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# THE EMPLOYMENT TRIBUNAL

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**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mr M Bah**

**Berendsen UK Limited**

**Held at London South**

**On 25 February 2019**

**BEFORE: Employment Judge Siddall (Sitting Alone)**

## **Representation**

**For the Claimant: Ms K Blatchford, FRU**

**For the Respondent: Ms V Webb, Counsel**

## **RESERVED JUDGMENT**

The decision of the tribunal is that the claim for unfair dismissal is not well founded and it does not succeed.

## **REASONS**

1. The Claimant was summarily dismissed for gross misconduct on 13 November 2017. He claims that he was unfairly dismissed. During the course of the hearing I heard evidence from the Claimant, from Mr Stuart Duell, Production Manager of the Respondent, Mr Laurence O'Donovan, previously a Production Manager of the Respondent and from Ms Enorr Erhuero, Head of HR, South East Region.
2. This case was listed to begin at 10am on 25 February. Having completed a preliminary hearing, I was ready to commence the case at approximately 11am.

I was advised that the Claimant had not yet arrived. I brought the parties into the room. Ms Blatchford explained that she had heard from the Claimant who said that he was not feeling well, although he was starting to feel better, and that he was making his way to the Tribunal. She said he did not expect to arrive for around another two hours. She said that he was travelling to the tribunal office in Croydon from Euston.

3. Ms Blatchford applied for the case to be adjourned to another day, or adjourned until the Claimant arrived. Having considered the reasons provided for the Claimant's non-attendance, I was not inclined to grant either adjournment. The Respondent's witnesses were in attendance and ready to give evidence. Ms Blatchford did not argue that the Claimant was too unwell to attend at all, and he did not appear to have good grounds for not being at the Tribunal at 10am. I also considered rule 47 of the Employment Tribunal Rules of Procedure which deals with non-attendance, and took into account the fact that the Claimant was represented at the Tribunal and that Ms Blatchford would be able to represent his interests. I decided that the case should commence. I advised Ms Blatchford that the Claimant would have an additional period of time to get to the tribunal while I read through the statements and documents. I estimated that it should only take around an hour to travel from Euston. It was my hope that the Claimant would arrive by the time we were ready to hear evidence. If not, the Respondent's witnesses would go first and Ms Blatchford could commence her cross examination of them in the hope that the Claimant would eventually arrive.
4. I broke at that point to consider the witness statements and documents. We reconvened at 11.55 by which time the Claimant had still not arrived. We proceeded to hear the evidence of Mr Duell. The Claimant eventually entered the Tribunal room at 12.50. He said that he had to get up very early to make his way to the Tribunal but that he had not been feeling well. I explained to him that he had arrived nearly 3 hours late and as a result we had started the case. His representative was cross examining the first witness and he would have an opportunity to speak to her over the lunch hour. We would hear his evidence in the afternoon. The case proceeded on that basis.

5. The facts I have found and the conclusions I have drawn from them are as follows.
6. The Respondent operates an industrial laundry at its Brixton site and the Claimant had worked there for many years. The Claimant made a request at very short notice to take four days holiday from Monday 26 June 2017. The Production Manager, Nigel Charles, turned down his request for Monday 26 June but granted him leave for 27, 28 and 29 June. The Claimant told Mr Charles that he needed the time off as he had an issue over deductions from his pay and had a court case that week and that a staff member called AW was assisting him. Mr Charles later checked with AW who said she had no idea what the Claimant was talking about. Mr Charles therefore advised Mr O'Donovan in an email dated 28 June that on the Claimant's return to work he would investigate this issue.
7. Mr Charles' email to Mr O'Donovan dated 3 July describes what happened when the Claimant returned to work. The Claimant did not return until 3 July 2017 and he was called into the office for a discussion with Mr Charles. Another member of staff JS was also in the office. Mr Charles' email reports that on entering the office "Mr Bah was angry and very threatening towards myself and JS". Mr Charles asked him to leave the office. He gave the Claimant five minutes to calm down but records that the Claimant then started to threaten an employee called CF "lifting his fist and aiming it at CF and I had to stand in front of him because I feared that he was going to hit CF". Mr Charles records that the Claimant then started on another member of staff SU, who pushed a trolley of stock between himself and the Claimant. Mr Charles called security. At some point the Police arrived – the Claimant said that he called the Police, whilst Mr Charles states that he had no option but to call the Police himself to restrain the Claimant. It seems more likely than not that two calls to the Police were made. The Claimant was removed from the building.
8. Mr O'Donovan stated and I accept, that when he came into work on the morning of 3 July, he met with Mr Charles who reported to him what had happened. He later saw the email sent at 4.40am that morning.

