



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Goscinny

**Respondent:** Boots Management Services Ltd

**Heard at:** Nottingham

**On:** 3, 4 and 5 September 2018  
14 November 2018

**Before:** Employment Judge Blackwell (sitting alone)

## Representation

**Claimant:** In person  
Interpreter: Ms Marta Jablonska Oridota

**Respondent:** Miss C Lody of Counsel

# JUDGMENT

The decision of the tribunal is that the complaint of unfair dismissal fails and is dismissed.

# REASONS

1. Mr Goscinny represented himself and gave evidence on his own behalf. Miss Lody represented the Respondent and she called Mr Fraser Stewart (who dismissed Mr Goscinny) and Mr Adam Coventry (who heard Mr Goscinny's appeal). There was an agreed bundle of documents and references are to page numbers in that bundle. Mr Goscinny brings a single claim of unfair dismissal. Before dealing with that claim, it is necessary to deal with the history of the claim.

2. In 2013, Mr Goscinny's claim was rejected because he did not pay the then required fees. He brought a further claim in 2015, which was rejected as being out of time. Following the Supreme Court's decision that the fees regime was unlawful, the claim was reinstated.

3. At a hearing on 1 August 2018, Employment Judge Dyal struck out race discrimination claims and Mr Goscinny withdrew the disability discrimination claims. Therefore, the only claim to proceed is that of unfair dismissal. The case was set down for a full hearing on 3, 4 and 5 September 2018.

4. On 24 August 2018, the Respondent applied for an unless order because Mr Goscinnny had not complied with the orders set out in EJ Dyal's decision sent to the parties on 2 August in relation to both disclosure and the exchange of witness statements. Unfortunately, the matter was not referred to a Judge and on the first morning of the hearing, Miss Lody made an application to strike out the claim on the same basis as had been advanced on 24 August. Mr Goscinnny had still not complied with Judge Dyal's directions nor did he bring a witness statement with him; nor did he produce any documents upon which he wished to rely. In order to deal with the application, I explored with Mr Goscinnny at length the basis of his claim and it was established that he had three points.

5. Firstly, that he was dismissed whilst he was on sick leave. Secondly, that his driving of the forklift truck on 25 July 2013 was not dangerous. Finally, that Mr Stewart (who had both dismissed him and given him an earlier final written warning) was biased against Poles or was in some other way biased against Mr Goscinnny.

6. I should note that the allegation of racism against Mr Stewart in respect of the issue of the final written warning was one of the claims of race discrimination struck out by EJ Dyal. I also took into account what amounts to a letter before action sent by solicitors on behalf of Mr Goscinnny at pages 174 and 175 and I note that the only matter relied upon in that letter is essentially that the conduct did not warrant dismissal. I took the view that given that a fair trial was still possible; that the Respondent was prepared for the trial and had both their relevant witnesses available, it was appropriate to continue so I refused Miss Lody's application. Miss Lody at the time correctly warned me against letting in a race discrimination claim by the back door. However, it seems to me that the motivation of Mr Stewart, given that Boots have to prove a potentially fair reason for dismissal, was a matter that could be explored in evidence.

7. The hearing proceeded on 3 and 4 September 2018 and I heard evidence from both Mr Stewart and Mr Coventry. The Claimant gave his evidence-in-chief and was cross-examined but did not finish that cross-examination. During his evidence, Mr Goscinnny produced a CD that he said was a record of a conversation between him and a former colleague, Mr Augustynowicz. He said that that record of the discussion confirmed that Mr Augustynowicz had heard from another witness that Mr Stewart had made an observation that he did not like Poles. Mr Goscinnny said the conversation also included a warning from Mr Augustynowicz that there was a plot to dismiss Mr Goscinnny.

8. I found this surprising given that the date of the conversation according to Mr Goscinnny was 3 August, ie 4 days after his dismissal. When he was challenged on that, he said (and I do not accept) that he had not told Mr Augustynowicz of his dismissal. I place no weight on this evidence, it is merely hearsay and is a repetition of the accusation made by Mr Goscinnny during the disciplinary process.

9. Unfortunately on the morning of 5 September Mr Goscinnny collapsed and was unable to proceed and the case was therefore adjourned part-heard.

