



EMPLOYMENT TRIBUNALS

Claimant: Balvinder Singh

Respondent: Glass Express Midlands Limited

Heard at: Birmingham

on: 19th November 2018

Before: Employment Judge Pitt

Representation

Claimant: Mr. M Stevens of Counsel, written submissions

Respondent: Mr. M Islam-Choudhury of Counsel, written submissions

JUDGMENT

1. The claimant is not entitled to a compensatory award.
2. If the respondent had followed a proper procedure the claimant may still have been dismissed.
3. The claimant contributed to his dismissal to the extent of 100%.
4. The claimant failed to mitigate his loss.

REASONS

1. This is a reconsideration of my judgement dated 27th of July 2017, which has been remitted by the Employment Appeal Tribunal following the judgement of Her Honour Judge Eady QC. The Learned Judge remitted the issue of the compensatory award for the following reasons (a) the Polkey award did not demonstrate what a fair procedure might have been in the circumstances of this case, in particular whether or not such a procedure would have led to the same outcome; (b) contribution, there is no indication from the tribunal whether it was just and equitable to make a nil reward rather it assumed that no award should be made given its conclusion the claimant was entirely responsible for the dismissal but failed to have the possibility it might not be just and equitable to reduce the award; (c) the judgement did not demonstrate in relation to mitigation that the burden of proof remained on the respondent, the fact that the claimant had not demonstrated he acted reasonably did not necessarily mean the respondents had discharged their burden of showing he had acted with.

2. I have before me today the following documents; the original notes of evidence; the original judgement, the judgment of HHJ Eady of the Employment Appeal Tribunal, written submissions on behalf of the claimant drafted by Mr. M Stevens of Counsel, written submissions on behalf of the respondent drafted by Mr. M Islam-Choudhury. The schedule of loss and counter schedule of loss.

3 The claimant's submissions are as follows: the conduct in the case is not so egregious that it would be just and equitable to reduce the compensatory award to nil; the tribunal's findings confirm that this is not a case in which the claimant's conduct was wholly responsible for the dismissal; an assessment of relative causative potency and blame worthiness suggests that the claimant suffered a legal wrong that is deserving of a remedy; there are a fair process was likely to have identified alternatives to a dismissal in breach of every chapter and verse of the ACAS code of practice; the respondent failed to prove the claimant had behaved unreasonably by sustained losses that he could have avoided.

4.The respondent's submissions are as follows: if a fair procedure had been followed there would have been no difference in the outcome in particular that in a case where an employee assaulted the managing director of the company, where no contrition was shown by the claimant and the claimant denied his actions, it is likely that an employer would have reached a reasonable belief in the claimant's guilt in respect of an assault on the managing director. An employer would then ask itself dismissal was reasonable i.e. was it within the range of reasonable responses. the respondents argue despite some provocation by Mr. Bill Singh this doesn't provide enough mitigation to make it likely the claimant would not have been dismissed. Turning to contribution, the tribunal must look at the relevant conduct; was its blameworthy conduct; did that blameworthy conduct cause or contribute the to the dismissal; if so to what extent should the award be reduced and is it just and equitable to reduce it. Finally, mitigation of loss Counsel argues that as a result of cross examination the claimant had no credible reason for working part-time as reason for part-time working were demonstrably not true claimant had previously worked full-time therefore the respondent say claimant had failed to mitigate his loss.

5 I have been referred to the following cases: Brito-Babapulle v Ealing Hospital NHS trust 2[013] IRLR854; which states it is wrong to assume that summary dismissal would have been the only outcome in a case of gross misconduct. Dunlop Ltd v Farrell 1[993] ICR885 in which His Honour Judge Hague QC said "first the tribunal must ask itself the question: if the proper procedure had been followed would it have resulted in the employee still being retained or would it have made no difference? If the answer is reasonably clear one way or the other there is no difficulty, but in many cases the answer may be uncertain the tribunal should the second stage of the process make of percentage assessment of the possibility of probability of the employee being retained which must then be reflected in the award of any compensation.) Polkey v AE Drayton Services Ltd [1988] 1 AC 344 HL, establishes the principle that where there is doubt whether an employee would have been dismissed this can be reflected by reducing the compensation by a percentage. In Lemonious v Church Commissioners UKEAT/ 0253 12 Langstaff P observed, "it is unusual there should be 100% reduction. Though there may be cases where conduct is so egregious that that that is the case it calls for a spelling out by the tribunal of the reasons for taking what is undoubtedly a rare course. In particular, it must not be a case that a tribunal should simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is

appropriate. It may be the case. But the percentage might still require to be moderated in the light of what is just and equitable.” In Rao v Civil Aviation Authority 1994 ICR 495, CA gives guidance in relation to the order of the adjustments or reductions. The statutory provision with which I am concerned is section 123 Employment Rights Act 1996:

“the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.”