9. Following this incident, the Claimant was suspended. Mr Stuart Duell was requested to carry out an investigation.
10. Mr Duell did not work on the nightshift so he asked the Transport Supervisor, CH to take statements from CF, SU and JS. The statements obtained which are at pages 60-62 of the Bundle are not particularly helpful. They are very short, do not specify the date the alleged actions took place and to some extent are inconsistent (although it is possible that all three employees were giving “snapshots” of what happened at different stages). The statement of CF states that the Claimant tried to hit him with a “dynamics server”. The statement of SU confirmed that he placed a cage between himself and the Claimant to protect himself. The statement of JS confirms that the Claimant had been angry and aggressive towards him in the office.
11. Having received these statements Mr Duell asked the Claimant to attend an investigation meeting with him on 10 July 2017. At the start of the meeting, the notes record that Mr Duell said “this is an investigation meeting to establish the facts about the incident on the 3<sup>rd</sup> July 2017 at 1.30am”. It notes that the Claimant had been removed by the Police because of his actions and behaviours towards the shift manager. I find that at this meeting, the Claimant was given a full opportunity to provide his version of what had happened on that night. He stated that Mr Charles, JS and CF had been abusive to him. He agreed that Mr Charles had stepped between him and CF but he says that this was “to separate him”.
12. I find that following that meeting the Claimant met with Mr Duell a second time to play a recording from his mobile phone about an exchange that he says took place between himself and JS. The Respondent does not agree that this exchange took place on the night in question, although the Claimant is adamant that it did. I find that as there seems to be agreement that aggressive words were spoken between JS and the Claimant on the night in question, it is possible that this is recording from the night of 3 July.

13. The recording was played in court. In addition, I have seen two transcripts of the recording, the first produced by the Respondent (which appears to be incomplete). The Claimant has also produced his own transcript. The recording is not completely clear and according to the Claimant's own transcript, although he records JS swearing at him, the Claimant agrees that he said to JS "you go drink alcohol you smelly wazincol" (which he says means "idiot"). The Claimant also agrees that he said, "you are not being civilised, I will civilise you".
14. Mr Duell took the view that it was not clear when this exchange had been recorded and he did not think it was relevant to the events of the 3<sup>rd</sup> July.
15. Following the investigatory meeting, Mr Duell viewed CCTV footage of what had happened in the packing area after the Claimant had left the office. He stated that the CCTV was clear, and he observed the Claimant assaulting CF. He did not see the Claimant trying to hit CF with a piece of equipment. He met with CF to clarify his evidence and show him the CCTV recording, and to see if it accorded with CF's memory of what had happened that night. CF confirmed that it did, and he stated that he had been assaulted.
16. Mr Duell retained the CCTV evidence on his server but it was deleted following a computer upgrade. Ms Erhuero also had a copy of the CCTV footage on her phone which was used at the disciplinary hearing, but she deleted this after the disciplinary hearing had taken place. As a result, the CCTV evidence was not available to view at the Tribunal.
17. Having spoken to the Claimant and to CF and having viewed the CCTV evidence, Mr Duell decided there was a disciplinary case to answer and he referred the matter to Mr O'Donovan to conduct a disciplinary hearing.
18. The Respondent wrote to the Claimant on 22 September 2017 asking him to attend a disciplinary hearing on 29 September. This letter stated that he would face allegations "relating to your alleged violent misconduct on the Brixton site on 3 September 2017". This was clearly an error. That error is not material as the letter did not reach the Claimant – it was posted to the wrong address.