10. Mr Goscinnny sent two letters to the tribunal of 19 and 28 October and the tribunal replied on my behalf on 9 November, though Mr Goscinnny says he has not seen the letter.

11. In the letter of 28 October, Mr Goscinnny says:

*“... from the very beginning I see in Mr. Judge’s behaviour the dislike of me after you treat me badly. Your behaviour towards me is unpleasant and inappropriate, it is not fitting for a Judge to behave towards a man like that. You are yelling at me, you are shaking your head as I testify, you make different strange faces when I answer the questions of your lawyer with Boots. Is this how the Judge who represents the law behaves like that? If you have any prejudices against people of a different nationality, please keep them for yourself and not to show them in public ...”*

12. I asked Mr Goscinnny if that was an accusation of race discrimination. His response was equivocal. I also asked him if in the light of that quotation, he wished me to stand down. Again, his answer was equivocal but I treated the letter as an application for me to stand down. I refused that application. I am not biased against Mr Goscinnny or any other person of Polish origin.

13. We then completed Mr Goscinnny’s cross-examination and he made an application to deliver his final submissions in writing at a later date. I refused that application, firstly because Mr Goscinnny was aware that he would have the opportunity to deliver a final submission; he knew that from day one and I have a note that I reminded him at the end of day 2 so that he could work on it overnight. I explained what needed to be included. Secondly, he did have a written document with him in Polish, which was then translated. I also asked him if he had anything to add to the written document given that it was prepared before today’s events. He indicated that he had met Magdalena Johnson who interpreted for him during the second part of the appeal hearing and she told him that it was a lie that he had withdrawn allegations of racial discrimination in that second appeal hearing. I made it clear to him that I could not take that into account because it was evidence given after evidence had been completed.

14. Mr Goscinnny elected not to be present when Miss Lody gave her final submissions and he also left before I was able to deliver this decision orally.

15. Turning now to the issues, this is a claim of unfair dismissal. It is for the Respondent to prove a potentially fair reason for dismissal within the meaning of subsections (1) and (2) of section 98 of the Employment Rights Act 1996. If such reason is made out, then it is for me to apply the statutory test of fairness as set out in subsection (4) of section 98. Given that the reason advanced is one of conduct, then the well-known case of **British Home Stores v Burchell** needs to be applied. In that case it was held that the following issues need to be determined:

(a) whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct that time;

(b) that the employer had in its mind reasonable grounds upon which to sustain that belief;

(c) that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

16. Finally, it is for me to apply the well-known the band of reasonable responses test, not only as to the decision to dismiss but also as to the process which led to the dismissal.

### **Findings of fact**

17. Mr Goscinnny was employed as a warehouse operative from 28 December 2011 to 30 July 2013, which is the effective date of termination. Boots are a well-known and very large employer manufacturing and selling pharmaceuticals and other products.

18. On or about 21 January 2013, Mr Goscinnny was suspended from work by Mr Stewart (see page 96). This was in relation to an alleged incident of gross misconduct in that it was alleged that Mr Goscinnny attended work under the influence of alcohol.

19. An investigation took place from which it emerged that three witnesses had confirmed that Mr Goscinnny smelt strongly of alcohol. Mr Stewart's disciplinary hearing is at pages 96 to 114. Mr Goscinnny accepted that he had had two strong beers before starting his normal night shift. He later admitted (though it was not known to Mr Stewart at the time) that on that morning he had woken up with a hangover after attending a birthday party. He also admitted to Mr Stewart that he had a drink problem and that is recorded in Mr Stewart's letter which imposed the sanction of a final written warning (pages 116 and 117).

20. Mr Goscinnny's defence at the time was that Mr Stewart should have summoned the police so that a breath test could have been carried out. Mr Stewart explained at the time that the police had been contacted and their advice was that Mr Goscinnny's car keys should be confiscated and that he should be sent home in a taxi.

21. I note that being under the influence of alcohol at work is categorised as gross misconduct in Boots disciplinary code. Mr Goscinnny did not appeal, though he now says that he did not know that he had the right to appeal because he could not read either the disciplinary notes or the outcome letter. I do not accept that evidence. I think that Mr Goscinnny knew full well he had the right to appeal. He was represented by his trade union at the disciplinary hearing and there was an interpreter present.

