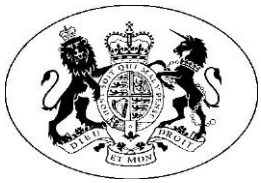
Case Number: 3200095/2018



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EMPLOYMENT TRIBUNALS

Claimant: **Mr B Nicholas**

Respondent: **WM Morrisons Supermarket plc**

Heard at: **East London Hearing Centre**

On: **29 August 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: In person

Respondent: Ms I Ferber (counsel, instructed by Eversheds Sutherland LLP Cardiff)

JUDGMENT

It is the judgment of the employment tribunal that:-

(1) Under section 111 of the Employment Rights Act 1996 it was not reasonably practicable to have presented this claim earlier, by reason of the unlawful tribunal fee regime. It was presented within a reasonable period thereafter and the tribunal therefore has jurisdiction to hear the case.

(2) The claimant was fairly dismissed and therefore his claim for unfair dismissal fails and is dismissed.

REASONS

Full reasons having been announced to the parties at the above hearing, and the above written judgment without reasons having been sent to the parties on 25 September 2018, and reasons having been requested by the respondent by email of 03 October in

accordance with Rule 62(3) of the Rules of Procedure 2013, the written reasons follow below.

1 The claimant, Mr Bevin Nicholas had worked for Morrisons for 10 years prior to his summary dismissal on 11 August 2016 for misconduct namely:-

1.1 A serious breach of health and safety policy.

1.2 Failure to wear hi-vis and failure to wear steel capped safety boots when operating an electric pumptruck, and being rude and abusive to colleagues Jade Cook and Alam Chaudhury.

2 This is an extraordinary case. I have never come across an employee who had been dismissed by the same employer during the same employment 3 times. In this last dismissal which occurred on 11 August 2016, his appeal was unsuccessful and he has not been reinstated. Claim out of time

3 Dismissal took place on 11 August 2016 and that is obviously a long time ago. The case has come up because of the "reinstatement" regime whereby the tribunal service is contacting parties who submitted a claim form to Central Office Leicester but for one reason or another the claim form was not then allocated to the local office. In 99% of cases the reason for that is failure to pay a fee.

4 Unfortunately, this slipped through the tribunal's net. It was one of the earlier ones. It is the tribunal's practice now to list all reinstatement cases for one-day open preliminary hearings to decide the jurisdictional time limit question before anyone goes to the trouble of preparing the case for a final hearing. That did not happen today. The parties had only prepared for a final hearing of the unfair dismissal claim on its merits.

5 In this case the claimant was therefore unprepared with detailed evidence of his means. That is why the tribunal asked him for a lot of information about his personal finances, his benefit situation, his council tax. He has a wife and two children with whom he lives. He has other responsibilities. He is responsible for his mother who lives in Dominican Republic. He also has 3 other children who live in East London.

6 There was enough information available on file to suppose that the original claim was sent to the tribunal office in time. The reference to Acas for early conciliation was immediate i.e. on 10 August 2016 before the dismissal even took effect because he had been informed on 10 August orally that his dismissal would take effect the next day. It was with Acas for early conciliation for 6 weeks.

7 The claimant has brought one tribunal claim before arising out of a previous dismissal and he therefore knows what the system is for presenting a claim. In the past he had been given remission of fees - this time not. It is not precisely clear why but I find that he would have found it not reasonably practicable even to find the £250 to issue the ET1 claim form, let alone £950 to take it through to a final hearing. I also find the claimant responded to the tribunal within a reasonable time when asked if he wished his claim to be reinstated after the Supreme Court decision in *Unison*.

8 This was a relatively informal adjudication following a relatively informal hearing on that issue because the parties were not formally prepared to deal with it today. They had prepared the case for final hearing. It nonetheless had to be decided. It is jurisdictional.