19. When the Claimant did not attend the meeting on 29 September, it was rescheduled for 5 September. Unfortunately, this letter was also sent to the wrong address.
20. On 16 October, the Respondent wrote to the Claimant confirming that he had been summarily dismissed after he had failed to attend the second hearing. This letter was also sent to the wrong address.
21. On 1 November 2017, the Claimant turned up at the Respondent's premises. He had noted that his pay had been stopped. He met with Ms Erhuero who called for Mr O'Donovan to join them. The Claimant was advised that he had been dismissed. Mr O'Donovan and Ms Erhuero assert that the Claimant became angry, and I accept their evidence. It would not be surprising for the Claimant to be angry if he had been dismissed without his knowledge and had suddenly found that his pay had ceased.
22. At this point the Respondent realised that they had been writing to the Claimant at the wrong address. They took steps to reinstate him and they wrote to him on 1 November 2017 calling him to a disciplinary hearing on Wednesday 6 November 2017. This letter also referred to an incident that had taken place on 3 September. In fact, the Respondent had got the date of the disciplinary hearing wrong as well – they meant 8 November 2017. This was corrected in a further letter addressed to the Claimant dated 7 November 2017, referring to the incident on 3 July 2017 and sent to the right address.
23. The Respondent states and I accept, that these letters included copies of the notes from the investigation meeting, the three statements from members of staff and the email dated 3 July from Mr Charles. The Claimant denies this. He says he did not receive the letters dated 1 and 7 November and did not receive any of the evidence before he turned up to the hearing. I do not accept this as the Claimant turned up to the disciplinary hearing on 8 November 2017. He would have had to have receive notification of when that hearing was due to take place. I also accept the evidence of Ms Erhuero that the Claimant brought a brown envelope with him containing the letters and the evidence he had been sent. The letters clearly refer to enclosures being included.

24. At the hearing, Mr O'Donovan took the Claimant through the evidence of what had happened on the night of 3 July, including the statements that had been obtained. He then showed the Claimant the CCTV evidence which the Claimant had not seen previously. He asked the Claimant for his comments.
25. Mr O'Donovan states that he saw from the CCTV that the Claimant had been trying to stop CF from recording events on his phone. He had tried to get the phone from CF and had hit him on the arm.
26. There are no notes available for the disciplinary hearing as these have been lost. That is extremely unfortunate. I accept that in broad terms the Respondent put the available evidence to the Claimant. I also accept that he was shown the CCTV evidence as this is not in dispute.
27. The Claimant said in his witness statement that the disciplinary hearing had taken place over 2 days. He said it had been adjourned during the first day because he had become very upset. However, during his evidence he was referred to these passages in his witness statement and he said that he got that wrong and that the meeting took place during one day.
28. I accept the evidence of Mr O'Donovan and Ms Erhuero that during the course of the hearing the Claimant became angry and abusive, especially after he had seen the CCTV evidence which he asserts is fake. He was eventually escorted from the premises by security.
29. The Respondent wrote to the Claimant on 13 November 2017 confirming his summary dismissal with effect from 13 November 2017.
30. In that letter Mr O'Donovan recalls that he had taken into account statements from CF, JS, SU and MC. He noted that there may have been confusion over the booking of annual leave but he states that "despite this I felt that your handling of the situation was unacceptable in the way in which you subsequently became both physically and verbally abusive". This resulted in the Police having to be called. He did not accept that the Claimant had been provoked.

31. Mr O'Donovan also noted that during his suspension the Claimant had visited the Brixton site on 17 August in breach of instructions and that again the Police had to be called.
32. Mr O'Donovan concluded that the statements were consistent with the CCTV footage. He states that he had taken into account the Claimant's length of service but had decided that the allegations were so serious that dismissal was an appropriate sanction.
33. Mr O'Donovan also referred to the fact that the Claimant had become abusive and aggressive during the disciplinary meeting.
34. There is another aspect to this matter. During the course of the investigation the Claimant asserted that JS and other employees at the Brixton site were requiring staff to give them money before allowing them to take holiday on the days they had booked. As a result of this allegation by the Claimant and others, the Respondent carried out an investigation. The Claimant was asked to attend a meeting to talk about what had been happening. I was advised by the Respondent and I accept that as a result of these allegations JS was dismissed from his employment.
35. The Claimant asserts that his dismissal was connected with the allegations made against JS and that the Respondent was determined to get rid of him.
36. I now go on to consider the evidence and the case put forward by the Claimant.