“where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that failing.”

6. I remind myself of the following findings of fact

7.1 I concluded that the sequence of events was as follows; Pete stormed into Bills office and there was a heated argument; as Pete left Bill’s office Bill pushed Pete probably to the back of the head although not as hard as the claimant maintains, this caused Pete him to stumble which in turn led Pete to return into the office and engage in a tussle with Bill as a result of which Bill ended up on the floor. The claimant accepts this, and I am satisfied that at this stage he initiated the violent behaviour. I do not accept the account given by Bill that he was an entirely innocent party.

7.2 I concluded that the principle reason for the dismissal was the conduct of the claimant on 18th August. However underlying that the respondent, namely Bill, seized the opportunity to rid himself of a ‘troublemaker’. That is to say someone who was undermining his authority and claim an interest in the business as well as the suspicion that the claimant was assisting another rival company.

Contribution

7.4.1 On the facts as I have found them it is clear that the claimant contributed to his dismissal; I have to assess to what degree, I concluded that the respondent seized this opportunity to dismissal the claimant with the underlying motive of ridding himself not only of an employee he did not trust but also someone claiming a part of his business; however but for this incident the claimant would in all probability have remained in employment. I take account of the first push coming from Bill, however to re-enter the office, instead of walking away and assaulting the managing director.

Mitigation

The claimant went from a full time position to a part time position. He said in evidence that this was because of the on-going High Court proceedings; this argument does not stand up to scrutiny as the proceedings did not commence until October. It was reasonable therefore for the claimant to start at full time working and reduce if necessary. Under cross examination he claimed he worked part time

in order to care for his elderly mother. He conceded he did not receive the carer's allowance for her but his brother did. If this is correct that clearly he would not have been able to maintain a full time position with the respondent from 1st September. Finally, he claimed that his brother's company was not in a position to offer him full time work. It is difficult to know which to believe. I do not accept this assertion if for no other reason than it was the last one he came up with.

7. I deal with the issues in the following order; did the claimant mitigate his loss, specifically has the respondent discharged its burden to show that the he did not. I note that I heard evidence from Mr Bill Singh to the effect that the claimant was working full time and not part time, save for this the respondent did not adduce any evidence in relation to the claimant's lack of mitigation relying upon cross-examination of the claimant. I heard evidence form the claimant as to why he took up a part time position; first, he says it was because he was preoccupied with the on-going High Court proceedings, under cross examination he added that he was a carer for his mother, although he had to concede that he did not receive carer's allowance for her, his brother did. Finally, he suggested that the company he now worked for, which was his brother's company was not in a position in offer full time work.

7.1 I must consider what steps where reasonable for this claimant to undertake in order to obtain employment. The claimant did obtain new employment within a short period of time which was of a part time nature. The question I pose myself was it reasonable for him to only work part time. If I accepted his assertions with regard to preparation for the High Court case or his care of his mother then it may be that it would be reasonable. However, this is a man who had previously held down a full time job. Throughout the proceedings I did not consider him a credible witness and so reject both arguments for the reasons set out in the original judgments. The final issue is the availability of work, if as he asserts full time employment was not available, would it be reasonable to accept this part time post? Clearly the answer must be yes. There is no evidence of this save the claimant's assertion. I have revisited my notes of evidence and note that the evidence of Mr Bill Singh in relation to the new employment was that the claimant was now working full time and not part time as asserted. Neither of these men were capable of belief. Has the respondent discharged the burden to establish that it was not reasonable for the claimant to work part time. This is a difficult question, I did not accept the claimant's explanations for his work pattern, this was as a result of the respondent's cross examination of him, whilst the claimant established he had mitigated his loss I concluded it was unreasonable for him to work part time. despite the fact that I could place no reliance on Mr Bill Singh's evidence as to the hours of work, I note that the issue of part time working was only raised by the claimant during cross examination and I am unable to conclude that he was in fact working part time, I concluded that he was not being truthful on this issue. The respondent raised the issue of mitigation and I concluded that it discharged the burden as a result of cross examination of the claimant by Counsel.