Unfair Dismissal

9 The respondent had asked the tribunal for a witness order for Mr John Settle who since left their employment. He was concerned about being paid for the day rather than having to take a day as leave from his present employment. He left Morrisons in December 2016 and works for another retail chain currently.

10 Mr Settle made the decision to dismiss the claimant. The other respondent witness I heard from today is still employed. Mr David Waghorne conducted the appeal.

11 The claimant had various roles with Morrisons. He managed the fish section, and managed the fresh food pre-packed (FFPP) section in Stratford. He was then transferred to the warehouse part of the Chingford store, early in June 2016. He says he found that warehouse department not to be in a good order. He apparently takes great pride in his job and says he loved working for Morrisons. He wanted to get that warehouse section working properly he says.

12 He had an early visit from Graham Sargent who is a health and safety manager. He found several issues wrong there. Certain equipment had to be ordered to make the warehouse properly compliant. As a result of his visit steel toe-capped safety boots were ordered and hi-vis waistcoats were ordered for all staff to wear when working in warehouse.

13 A pump truck is sort of truck the claimant was familiar with. It has a hydraulic mechanism to lift a pallet off the ground. Some trucks are manual and can be pulled. Those might be taken into the store. There are other ones which are electrically operated - of two sorts. There are ride-on trucks, and also trucks which roll independently, and the operator walks ahead. It has a control like a joy stick to direct to set the direction and speed. The control can be twitchy and one has to be careful with it.

14 The trucks are used to unload lorries. The claimant stated on 21 July he was early to work. At 5.30am he was already in the loading bay where two double-decker 20 foot trailers were ready to be unloaded. The main load in question was a heavy load of beers, wines, and spirits. The claimant felt under pressure because these two lorries were there already and needed to be unloaded quickly. There was a special offer on these items and they needed to be taken into the store as soon as possible. He said that he was under pressure.

15 The hi-vis jackets had arrived at the warehouse and were available, as the claimant agrees. He stated many times in the investigation hearing, and this hearing, that he forgot to wear one and is sorry. He stated (which I found hard to

accept) that it would have taken a five-minute walk to pick one up, and then walk five minutes to walk back. I doubted the warehouse could have been that big.

16 Nonetheless, the main area of dispute has been the safety boots. This is of particular relevance in view of the later injury the claimant had. There was evidence that safety boots which are personal equipment unlike the hi-vis (where anyone can take any vest off the peg and go into the warehouse). The boots are ordered to each employee's size. The claimant's is size 9 ½, and there are no half sizes in these boots; he therefore had to order a 10.

17 These had had arrived, according to the respondent's clear evidence. Apparently Jade Cook, the People Manager, had told him (three times) that they had arrived and were available for collection. There was a conversation that took place in the canteen and was witnessed by others she was sitting with and they were Bradley Oliver the FFPP manager, Nick Aristidou, the produce manager, and Vicky Wordsworth, a people clerk (HR adviser). The boots according to Ms Cook were available for collection from the HR office at the Ilford store.

18 This was the claimant's first warehouse job for the respondent. His previous jobs had been in store. The claimant had had management roles in the past. At one stage he had been demoted after a dismissal, but he was reinstated later. He had completed health and safety training although it was some time before he took on this warehouse manager job. He had had no special training since taking on the warehouse manager job. The records show that he understood the importance of safety boots and that he understood the importance of hi-vis. This was a questionnaire he had filled out as part of training at the Morrisons academy.

19 The claimant states, and there is no reason to doubt this, that a colleague had left a pallet on the floor, obstructing an aisle. At the time he got there with his electric pump truck, walking with it, but with his back to the direction of travel looking over his shoulder he tripped on the pallet on the floor, fell over and the truck kept going, and ran over his foot causing an un-displaced fracture of the right big toe.

20 I find as a fact he went at one stage to the first aid room, contrary to what he says. As it happens, according to Jade Cook's investigation statement, she stated that this injury would not have happened if he had worn his safety boots. This is evidence which the respondent ultimately accepted.