### **Decision**

37. I have considered carefully the Claimant's evidence that he was dismissed because of the corrupt behaviour that had been going on at the Brixton site involving JS and others.
38. I find that the Claimant has not shown that it was more likely than not that this was the reason for his dismissal. The allegations of corruption had been brought to the attention of the Respondent on 27 May 2017. The Claimant was



not interviewed about this matter until 9 August 2017, well after the incident on 3 July. He does not suggest that he had himself made a complaint about JS earlier, resulting in JS seeking to victimise him or create circumstances in which he would be dismissed.

39. Secondly, I note that the complaint against the Claimant was initiated by Mr Charles. There is no allegation that Mr Charles was involved in the extortion. I note that the Claimant did not make any allegation against Mr Charles until the investigation meeting.
40. In all the circumstances I find that the reason for the Claimant's dismissal related to his conduct on 3 July. An allegation of serious misconduct was made by Mr Charles on that date. I do not accept that this complaint was motivated by a wish for retribution upon the Claimant, in connection with the issues around booking holiday. I do accept that the corrupt practices going on around the booking of annual leave would have heightened the tension when the Claimant was called into the office to discuss the booking of his leave with Mr Charles. It therefore had an indirect effect on the events of 3 July, but was not the reason for the Claimant's dismissal.
41. Misconduct is a potentially fair reason for dismissal. In accordance with the case of *Burchell v British Home Stores*, I must go into consider whether the Claimant had a genuine belief in the Claimant's misconduct, based on reasonable grounds after a reasonable investigation.
42. I accept that both Mr O'Donovan and before him Mr Duell, had formed a genuine belief that the Claimant had acted aggressively and had sought to assault CF. I must consider whether they acted reasonably in deciding to dismiss him.
43. I turn first to the investigation carried out by Mr Duell. It is very unusual for an investigator not to interview witnesses directly himself. If Mr Duell had difficulties in interviewing witnesses because they worked on a night shift, it might have been more appropriate to appoint another investigator. The witness statements obtained from the three witnesses are poor and overall they are of

limited value, although I note that the witness statements of CF and SU do provide some corroboration for the matters set out in Mr Charles' statement.

44. Mr Duell gave the Claimant an appropriate opportunity to provide his account of what had happened on the 3<sup>rd</sup> July 2017. Following that meeting, Mr Duell carried out further investigation himself. He viewed the CCTV and formed the clear view that this demonstrated the Claimant acting aggressively and attempting to assault CF. However, he did not leave matters there. As I have said, the witness statement taken from CF is not very satisfactory. It was inconsistent with the CCTV evidence in that CF referred to the Claimant attempting to hit him with a piece of equipment. Mr Duell says and I accept that this was not shown on the CCTV. In order to address this inconsistency Mr Duell interviewed CF himself and obtained his confirmation that the CCTV was an accurate recording of what had happened.
45. The administration around the disciplinary process was extremely poor. Three letters went to the wrong address. These letters themselves contained errors and they referred to the wrong date on which the incident took place. In the overall scheme of things this is irrelevant as the Claimant did not receive those letters.
46. It is highly unfortunate that after the mistake had been realised, the letter sent to the Claimant inviting him to a further disciplinary hearing also contained errors. Again, it referred to the wrong date of incident and in this case, it referred to the wrong date for the disciplinary hearing. However, the Claimant was clearly aware that a disciplinary hearing was due to take place on 8 November as he turned up on that day. He was clear from his interview with Mr Duell that he was being questioned about events on the night of 3 July. Finally, the allegations of what had actually happened on that night are set out clearly in the email sent by Mr Charles, and are also referred to in the witness statements taken from the three other members of staff, albeit there are some issues with these statements. I find that the Claimant had the opportunity to consider this written evidence prior to the disciplinary hearing.

