his performance. The Claimant had been, in Mr Tatt's word, moaning to colleagues about his brother and his job and indicated he was interviewing for other jobs and was going to leave. The Claimant asked if he could move departments. Mr Tatt told him there was nothing available at that time and the only possibility also fall under the remit
12. A disciplinary charge was brought against the Claimant which came to hearing on 11 August 2017 in relation to failure to carry out instructions given by his manager for work while the manager was on holiday on 4 August 2017 and rudeness to the manager on being asked why the instructions were not carried out on 7 August 2017. There had already been an investigation meeting on 9 August 2017, the notes of which were provided to the Claimant together with a statement from his Manager, Mr Luke Ansell. The Claimant referred to having made complaints on earlier occasions about his brother, but Mr Tatt said that nothing had subsequently been escalated to management or put in writing.
13. At the meeting the Claimant agreed he had not carried out instructions which had been given to him. He said this was because he felt he was unwell and unable to carry on with his duties but had not informed his supervisor that he felt unwell due to his recent sickness record. Mr Tatt explained that the Claimant was under an obligation to follow the reasonable instructions of his manager. If he had personal issues which made him feel he could not carry out the instruction he should have raised that with the supervisor or management. The Claimant argued that his rudeness to his manager was in response to the manager's unacceptable behaviour towards him. Mr Tatt did not accept this because Luke Ansell had been on leave on the date referred to. If Mr Luke Ansell was not present then the Claimant could have taken the opportunity to raise this with another.

14. Mr Tatt wrote to the Claimant with the outcome of the disciplinary process on 18 August 2017. Nothing had been found to substantiate the Claimant's accusations and his allegations did not excuse his actions. Mr Tatt had already spoken to the Claimant about his attitude informally without any change in the Claimant's approach. He considered his conduct required a final written warning which would remain on his file for 12 months. The letter of 18 August 2017 made clear that if there was any repeat of this conduct or any other misconduct in general within the next 12 months the Claimant may face further disciplinary action. That further action could lead to dismissal. The Claimant was advised of his right of appeal to the Finance director but did not appeal the final written warning.
15. A further disciplinary charge arose against the Claimant which resulted in a meeting on 4 October 2017. The Claimant was provided with statements from Charlie Holmes and Dominic Barratt regarding the incident and notes from the investigation meeting. There was also a statement from Mr Luke Ansell which Mr Tatt discounted because of allegations raised by the Claimant about him. The Claimant was asked if he had any statement from witnesses to corroborate what he was saying about his treatment by Mr Luke Ansell. The Claimant said he would "save that for the appeal." The Claimant was charged with unacceptable bullying, intimidation and aggressive behaviour towards other members of staff having shouted and sworn at Charlie Holmes (a female) causing this employee upset and distress and behaving in an aggressive and intimidating way towards work colleagues. The Claimant was alleged to have sworn at Charlie Holmes and said he would punch her in her face. The Claimant accepted he had said that but that everyone swore in the warehouse and as a joke.
16. Dominic Barratt complained that the Claimant had behaved aggressively and had broken the enter key on the Respondent's keyboard. He had also thrown paperwork around. The investigation appeared to corroborate that the Claimant had driven a forklift truck in an aggressive manner and stopped close to where another employee was operating at pallet truck which caused that employee to shout at the Claimant. The Claimant was difficult to control in the meeting of 4 October 2017. He interrupted, and Mr Tatt had to threaten to terminate the meeting to obtain order. He became aggressive during the meeting and threatened to use evidence against his brother. The Claimant accepted he had mood swings because of his mental disability.
17. On 5 October 2017 Mr Tatt wrote to the Claimant. He set out the allegations which were being considered. He stated that he found the Claimant's explanation unsatisfactory, namely that staff had been put up to make allegations which were fabrications. His reasons for that finding was that Charlie Holmes had produced a witness statement to say that the Claimant had sworn at her and caused her upset and distress. Mr Tatt said it was unacceptable for the Claimant to behave in such a way towards another member of staff and the company would not tolerate it. There was no basis for suggesting she would make up such an allegation and she was clearly upset. There was evidence that the Claimant was aggressive and intimidating towards work colleagues on 22 September as stated in Dom Barratt's and Charlie Holmes' witness statements which contradicted the

comment that the incident did not happen. There was no evidence to support the allegation that the statements were fabrications. Since the Claimant had a final written warning on his file the disciplinary process had been exhausted and the Claimant was dismissed with notice. He was entitled to one's month notice and was released from the obligation to work his notice and pay the lieu thereof, his last working day being 4 December 2017. He was also paid in respect of accrued holiday remuneration in his final payment on 15 October 2017. The letter reminded him of his right to appeal.

