EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr TP Fogg	V2I Limited

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 25 July 2018

EMPLOYMENT JUDGE Warren

Representation
Claimant: in person
Respondent: Mr R Anderson, consultant.

REASONS

The background and issues

1. By an ET1 presented to the Tribunal on 23 March 2018, the claimant alleged that he had been unfairly dismissed. By the date of the hearing, the respondent conceded that the dismissal had been procedurally unfair although it was pleaded that the reason for dismissal was gross misconduct and that the dismissal was substantively fair.

The evidence

2. The Tribunal heard from Mr B Humphries, the owner of the respondent business, and the claimant's brother, Lisa Ratcliffe and employee of their respondent, and the claimant in his own regard. Statements were taken as read and all witnesses were cross examined. There were witness statements from Paul Molyneux, although he did not give evidence. There was an agreed bundle of documents consisting of 123 pages. References to page numbers in this judgement relate to the agreed bundle.
3. The case was decided on the evidential test 'the balance of probabilities'

The findings of fact

4. The claimant was employed continuously in his brother's business from 6 September 2010 to 29 January 2018, when he was dismissed without notice following an altercation between the claimant and his brother over annual leave. The business specialised in the commercial leasing of vehicles. It had 8 employees.

5. The claimant sought a week's leave to go on a holiday gifted as a birthday present by his girlfriend at the end of February 2018. He asked at the end of January 2018, and was refused. He knew that he couldn't take leave in March and September as those are the busiest months for the business, based around new vehicle registrations. The two brothers worked in a small office area with a handful of staff. Mr Ben Humphries decided to refuse the request for leave, and asked Ms Ratcliffe to send an email to his brother to that effect.

6. The claimant sought an explanation and approached his brother in his office. The brothers argued. Mr B Humphries gave evidence that he felt the relationship had diminished and he believed that the claimant was going to leave and work elsewhere. He accused the claimant of standing in the doorway of the office and shouting 'well you can fuck off then and fuck it I am going to leave I have had enough'. He alleged that the claimant continued to shout as he stormed out of the main office.

7. The claimant's explanation was that he was told to go by his brother. He denied using any expletives or shouting. 2 witnesses made statements, Lisa Ratcliffe gave evidence, and Paul Molyneux (both employees of the respondent business) made a statement. Neither support Mr B Humphries account of the claimant's loud and aggressive behaviour in the main office area. One describes the claimant 'muttering the f word' as he went out through the fire door.

8. This was a small office area with open doors. If Mr B Humphries was right the witnesses (his employees) could not have failed to hear most of not all of what happened. 2 other employees were present but have not made statements (Steve and Alexander).

9. The claimant was dismissed summarily at that point, and confirmed by text. There was no investigation and no hearing.

10. There was an appeal when the claimant asked for it. It was heard by Mr B Humphries, with Miss Ratcliffe acting as notetaker. However, it degenerated very quickly into the 2 brother's arguing, and was brought to a halt by Ms Ratcliffe before the claimant had the chance to put his case.

11. Afterwards the claimant chose to live on his savings for 8 weeks and then, began work for his father as an employee. His father ran a similar business based on different vehicles. The claimant was clear of the restrictive covenant preventing him working in competition with his brother, on 1 May 2018 and immediately set up in competition with his brother.

12. After his dismissal, the claimant was accused of sending emails from customers to his own email account in preparation for leaving. The claimant however gave a credible account that he was using an office Gmail account of which his brother was well aware. He was accused in March having left of taking commercial details of a funder for his own benefit. In fact, he gave evidence that the deal was for his father – an introduction and no more – he rang the funder and with their permission gave his father the phone number. Both parties had confirmed by email that this was an accurate reflection of the circumstances. The claimant made the point that he had not chosen to leave and would not have done so. He had been with the business for 7.5 years and he had no reason to want to leave. The claimant was very aware of the restrictive covenant and actively took steps to avoid a breach.

The Law

13. Section 98 Employment Rights Act 1996 provides:-

(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

a) the reason (or if more than one, the principal reason) for the dismissal; and

b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

b) relates to the conduct of the employee."

(4) "Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a) 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

b) shall be determined in accordance with equity and the substantial merits of the case."

14. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

a) the starting point should always be the words of section 98(4) themselves
b) in applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair
c) in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer
d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another
e) the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

15. The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. In A V B 2003 IRLR 405 the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.

The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures.

Conclusions

16. The respondent has conceded that the dismissal was procedurally unfair, but that they genuinely believed the claimant guilty of gross misconduct by behaving aggressively and shouting profanities in the office. I have found that the facts do not reflect this, supported by evidence from 2 of the respondent's own employees. They genuinely but mistakenly did believe that the claimant intended to leave, and that the relationship had diminished. Had there been an investigation, the respondent would have realised that there had simply been an argument between 2 brothers which got in the way of their business life

17. The claimant was dismissed for gross misconduct – but there is no credible evidence of any gross misconduct at all, the respondent's belief was thus not reasonable.

18. There is also no credible evidence of any post dismissal misconduct.

19. The claimant was thus unfairly dismissed and dismissed in breach of contract as he was not offered notice or pay in lieu.

20. Did the claimant contribute to his own dismissal? I consider that he did. It is one thing to argue with his brother outside of the office, but he should have recognised his brother's authority over him in the office and backed away from the argument sooner. I consider that he contributed to his dismissal by 20% and any award will be reduced accordingly.

21. Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL). If a fair procedure had been followed with proper reflection of the circumstances in a dispassionate environment, this is likely to have led to a warning for arguing. The claimant had no previous disciplinary matters marked on his record, he liked his job and was successful at it. Mr B Humphries admitted that he was ready for a change, and that the relationship had diminished. He however had no reason to dismiss the claimant and as the claimant had been there for 7.5 years with a clean disciplinary record, it would be pure speculation to consider that he might be dismissed in the future.

22. The parties agreed that reinstatement and reengagement were inappropriate in this case.

23. The remedy and calculations are included in the Judgement.

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Employment Judge Warren

Signed on 14 January 2019

Judgment sent to Parties on

5th February 2019