47. I have noted that the Claimant only had the opportunity to view the CCTV evidence when he came to the disciplinary hearing on 8 November 2017. Ms Erhuero states that the file was too large to send out and so it could not be delivered to the Claimant prior to the hearing. I accept that it is more difficult to provide a member of staff with video evidence than to provide them with documents. In this case the statement of Mr Charles set out clearly what the allegations against the Claimant were. The CCTV was confirmatory of that evidence. Although it would have been preferable for the Claimant to have been shown the CCTV evidence at any earlier stage, perhaps at a reconvened investigation meeting, in all the circumstances of this case I do not find that the Respondent acted unreasonably. I have noted also that the Claimant appears to have no reasonable answer to what he was shown on the CCTV, save to argue that it was fake. There is no evidence that the CCTV had been doctored and in any case, I note that CF had confirmed that it was an accurate recording of what had happened on the night in question.
48. In summary, the Respondent may be criticised for the way in which it conducted the disciplinary process in a number of respects. First, there was the failure of Mr Duell to interview witnesses directly and get full statements from them and second there were the errors in the letters sent out to the Claimant.
49. Case law has made clear that I must consider whether the process as a whole was unfair. Ms Webb refers me to the case of *Shrestha v Genesis Housing Association* [2015] IRLR 399 as authority for the principle that the investigation should be looked at as a whole when assessing the question of reasonableness. I adopt that approach here.
50. I take into account that Mr Duell was clear during the investigation meeting that the Claimant was being asked to answer allegations about his conduct on 3 July 2017. There can have been no doubt in the Claimant's mind about what the investigation and disciplinary process was about.

51. The Claimant was provided with documentary in support of the reconvened disciplinary hearing which took place on the 8 November 2017, which again set out the allegations against him very clearly. Although an employer would usually be expected to provide copies of all evidence to a member of staff in advance of a disciplinary hearing, I accept that in this case there were problems in allowing the Claimant to view CCTV in advance. In the circumstances of this case it was reasonable to show him the CCTV at the disciplinary hearing and to give him a chance to comment upon it. Mr O'Donovan and Mr Duell had both formed the conclusion that the CCTV evidence showed him acting aggressively and even the Claimant does not contradict this, arguing instead that CCTV evidence was "fake".
52. The errors in the letters are extremely regrettable and led to the process being extended far beyond what was necessary in the circumstances. In overall terms I find that this did not cause unfairness to the Claimant. As soon as the Respondent realised its error, he was reinstated and invited to a further disciplinary hearing at which the evidence was put to him in full and he was given a proper opportunity to comment. The Claimant's conduct at the disciplinary hearing no doubt confirmed their conclusion that the Claimant had been aggressive and threatening on the 3<sup>rd</sup> July.
53. I accept that the recording of the exchange with JS may have taken place on 3 July. Unfortunately, this does not help the Claimant's case. It is evidence of a heated altercation with another member of staff (whom he says is JS) in which both are being offensive to the other. Even if this recording had been supplied to the disciplinary hearing, it is likely that Mr O'Donovan would have concluded that it provided further evidence of the Claimant behaving inappropriately and aggressively.
54. In conclusion, despite the several errors made by the Respondent in the way in which they conducted this disciplinary process, I find that in overall terms the process was unfair. Both Mr Duell and Mr O'Donovan had a reasonable basis from which to conclude that the Claimant had behaved aggressively and in a

threatening manner to other members of staff on the night of 3 July. Despite a number of defects, the overall investigation was fair and reasonable.

55. Was dismissal within the bands of reasonable responses? The Claimant was a long serving member of staff. It is not suggested that he had previous disciplinary warnings against him. However, violent or aggressive behaviour to other members of staff is potential gross misconduct. "Physical violence or bullying" is described as such at paragraph 1.44 of the Respondent's disciplinary procedure. The letter of dismissal from Mr O'Donovan dated 13 November 2017 makes it clear that having found that the Claimant's behaviour amounted to gross misconduct, he had gone on to consider what the sanction should be as a separate matter. He notes the Claimant's long service but reaches the conclusion that in light of what had happened summary dismissal was the appropriate sanction. The letter of dismissal is a carefully considered document addressing the issues, noting his findings in relation to the allegations, and noting the reasons why he decided to summarily dismiss the Claimant. I find that decision was within the range of options available to the Respondent.
56. In all the circumstances the claim for unfair dismissal does not succeed and it is dismissed.

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Employment Judge Siddall  
Date: 6 March 2019.