

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100803/17

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Held in Glasgow on 21 November 2017

Employment Judge: J M Hendry (sitting alone)

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Mr Andrew Taylor

**Claimant
In Person**

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Timbmet Ltd

**Respondents
Represented by:
Ms W Gillan - HR**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed from his employment by the respondents and that a remedy hearing will be assigned for a date to be afterwards fixed.

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REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a Timber Checker. He alleged that although he had
35 accepted striking a colleague it had been the colleague that had been the aggressor. He argued that the dismissal was procedurally unfair as he had not been allowed to see witness statements or to question witnesses at the disciplinary hearing. He also alleged that his employers had taken a different attitude towards his behavior than that of his work colleague who faced no

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action. Further he alleged that he had not been given an appeal hearing following his dismissal.

2. In response, the respondent's position was that the claimant had been properly/fairly dismissed for gross misconduct. They argued in the ET3 that witness statements were not given to him because of "*fear of reprisal*" and their position was that a full investigation had been undertaken and that their response in taking no action against the other party involved in the incident was appropriate. In their view, they had acted on the evidence available. Independent parties had conducted both in disciplinary and appeal process.
3. The Tribunal heard evidence from two witnesses. The claimant gave evidence on his own behalf and Mr Cameron Frame, the respondent's disciplining manager gave evidence on behalf of the company.
4. The Tribunal considered the document bundle lodged by the respondents Jb1 – 64.

Facts

5. The claimant was employed by the respondents as a Timber Checker from 6 October 2014 until his summary dismissal on 6 March 2017.
6. The claimant had a clean disciplinary record.
7. The claimant was contracted to work 30 hours per week. His monthly pay was £1,324.50 gross and £1,143.21 net.
8. The claimant was subject to the respondent's disciplinary policy of which he was aware (JB31)
9. In early 2017 a number of employees at the respondent's timber yard discovered an 'App' that would allow them to make prank or hoax phone calls

to colleagues. The call would sound official and claim that a parking ticket or something similar was unpaid.

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10. One of the claimant`s colleagues William (Billy) Masson who was a Mobile Plant Operator was amongst those who became aware of this. He could not get the App to work. The claimant decided to use the App to make a prank call to Mr Masson`s house. Other employees in the yard were also engaged in this behavior. The claimant duly made a prank call to Mr Masson in the afternoon of 15 February 2017.
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11. Mr Masson starts work at 7am. The claimant starts work at 8am but usually gets into the yard at about 7.30am and goes to the canteen for something to eat.
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12. On 17 February 2017 the claimant went to the canteen as usual. He noted that the chair that he usually sat on had been moved and knocked over. He sat down. Shortly after this Mr Masson appeared in the canteen. He was very angry. He was shouting and swearing at the claimant. He blamed the claimant for a prank call that had occurred during the night. The claimant began explaining that he had not made that call. Mr Masson was not prepared to listen to any explanation. He called the claimant "*a fucking idiot*". Mr Masson also said that he and his brother would deal with the claimant. There was a confrontation with both men shouting at each other. The claimant was still seated. Mr Masson was shouting he was going to kill the claimant and punched him on the shoulder. The claimant fearing that he was going to be assaulted further stood up and retaliated by punching Mr. Masson twice. At this point another employee Kate Brown entered the canteen and pulled Mr Masson away. She witnessed the claimant hitting Mr. Masson but not the earlier assault. She then took Mr Masson to the office belonging to Graham
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- Tennant, a Manager, who was told about the incident.

13. Mr Tennant and another employee Donnie McLean approached the claimant and suspended him. They told him to leave the yard. The claimant asked why Mr Masson was being suspended and was told
- 5 14. Mr Tennant carried out an investigation. The claimant was suspended. Mr Masson denied that he had punched the claimant.
15. The respondents arranged for statements were taken from Kate Brown, a Cleaning & Catering Assistant (JB32-33), Billy Mason (JB34-35) and from the claimant (JB42). A statement was also obtained from Graham Rose (JB43).
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16. The respondents disciplinary policy defines gross misconduct (Jb40 at paragraph 9.1) as:-
- 15 *“Gross misconduct is misconduct of such a serious fundamental nature that it breaches the contractual relationship between employee and the company. An employee who is accused of or is suspected of gross misconduct will normally be suspended from work on full pay while the company investigates the alleged offence. If, however, the investigation and disciplinary meeting, the company is satisfied that gross misconduct has occurred it will be entitled to terminate summarily the employee`s contract (without notice or any payment in lieu of notice)”.*
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- 25 17. Examples of gross misconduct are given in the policy and 9.3. it is stated *“physical violence, fighting or assault (including verbal) or threatening behaviour towards another person can be gross misconduct.”*
18. The claimant gave a statement on 20 February 2017 (JB42). As he mentioned in the statement a colleague, Graham Rose, that had spoken to Mr Masson early in the morning of the incident a statement was also taken from him. Mr Rose`s statement was to the effect that Mr Masson was looking for the claimant early on 16 February 2017 because he thought he was behind a
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prank call made to his house in the middle of the night. Mr Rose described Mr Masson as being "*in a rage*", he shouted to Mr Rose that he had better warn the claimant not to come in to work because he was going "*batter him*". Shortly after that he was again approached by Mr Masson who once more told him to tell the claimant not to come near his work as he would batter him. He said that he had thrown the claimant`s chair across the canteen due to his anger.