21 The claimant was admitted to Whipps Cross hospital straight away and was fitted with a surgical boot and given crutches. He returned to his home in North West London. He states that he was in pain as a result of this injury, not surprisingly. He was paid company sick pay. This was subsequently reviewed and because of the circumstances of the accident. The respondent called it a clear breach of health and safety policy. Under the contract this could be an exception to right to receive company sick pay.

22 The claimant was informed that his sick pay would be stopped. This was by a letter, but also by a telephone call from Jade Cook. Perhaps because was in pain,

and also because he was upset at the loss of money he raised his voice during the call, and he "swore". As the earlier part of this judgment relates, the loss of that amount of money was going to impact heavily on the claimant. Also witnessing this conversation was Alam Choudhury, the duty manager. The call was on speaker phone at the Morrisons end. They stated that the claimant was shouting and swearing.

23 The claimant stated in the investigation throughout that he shouted but did not swear. To clear this up I asked him at this hearing whether the word "fuck" is swearing and he gave an interesting answer. "Fuck you" is swearing, whereas "Fuck" is merely slang. It may therefore be that this is a dispute about not very much. He used bad language and he accept a warning for that. He also stated that he would accept a warning for the lack of hi-vis which he forgot. He has been consistent about that.

24 The lack of boots he blames on the fact, he says, that they had not arrived, and that the witnesses Bradley, Oliver, Jade, Nick, and Vicky had fabricated this evidence to the effect that he knew the boots had arrived.

25 When this was first investigated the claimant suggested that Jade was trying to protect herself, but he did not know why Nick would be lying. Later he stated at this hearing that all of these people go out drinking together and that Nick was actually going out with Jade. If that was the case it seems astonishing that he did not mention it to Mr Aaron Green who conducted the investigation. It was a thorough investigation. There were detailed statements compiled from witness interviews. There was an interview with the claimant himself.

26 As investigations go this was thorough and and well within the range of reasonable fact-finding investigations that an employer could carry out. The investigation also looked into the claimant's attendance record and found that there was no case to answer on that. This was a health and safety policy breach where there were real consequences. It seems more than likely that if the claimant had worn those toe cap boots he would not have fractured his toe. It was not of the worst order of toe injurie.

27 Jade Cook and another witness stated that, when the claimant had been told that the boots had arrived, he apparently kissed his teeth and said he would not be wearing them. The other witness was Nick Aristidou. Ms Cook stated she had told the claimant three times prior to this accident that the boots were ready for collection.

28 It was a consistent question for the claimant throughout the investigation, why these people would be lying. One of the suggestions he made then as now was that he had had a relationship with a woman called Amisha who worked at the Nutmeg Clothing concession within Morrisons. He had borrowed some money from her and then had gone off sick leaving the money still being outstanding. Amisha reported this to Bradley Oliver who then advised her to raise it with Luke Blushington the store manager. Apparently all of these people had been advised

then not to speak to the claimant. On that basis the claimant suggests that these people were against him and wanted to get the claimant dismissed by giving this very damning evidence against him.

29 Ultimately the respondent did not accept those arguments from the claimant. They considered that there was a broad range of colleagues from senior management to clerks who were giving similar and consistent evidence.

30 The disciplinary hearing was conducted by John Settle in Colindale going some way to nearer to where the claimant was then living in Kilburn. The claimant stated it was some effort to get there on public transport as he was still pain. I have seen detailed notes of the hearing. One interesting discrepancy that was brought out in the hearing was he said to Mr Settle "I never kiss my teeth". That contrasted with what he told Mr Waghorne at the later appeal hearing which was: "I do it all the time it's from back home" (referring to the Caribbean). One or other of those statements cannot be true.