18. In a letter dated 9 October 2017 the Claimant appealed. He stated the allegations were false and fabricated. Comments made in confidence had been twisted and changed to make it seem if he was disrespecting the company. The Claimant accepted he had issues with his brother during his employment and he had tried on occasion to rectify these problems. He had been given no real assistance from management. He had asked to move departments to avoid further incidents. He obtained personal statements from several other members of staff who confirmed his side of the story. He was unwilling to name these witnesses at this point. He had made several complaints about his brother to the management and none of them had been followed up. He had complained to his brother about another member of staff and nothing had happened. He considered his brother had been bullying him and made inappropriate comments towards him.
19. Mrs Dianne Tatt, who was also a director, heard the Claimant's appeal. Mrs Tatt wrote to the Claimant on 10 October. She asked for further written details of the grounds of appeal. She asked for the statements mentioned in the second paragraph of the Claimant's letter and the documentation in relation to the complaints to the company about Mr Luke Ansell and the other member of staff mentioned. She also asked for documentation outlining the bullying and inappropriate comments of Mr Luke Ansell towards the Claimant in respect of which the Claimant said he had evidence.
20. The appeal meeting took place on 23 October 2017. Mrs Tatt was present with a note keeper and the Claimant was present. The Claimant did not indicate any difficulty with Mrs Tatt conducting the meeting. The Claimant had not provided documentation from other employees and indicated he did not wish to do so in case this jeopardised their jobs. The Claimant supplied screenshots of the abuse he said he had received from his brother. In the course of the appeal the Claimant confirmed to Mrs Tatt that the process which was used in relation to his dismissal was fair. The Claimant argued that before Christmas (presumably 2016) when his brother was aggressive towards him, and the Claimant had asked who he could go to about his brother's behaviour, his brother had said: "None. You come to me". When asked if the Claimant was treated differently from others by his brother Luke the Claimant responded that he was not treated the same way as others, but Luke would shout and swear at him sometimes and that everyone swore downstairs (presumably in the warehouse). The Claimant said he had spoken to the Managing Director on one occasion about Luke's aggression towards him. Mr Tatt had said he would look into it, but the Claimant had never been told if something had been done or not. The Claimant said he

had spoken to the finance director about moving departments in the investigation meeting. When asked what outcome he sought the Claimant informed Mrs Tatt that he could not come back to work. Luke Ansell had admitted making it perfectly clear to him that he had no brother any more. The Claimant told Mrs Tatt that if Luke and he had sat down together in a meeting they would have been able to sort things out. The company could have helped.

21. Mrs Tatt asked about corroboration in relation to Luke's aggressive behaviour towards him. The Claimant said he did not wish to put the witnesses at risk. At this point the Claimant gave Mrs Tatt names of Belinda Allen, Rob Doyle, Bret Marshall, Josh Thompson and Ray Dunsby.
22. The meeting then concluded.
23. Mrs Tatt interviewed the named employees. Mr Marshall said he had not witnessed anything, but the brothers had clashed from the start. The Claimant had moaned to Mr Marshall about his brother. Mr Luke Ansell could be less polite to the Claimant than others.
24. Belinda Allen was interviewed. She said she witnessed aggressive behaviour towards the Claimant. The two brothers had been fine towards each other to begin with, but this had changed as time went on. Luke Ansell picked on the Claimant sometimes. He would make it harder for him. He would give him jobs and picked fault with his work. He had not witnessed anything physical but had seen verbal aggression. Luke would shout at him a lot. He would also "slag him off" behind his back to other members of staff which she felt was not right as he was the manager of the department. Rob Doyle could not understand why his name would have been mentioned.
25. John Thompson told Mrs Tatt that he had not witnessed anything. He was friends with the Claimant outside the office. He did not think that the two brothers had a good relationship and it had been better before.
26. Mr Ray Dunsby said he had not witnessed anything between Luke and Jack and he had not have any dealings with Jack.
27. Mrs Tatt then spoke to Dominic Barratt and Charlie Holmes who had made the allegations in the first place against the Claimant which he said were fabricated and the two individuals were coerced into making the allegations by Mr Luke Ansell.
28. Mr Barratt said that he had not been put under any pressure to make the allegations. On Saturday while doing overtime he and Charlie Holmes had decided they needed to put in a formal complaint about the Claimant after the incident the previous night. Mr Barratt felt that Luke Ansell approached his brother in the same way as everyone else. He had witnessed the Claimant's mood swings and said that if the Claimant was irritated or moody this would affect his forklift driving and his attitude to everyone else in the department. His mood would make days difficult and it was much better now that Jack was not around.