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19. A short time after the incident the claimant spoke to a worker, Mr Rose and told him that Mr Masson had thrown a punch at him.

21. Mr Tennant prepared an investigation report (JB44-47) and also concluded that the claimant should be disciplined.

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22. The respondents wrote to the claimant on 25 February 2017 (JB48) inviting him to a disciplinary hearing on 28 February 2017. The disciplinary hearing was dealt with by Mr Cameron Frame. He had not previously been involved in the matter. He was the Head of Sales. He has not conducted many disciplinary hearings previously.

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23. The claimant was accompanied by a work colleague. The meeting took about 15 minutes. His responses were noted to questions put to him (JB49). The claimant was asked if he had anything to add to his statement. He indicated that he didn`t. He confirmed that he had punched Mr Masson. He was asked what had started the matter and said there was an App for making prank calls and that it had got out of hand. The claimant said Mr Masson had called him on his phone on his way to work. The meeting ended with Mr Frame advising the claimant that he would be discussing the matter further and he would be contacted in due course.

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24. Mr Frame took advice from the HR Department about the matter. He then wrote to the claimant on 6 March 2017 confirming that he was dismissed. Because of his conduct the letter stated:-

5 *"I opened the hearing by confirming the reasons for the hearing as set out in my letter to you dated 22 February 2017. There was an altercation and argument between yourself and Billy Masson on 6 February 2017. You were witnessed punching Billy Masson in the face and back of the head.*

As detailed on the disciplinary procedure physical violence, a fight or assault will not be tolerated in the workplace.

10 *I understand that you have an app on your mobile phone for prank calls and were party (possibly with others) of making prank calls. On the evening of 15 February 2017 a prank call was made to Billy Masson`s ex-directory home telephone number.*

15 *I understand that Billy Masson called your mobile number on the morning of 16 February 2017 and explained that he was upset and angry about the prank calls he had received the previous evening.*

20 *At approximately 7.30am you were in the canteen area at Glasgow, Billy Masson entered the canteen and an argument appears to have taken place between yourself and Billy Masson regarding the prank telephone call Billy received the previous night.*

25 *Your statement regarding the incident that took place on 16 February 2017 between yourself and Billy Masson is significantly different to Billy Masson`s.*

30 *You confirmed that the incident started with Billy entering the canteen, walking towards you shouting. Billy then `took a swing at you` while you were sitting at a table. You then confirmed that you stood up and punched Billy Masson twice.*

5 *Mr Masson`s statement confirms he entered the canteen, walked up to you at which point an argument took place. Billy shouted `you know Mary is unwell, I`m sick of it, you`re taking a rise out of me at work and even at home now`. Billy confirms he turned round as the canteen door opened. At this point you got up from your chair and punched him at the side of the face and back of the head. I explained in the hearing that your statement and Billy Masson`s vary, however, you confirmed that you did punch Billy Masson twice and this was also independently witnessed. I asked if you had any additional points you wanted to raise and you confirmed that you did not... In arriving at the decision to dismiss you due to gross misconduct I carefully reviewed all the information including the statements, the disciplinary policy and your representation. As detailed from the company disciplinary policy at 9.2.3 physical violence, fighting or assault towards another person cannot be tolerated in the workplace and constitutes gross misconduct.”*

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25. The claimant was told he had the right to appeal.

20 26. The claimant exercised his right of appeal (JB54). The matter was passed to Sean Sullivan, the Training Director based in Oxford. The claimant sent an amended statement to him (JB57) which included information that a member of staff had said that Mr Masson said that he should watch his back and was going to get someone “to kick my head in”. He indicated that the Mr Masson punched him on the shoulder and threatened him.

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27. Mr Sullivan did not hold a hearing nor did he make any further investigations into the matter. He wrote to the claimant on 16 March 2017 upholding the dismissal.

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Witnesses

28. I found the Respondent's witness Mr Frame to be an honest and straightforward witness who was also reliable witness. Although Mr Frame professed to have some experience of disciplinary matters his understanding of his role was perhaps limited.

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29. The claimant was generally a credible and reliable witness although I did not fully accept some of his evidence which was a little self-serving in relation to his dispute with his colleague.

10 **Submissions**

30. The submissions were straightforward. Ms Gillan asked me to find Mr Frame a credible witness. Her position was that the dismissal followed a fair investigation and the penalty was within the band of reasonable responses. If the dismissal was held to be unfair then her position was that the claimant had contributed to the extent of 100 5 to his dismissal and should receive no compensation. His actions had directly led to the confrontation with the claimant's colleague Mr Masson.

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20 31. The claimant felt he had been singled out and treated differently from Mr Masson. He did not accept that either the investigation or the disciplinary hearing was fair. His actions were taken in self-defence and under considerable provocation.