22. On 25 July 2013, a further incident involving Mr Goscinnny took place. A Mr Gillon, a colleague, complained about Mr Goscinnny's driving of a forklift truck. We see the initial record of that complaint at pages 118 to 119. Mr Goscinnny was interviewed - see pages 120 to 122. The matter was viewed as being serious

and further evidence was taken from a number of witnesses – see pages 124 to 128.

23. Mr Stewart also viewed the CCTV of the incident and he decided to invite Mr Goscinnny to a disciplinary hearing – see page 129. The allegation is one of an incident of gross misconduct by breaching health and safety regulations. Mr Goscinnny was provided with all of the statements taken. He was also warned that dismissal was a potential outcome. Mr Stewart also referred the CCTV footage to Mr Rawson who was the truck safety adviser. His comments are at page 132 and I will return to them.

25. The disciplinary hearing took place on 30 July and the notes are at pages 136 to 154. Mr Goscinnny was represented by a trade union official and had an interpreter present.

26. The main conclusions are set out in paragraph 23 of Mr Stewart's evidence-in-chief, none of which was challenged by Mr Goscinnny. Mr Stewart concludes:

*“23.1 He had seen Kevin (Mr Gillon) in his way (with his back to him) who was physically blocking where [Mr Goscinnny] wanted to drive to, it seemed, to park the forklift truck;*

*23.2 He accepted that he deliberately manoeuvred the truck such that the truck hit an item (an envelope) that Kevin was holding in his hand;*

*23.3 He appeared to recognise and accept that his driving was dangerous and unacceptable and that he had not followed the safety standards ... yet he believed he had done nothing wrong;*

*23.4 In particular, his view was that it was alright because he had not physically harmed Kevin ...”*

27. That defence is precisely the one that Mr Goscinnny pursued before this tribunal. He put a number of questions to both Mr Stewart and Mr Coventry on the basis that they did not know the difference between actual harm and the potential for harm.

28. Mr Stewart took the decision to dismiss during the disciplinary hearing and it was confirmed by him by letter of 1 August at pages 159 to 160. It concludes as follows:

*“After adjourning to make my decision, I explained that I had considered all the evidence before me. I took into consideration the seriousness of the incident and I did consider the points raised in your letter. However, I felt that the fact that you had purposely endangered the safety of your colleagues by your actions was totally unacceptable and I made the decision therefore to summarily dismiss you from the Company with immediate effect for an act of gross misconduct, specifically for dangerous driving of your truck on 26<sup>th</sup> July 2013. ...”*

29. In the letter, Mr Stewart pointed out the right of appeal and Mr Goscinnny duly appealed by letter which is at pages 155 and 156. Essentially, that appeal was to the effect that the driving was not dangerous because "*he had eye contact and voice contact with his colleagues*". In rapid succession, Mr Goscinnny made complaints against Mr Gillon, Mr Braun, Mr Stewart and Miss Mitchell. Against both Mr Stewart and Miss Mitchell he made allegations of racism. Of those complaints, only that against Mr Stewart is relevant to the issues before me. I note at page 194 that Mr Goscinnny responded to Mr Coventry's invitation to an appeal hearing in the affirmative.

30. The appeal proceeded initially on 13 September and Mr Goscinnny had an interpreter but not a representative. Mr Coventry took care to ensure that Mr Goscinnny was content to continue. I note Mr Goscinnny's initial comment in response to Mr Coventry asking for an explanation of his grounds of appeal. Mr Goscinnny states:

*"...that Joe is a racist and is discriminating against him and he doesn't believe it was a gross misconduct situation and shouldn't have been dismissed, should have just had a warning. ..."*

31. I should note at this point that in my view, Mr Coventry's appeal was a rehearing; it is one of the most thorough appeal rehearings I have come across. The initial hearing took some 2¼ hours and was adjourned by Mr Coventry so that further evidence could be obtained.

32. I should also note that on page 198, Mr Coventry explores with Mr Goscinnny the matter that Mr Goscinnny now relies upon in relation to sick leave. Mr Goscinnny advances the mistaken premise that when you are on sick leave you cannot be dismissed. However, Mr Goscinnny confirmed that he was both happy and fit to attend both the disciplinary hearing and the appeal hearing.