29. Charlie Holmes said she had not made any complaint under duress. She had talked it over with Dominic Barratt and decided to put in the complaint. She had not witnessed any aggression between Luke Ansell and the Claimant. The Claimant could be aggressive if he was in a mood.
30. Mrs Tatt produced a 3 page report into the appeal. She recorded the evidence received and faithfully recorded her interviews with the other members of staff. Her conclusion was that the process of verbal and written warnings had been carried out within the correct time scales. She had been presented with no corroborative evidence of the accusations made by the Claimant and no verbal evidence of the witnesses corroborated the accusations. She did note that Belinda Allen remarked that at the times Mr Luke Ansell's management skills towards his brother were lacking in the work place. Having established that the statements of evidence provided for the dismissal were not taken under duress or influence in any way she concluded the appeal was to be dismissed.
31. The grounds of appeal were recorded in the outcome letter of 27 October 2017. Mrs Tatt stated that the grounds of appeal were that the Claimant had suffered verbal abuse and intimidation from his immediate manager, Mr Luke Ansell, that senior management had not dealt with the situation to resolve it when it first started, and the intimidation had continued through the supporting statements of staff who had been coerced in their allegations. She noted in relation to first allegation Rob Doyle, Ray Dunsby, Brett Marshall and Josh Thompson had all said they had no direct evidence of verbal abuse of the Claimant by Luke Ansell. She noted that Belinda Allen felt there were issues in the brother to brother relationship between the Claimant and Mr Luke Ansell and that Luke had been harder on the Claimant than on other employees. She said Mr Luke Ansell had not tolerated the Claimant's mood swings and open disrespect of Mr Luke Ansell and senior management very well. She felt the relationship was very fraught and that Luke Ansell was overly critical and had possibly not handled the situation well.
32. I observed at that point that although Belinda Allen paints a picture of a far from satisfactory relationship personally and in the work place she does not contend that there was duress on any individual to complain or that a conspiracy was created by management to dismiss the Claimant.
33. In relation to failure by senior management to deal with complaints Mrs Tatt found that the option to move the Claimant to another department had been explored but no alternative area work wished to work with the Claimant due to his dramatic moods swings and continued adverse comments which were said to cause an uncomfortable working environment considered to be unbalancing for the existing workforce. This information was not supplied to the Claimant as it was considered it would have been even more inflammatory. Mr Luke Ansell had been spoken to at length and since on very informal investigation others had not corroborated the Claimant's accusations it was considered formal action would not be taken. In relation to the allegation that intimidation had continued through the supporting statements of staff who had been coerced into making allegations Mrs Tatt

found no basis for this suggestion as both Dominic Barratt and Charlie Holmes had both expressly rejected the statement.

34. Mrs Tatt's evidence was that she gave very serious consideration to the points raised by the Claimant in his appeal but could find no reason to overturn the decision. Verbal and written warnings had been carried out within the correct time scale and were lawful. The allegations made against the Claimant leading to dismissal were fully set out and established and the appeal consequently failed.
35. The Claimant's evidence does not deal in detail with the allegations which led to the dismissal.
36. His primary focus is on a failure of the Respondent to achieve a satisfactory working relationship between the Claimant and his brother. The Claimant recounted raising his concerns with HR and things improved for a while but then it began again.
37. He said he also spoke to Mr Jarle Tatt, the Managing Director in person to say that he was not happy with the way that his brother was treating him. Mr Tatt had said: "If you feel there is a problem we will deal with it".
38. The evidence of Mr Tatt was clear that the initial step was to raise these matters and to seek informal resolution. He had spoken to Luke Ansell. The Claimant indicated that matters had improved for a period. If the improvement was not permanent than the Claimant should have at that point have escalated matters into a formal procedure in writing. Those are the finding of fact.

### Submissions

39. The Claimant did not make a submission. The Respondent gave oral submission setting out the history of the dismissal. Reference was made to the terms of the contract and the employee handbook. In relation to the dismissal for misconduct there have been no challenge to the belief of the decision makers in the misconduct alleged. This was following a reasonable investigation. The Claimant had a final written warning, which was not appealed, on his file. There were further serious findings about conduct and in the circumstances the decision to dismiss fell within the band of reasonable responses. The representative referred to some of the leading authorities, **Post Office v Foley** and **Madden**. There had been a reasonable investigation and the Claimant accepted what had taken place. He did not allege his actions were in jest. There were viewed as threatening by others. Dismissal was a fair sanction. If there was any unfairness the Claimant had contributed to the tune of 100% to his dismissal and if there was procedural unfairness a fair procedure would surely have resulted in dismissal.