25 **Discussion and Decision**

The Reason for Dismissal

32. The first matter for the Tribunal to consider was whether it had been satisfied that the reason for the dismissal was one of the potentially fair reasons in Section 98(1) or (2). In this case the respondents said that it was the claimant's conduct, so that it was for them to show that misconduct on his part was the real reason for dismissal, i.e. under Section 98 (2)(b) of the ERA.

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33. In the circumstances I am prepared to accept that the reason for dismissal was misconduct and what they had in mind at the time of dismissal was that the claimant had admitted punching Mr Masson and that the dismissal,
5 “*related to the conduct of the employee*” – Section 98(2)(b).

Section 98(4) ERA

34. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal related to
10 conduct of an employee, frequently involves consideration of the adequacy of the employer’s investigation into some alleged wrongdoing and thus whether a reasonable employer could have concluded that he was guilty, i.e. the **Burchell** test.

36. Another frequent issue for an Employment Tribunal is as to whether the employer has adopted a fair procedure throughout a disciplinary process. No disciplinary process is perfect and the respondents here did try and carry out an investigation by taking statements.
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37. The difficulty arose when the claimant was not allowed to see the statements that had been taken even the one from Mr Rose, the witness he had suggested should be interviewed. The difficulty that then posed for him was not merely procedural in nature. He did not know exactly what was being said particularly about the surrounding circumstances leading up to the incident
20 nor what was being said in relation to earlier events by Mr Masson. It did not make for a transparent process. It also shortened the disciplinary hearing as the claimant had little to say other than Mr Masson attacked him first.

38. The reason advanced in the ET3 for this state of affairs was that there was a fear of reprisals against those that made the statements. There is no doubt that ill-feeling, on both sides, was engendered by the incident but the respondents led no evidence as to what the basis for that fear was nor was it
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clear who had made this decision or what basis they had for making it. It was apparently not Mr Frame the only witness who gave evidence on their behalf.

5 39. The back ground was that the claimant knew perfectly well who was likely to have given a statement namely Mr Masson, Kate Brown (who he saw) and Mr Rose. He was not aware if other statements had been taken. There was no evidence of the claimant expressing any hostility towards Ms Brown. He was not sure when she had come in or what part of the confrontation she had witnessed. I was not convinced, nor to be fair did the respondents try to
10 convince me, that there was any basis for withholding the statements. In terms of the ACAS Code on Discipline and Grievance at Work it is normal to provide witness statements to someone facing disciplinary proceedings although I accept that there can be situations where this custom is not followed.

15 40. The fact that the statements were not handed to the claimant impacted upon the disciplinary hearing and it was unfortunate that Mr Frame did not spend more time asking the claimant to comment on the detail contained in those statements and ascertaining his position. It is also unfortunate that the
20 claimant was not given an oral hearing by Mr Sullivan or that he made further enquiries into the background events and possible threats made to the claimant but these difficulties were apparent before the appeal and were certainly not cured by it.

25 41. The second reason that the dismissal appears unfair to the Tribunal is that however, well -meaning Mr Frame approached the matter in too simplistic a way. It would have been open to him, after hearing the witnesses evidence, and their response to any questions posed to them by the claimant or by
30 himself, to have rejected the claimant's version of events perhaps in its entirety. He did not attempt to do so. He made no further enquiries into the matter nor did he consider the background events including the various alleged threats. His evidence was very clear on the matter. He found that as

the claimant had struck Mr Masson then by that very fact alone it must be gross misconduct and dismissal must be the only response. He did not, despite the availability of HR advice, seek to assess the whole situation including any apparent mitigation. He accepted in evidence that he had not
5 taken account of the earlier matters which in hindsight he accepted might have provided the claimant with powerful mitigation for his actions and led him considering a lesser penalty. Crucially in the Tribunal's view he came to no conclusion as to whether the claimant was correct that he had been punched or struck first or had a reasonable apprehension he was going to be
10 struck and whether the evidence of Mr Rose that Mr Masson was in a rage might support the claimant's evidence as being more likely than Mr Masson's. He also conceded that if he had come to this view then that might have provided substantial mitigation justifying a lesser sanction.

15 42. What was disappointing was that there was evidence from Mr Rose that could be regarded as corroborative, if accepted, of the claimant's contention that Mr Masson was intent on assaulting the claimant. It might have been that this was ultimately rejected but it was not considered and in failing to do so the employers went out-with the band of responses open to a reasonable
20 employer in these circumstances.

43. Considering matters in the round the Tribunal formed the view that the dismissal was unfair. There are however, substantial arguments that can properly be put by the respondent company in relation to the claimant's own
25 culpability for these events and accordingly, a remedy hearing will be assigned which can hear arguments on this matter. In addition, the claimant advised the Tribunal that he had started new employment and did not yet have vouched information about his current and expected income.

30 44. It may be that the remedy hearing can be dealt with without a further evidential hearing on the basis of the submissions if agreement can be reached on the facts and the issue of contribution canvassed in writing.

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Employment Judge: JM Hendry
Date of Judgment: 19 December 2017
Entered in register: 21 December 2017
and copied to parties

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