8.1 In relation to the Polkey issue I have referred to The ACAS Code of Practice 1; Code of Practice on Disciplinary and Grievance Procedures. I note that in the preamble it reads: " Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible

employers and employees should consider using an independent third party to help resolve the problem....in some cases an external mediator might be appropriate." Later it reads: "This Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances." The basic procedure set out in the Code is as follows: Establish the facts of each case; inform the employee of the problem; hold a meeting with the employee to discuss the problem; allow the employee to be accompanied at the meeting; decide on appropriate action; provide the employee with an opportunity to appeal. Clearly on the facts of this case, it is more difficult for the respondent to carry out such a process as the Managing Director was directly involved in the alleged misconduct; however, I note the Code specifically caters for the use of external 'mediators', this is a case where such a person could assist, and a further person could deal with any appeal.

8.2 I asked myself the following questions; if the process outlined above had been followed, would a reasonable employer, following an investigation have a reasonable belief of the claimant's guilt. As can be seen from judgment I was satisfied that the claimant had committed an assault upon the managing director. I conclude therefore that it is likely that an independent person conducting a disciplinary would also conclude that.

8.3 I further asked myself was dismissal inevitable. First I note that if an assault on any person in the workplace dismissal is likely to fall within the range of reasonable responses. What were the chances of dismissal in this case? I note the case of Lemonious that the reduction of an award to nil is rare and that Tribunal should spell out its reasons for such an award, further I take account of the submissions on behalf of the claimant reminding me of my finding of fact that 'Bill (the managing director), was not an entirely innocent party, and Mr Islam-Choudrays submission that there is corresponding blameworthiness on the employer's side and substantial points of mitigation. Dealing with the latter issue first, I do not agree that there was the same level of blameworthiness from Mr Bill Singh, as I noted in my judgments that the claimant initiated the violent behaviour in the office although Bill was not an entirely innocent party when the incident first started. In terms of mitigation, I understand this to be the claimant's claim that he was entitled to as share in the company. Whilst it is clear that this was a live issue at the time, I am not satisfied that it entitles an employee to assault another employee and whilst it goes some way to explain the claimant's actions it does not diminish his responsibility for them. I conclude that there was a 100% chance of the claimant being dismissed.

9 Turning to the issue of contribution; was the dismissal of the claimant caused or contributed to by any action of the claimant? In this case it was the behaviour of the claimant in assaulting the managing director. I note that the claimant points to other contributory factors, such as Bill seized the opportunity to be rid of a trouble maker and the prior treatment of the claimant by Bill. I note here that the prior behaviour which involved glasses being knocked to the floor was not on the same day; and the refusal to acknowledge ownership was an ongoing issue which had to be resolved by the courts. Is it just and equitable to reduce the award in such circumstances? I concluded that it was; it was the assault that precipitated the dismissal and without it the claimant may still be employed. By how much is it just

and equitable to reduce the award. I am satisfied that it is just and equitable to reduce the award to nil. Whilst I accept that the claimant was unfairly dismissed I do not accept the claimant's assertion that to reduce the award to nil so will permit employers to goad their employees to act and dismiss with impunity. First I do not accept that Bill Singh 'goaded' the claimant; whilst I accepted that there was previous contact as the claimant left the office, the claimant returned to the office to assault Mr Bill Singh; whilst I have noted that the ownership issue was ongoing, I do not accept this amounted to goading of the claimant. Mr Bill Singh clearly believed he was the sole owner and indeed both he and the claimant spent vast sums of money in resolving the matter in the High Court. Finally, assault is an offence under the criminal law which may lead to a custodial sentence, asked myself is it correct that a person is in effect rewarded for such behaviour? I concluded that in this particular case it was not. Therefore, despite the claimant's mitigation I consider that it is just and equitable to reduce the compensatory award to nil as a result.

10.1 I concluded therefore that the respondent had discharged its burden in establishing that the claimant had failed to mitigate his loss by only working part time.

10.2 I further concluded that if an ACAS compliant procedure had been followed the claimant would still be dismissed. I assessed the chance of dismissal as 100%

10.3 Finally I concluded that the claimant contributed to his dismissal and it was not just and equitable to make any compensatory award.

Employment Judge Pitt

Date 2nd December 2018