### The Law

40. In accordance with section 98 of ERA 1996 in determining whether a dismissal is fair or unfair it is for the employer to show the reason of if more

than the principal reason and that it is one of the potentially fair reasons. The relevant reason in this case is the conduct of the employee which is a potentially fair reason.

41. It is then for the Tribunal to decide with a neutral burden of proof whether the dismissal is fair or unfair having regard to the reason shown by the employer. The decision depends on whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating the reason shown as a sufficient reason for dismissing the employee and that question is to be determined with accordance with equity and the substantial merits of the case.
42. In conduct dismissals the Tribunal considers, again with a neutral burden of proof, whether the decision makers formed an honest belief in the misconduct alleged, whether such belief was formed on reasonable grounds and whether the grounds were identified after such investigation as a reasonable employer would undertake. The range of reasonable responses test is applied to each component of those three points identified. Finally, the Tribunal considers whether dismissal is a sanction which falls within the band of reasonable responses to the misconduct identified. The Tribunal has jurisdiction to reduce an award whether a basic or compensatory award on the grounds that there is contributory conduct on the part of the Claimant which is culpable and also to reflect the probability of a fair dismissal occurring in the event that the dismissal is found to be unfair on procedural grounds.

## **Conclusion**

43. Applying those provisions to the circumstances of this case I was struck by the evidence given by Mr and Mrs Tatt in relation to their approach to the circumstances of this case. In particular, Mr Tatt was candid in his acceptance that on occasions swearing does occur in a warehouse environment. Potential difficulties were identified at the outset of the employment of the Claimant in a post subordinate to his younger brother. Further discussion on the issue took place at the time of his pay award. When the Claimant complained about his brother Mr Tatt spoke to Luke Ansell and for a time the situation improved in the fraternal relationship at work. The Claimant said it then deteriorated but he did not return to Mr Tatt.
44. The Claimant has accepted with courage and honesty the mental health issues with which he has had to deal, and which have caused him some difficulty in the context of his employment. Mr Tatt for his part has a realistic and practical approach to the strains which family life may impose on relationships. He acknowledges that as a family company the Respondent has been aware of these. It is clear that the Claimant was in need of employment on a seasonal basis when he joined the Respondent and the potential difficulties which might arise were mentioned at the time he was taken on as a permanent employee and underlined subsequently at a time when despite some concerns regarding his performance and relationships he was awarded an annual pay rise.

45. Regrettably, poor relationships and insubordination led to a warning which was not challenged by the Claimant and which was recorded as a final written warning. A reasonable instruction had been ignored. That causes a potentially insuperable problem to an employer. Subsequent reports within two months indicated that the Claimant had threatened physical violence to a female employee and had driven a forklift truck in an aggressive and potentially dangerous manner.
46. The Respondent did not consider this to be a gross misconduct dismissal and was prepared to pay the Claimant his notice, although not prepared to have him work his notice. It is difficult to see where this employer has stepped in any way outside the band of reasonable responses.
47. Applying the particular legal provisions, the decision makers at dismissal and appeal level formed a belief in the misconduct of the Claimant upon the information of the two individuals who provided statements. There is nothing to suggest that those actions were some form of conspiracy orchestrated by Mr Luke Ansell to procure the dismissal of the Claimant. While the complainants spoke to each other they were not agreeing to make false allegations but rather deciding that a point had been reached where action had to be taken. The two individuals had their own good reasons for raising with management their concerns in relation to the Claimant in particular in relation to the possibility of injury occurring as a result of his actions. There has been no challenge to the investigations undertaken by the Respondent which were thorough and careful. The belief of the decision makers was formed on reasonable grounds being the product of those investigations.
48. Given that the Claimant already had a final written warning on his file and the seriousness of the misconduct identified it is difficult to see how the sanction of dismissal would not had been available to the Respondent. Indeed, it could be argued that without a final written warning dismissal may well have been appropriate in particular in the context of aggressive driving of a forklift truck.
49. It follows that the Respondent has demonstrated a potentially fair reason for dismissal and that reason is sufficient to justify the dismissal in accordance with section 98(4). The Claimant's claim therefore fails, and it is dismissed.
50. In the event that I am incorrect in that conclusion and the case falls to be considered in the context of contribution I would find given the serious and repeated offences the level of contribution must be 100%.

Regional Employment Judge Hildebrand

Date 9 November 2018