33. The appeal was reconvened on 25 September. Again, Mr Goscinnny had an interpreter present - Miss Johnson to whom I have referred to above. The appeal lasted for about 3 hours and at the end Mr Coventry recaps and adjourns so that he can consider his decision.

34. On 21 October 2013, Mr Coventry sent a lengthy outcome letter - see pages 219 to 225. Again, the outcome letter is very thorough and deals at length with the grounds of appeal and every other matter that was discussed during the two appeal hearings.

35. Mr Coventry came to a different conclusion to that of Mr Stewart. He regarded the forklift truck driving incident as unintentional. In other words, there was no intent to cause harm to another colleague. However, Mr Stewart noted that there was the final written warning on file in relation to attending work under the influence of alcohol and he determined that he was entitled to take into account that final written warning. Thus, taken together, his conclusion was that the dismissal should stand but that it would be a dismissal with notice and Mr Goscinnny would receive pay in lieu of notice on the next available pay day.

## Conclusions

36. I will deal first with the three grounds advanced by Mr Goscinnny as reasons for concluding that the dismissal was unfair.

37. Firstly, that he was dismissed whilst on sick leave. Whilst there is some doubt as to when the injury that led to the sick leave took place, it seems to me that that is irrelevant. Mr Goscinnny is mistaken – providing that he is fit to attend and participate in the disciplinary process, there is nothing to prevent an employer from dismissing whilst the employee is absent from work. Mr Goscinnny confirmed at both stages that he was willing to attend and fit to attend. Therefore, this assertion has no weight.

38. The second matter is that his driving was not dangerous. As I have said earlier, Mr Goscinnny seems to base this on the premise that ‘if I did not hit anything, then my driving could not have been dangerous’.

39. I have seen the CCTV and I endorse what Mr Rawson, the expert in the matter, said as follows:

*“I agree with you that this drivers standard of driving is appalling.*

*Looking at the footage here are some of my observation and the rules he did not follow.*

*The driver at no time carry’s out an all-round check before moving off.*

*Drivers are told that they MUST do a all-round check before moving off.*

*He does not stop for one pedestrian he gets him to move out of his way.*

*Drivers are told that they must always give way to pedestrians.*

*He drives alongside the parked N20 truck that the pedestrian is standing next to and talking to the driver. He them (sic) turns towards the parked truck almost hitting the pedestrian. If he had not stopped he would have trapped the pedestrian.*

*Drivers are told that they must not drive up to anyone standing next to a fixed object, so that they do not trap them if some think (sic) goes wrong.*

*...”*

Thus, on the basis of the CCTV alone, the employer was entitled to come to the conclusion that the driving in question was dangerous.

40. The third matter relied upon is the allegation against Mr Stewart of bias, either on the basis of race or in general. This point was explored at considerable length by Mr Coventry. Miss Lody cross-examined Mr Goscinnny again at considerable length and I am not entirely clear whether Mr Goscinnny understands

the meaning of the words 'racial discrimination'. However, I shall take it at its legal meaning. I have referred to above the discussion between Mr Goscinnny and Mr Augustynowicz. That is plainly hearsay and is the only evidence available to me. The only evidence available to Boots was an allegation that an unnamed female had witnessed Mr Stewart making a remark to the effect that he did not like Poles. Since Mr Goscinnny did not disclose the name of that witness, it seems to me that there was nothing that Boots could have done. I note Mr Stewart's evidence that race had nothing to do with his actions, either in issuing a final written warning or in dismissing Mr Goscinnny. I accept that evidence. Had Mr Stewart been biased in any way against Mr Goscinnny, he surely would have dismissed at the time of the alcohol incident. Many employers would have dismissed at that point.

41. Thus, to turn to the legal test to be applied there was a genuine belief, though a different one, by Mr Stewart and Mr Coventry that Mr Goscinnny had committed acts of misconduct which were sufficient to warrant dismissal. Both Mr Stewart's and Mr Coventry's investigation was reasonable. It seems to me that there was no stone left unturned by Mr Coventry. As to whether the dismissal fell within the band of reasonable responses, in my view it clearly did. Either of the two offences taken into account by Mr Coventry are serious enough to warrant dismissal; taken together clearly dismissal falls within the band of reasonable responses and therefore Mr Goscinnny's claim must fail.

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Employment Judge Blackwell  
Date: 23 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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