31 Mr Settle's evidence to the tribunal was very clear. On the claimant's behalf I asked him about if there was any sense of remorse or any feeling of reassurance that this would not happen again. He said there was not. But that was to be expected given the claimant's position that he was not in the wrong over the boots, as he maintained they were not available. He had apologised for his behaviour shouting on the telephone, and his failure to wear hi-vis.

32 The respondent clearly rejected the claimant's principal defence that the boots were not available. Was that a reasonable stance to take? I could not conclude it was unreasonable given the amount of investigation there was. The respondent seemed to have a good insight into the whole context of the disciplinary process. The respondent also reasoned that if the claimant simply did not wear the hi-vis that he says was available the chances are that he would not have worn the boots anyway. Mr Settle considered this incident revealed a complete disregard of health and safety precautions of most basic kind.

33 Mr Settle was questioned over whether this was a summary dismissal matter not just a dismissal on notice. He answered this well too. Summary dismissal involves a loss of trust over a complete disregard of health and safety. Summary dismissal and is more to do with risk assessment than crime and punishment. At the disciplinary hearing, Mr Settle took some time going over the evidence again and deliberating. He then delivered his decision orally and stated that there would be an outcome letter.

34 The outcome letter was not sent until 20 August. The claimant appealed before he received the outcome letter. He stated:

> "the evidence against me from one of the employees stating that I was rude and swearing towards her is untrue"

and

> "the evidence from the three other employees stating that they were in attendance when I was told that proper footwear is available for collection is a fabrication".

Those were the grounds of appeal.

35 Mr Waghorne seems to have been an experienced appeal manager both here and at his previous employer where he was for nearly 30 years, at Tesco. There was a long note of the appeal hearing. He did a lot of pre-reading and made enquiries through Haley Haynes of HR. He concluded ultimately the claimant was guilty of misconduct for his rudeness to Ms Cook, and the hi-vis, and was guilty of gross misconduct for the health and safety breach - the lack of boots. An outcome letter was drafted subsequently stating that the appeal had been dismissed. The claimant was told orally that he had been dismissed, both at the disciplinary and the appeal hearing.

36 That is the evidence on which I have had to decide the case. First I find on the evidence that this is a conduct dismissal under Section 98(2)(b) of the Employment Rights Act 1996. It is not a question of training or capability. That was the correct analysis of it.

37 The main issue is the question of the range of reasonable responses under s 98(4) ERA. I note that this is a large employer. They seem to have considerable amount of dedicated HR staff who were involved in each stage of the process.

38 Every part of the process needs to be subjected to the range of reasonable responses test which is imported into section 98(4) of the ERA. First, was there a reasonable investigation? I have found above that Mr Green's investigation was well within the range of reasonable investigations as it was thorough.

39 Secondly, was there a genuine belief that misconduct had taken place? I do not think that there is any suggestion either from the claimant or implicit in any of this evidence that it was not a genuine belief of theirs. Had they been in a hurry to get rid of the claimant any time, he would not have been reinstated twice previously into this employment.

40 The claimant's allegation that he was not generally liked in the warehouse or the store was not accepted by the respondent, reasonably in my view. All the evidence seemed to point the other way.

41 The third part of the test is, was it a reasonable belief? For the reasons given above, it was an obvious, serious, and apparent deliberate, disregard of health and safety. It was reasonable.

42 Given this, was summary dismissal a reasonable sanction? Given the possibility (more a probability) that this could easily reoccur, and the loss of trust in the claimant, I conclude that it was an eminently reasonable sanction. In the respondent's disciplinary policy the number one example of gross misconduct is health and safety related misconduct, as it happens.

43 Lastly was there a reasonable process? There has been no criticism of the structure of the disciplinary process. I find the process was reasonable, and commendably swift without being rushed. The managers conducting it seemed to have real insight into what would or would not amount to mitigation (if any had arisen).

44 So, for all those reasons the claim of unfair dismissal has been heard on the merits. The claimant was fairly dismissed and his complaint fails.

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Employment Judge Prichard

07/01/2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE