EMPLOYMENT TRIBUNALS

Claimant: Mr D Phillip

Respondent: Cox Automotive UK Limited

HELD AT: Leeds **ON:** 20, 21 and 22 May 2019

BEFORE: Employment Judge Rogerson

REPRESENTATION:

Claimant: In person
Respondent: Mr. I. Ahmed of counsel

JUDGMENT

The complaint of unfair dismissal fails and is dismissed.

REASONS

1. The issues in this case were explained to the claimant at the beginning of the hearing. This is a complaint of unfair dismissal, where the claimant accepts that he was dismissed for two conduct related reasons:
    1. Deliberately damaging customers vehicles.
    2. Aggressive and threatening behaviour.
2. He accepts that these are both allegations of sufficiently serious misconduct which if proven could warrant summary dismissal. They fall within the defined examples of gross misconduct in the respondent's disciplinary policy. The claimant's case before this Tribunal is that he is innocent of both allegations and he wants to prove his innocence to the Tribunal at this hearing, to show that he was unfairly dismissed.

3. I explained to the claimant that in a complaint of unfair dismissal, it is not for the Tribunal, to decide if the claimant was innocent or guilty of these two allegations or whether dismissal was the right decision to make. It is the employer's belief in his guilt, whether that belief in his guilt was genuinely held by the decision maker, and whether at the stage the belief was formed there were reasonable grounds and a reasonable investigation. The focus is on the information the decision maker had when the decision was made and whether the decision to dismiss/uphold the dismissal was reasonable in all the circumstances. The function of the employment tribunal is to determine, whether, in the particular circumstances of this case the decision to dismiss the employee falls within the band of reasonable responses which a reasonable employer might adopt. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band, it is unfair.

4. The decision makers were Mrs Wareing, the dismissing officer, and Mr Barlow, the appeals officer. The questions were: did they genuinely believe that the claimant had deliberately damaged customers vehicles and had behaved aggressively and in a threatening manner? If they did believe he was guilty was that belief based on reasonable grounds and a reasonable investigation. Was dismissal within the band of reasonable responses and fair?

5. The list of issues Mr Ahmed provided at the beginning of the hearing, were the issues that were identified to the claimant as the questions to decide for the complaint made of unfair dismissal and are not repeated here.

Findings of fact

6. I heard evidence for the claimant from, Mrs Tina Wareing, a general manager and the dismissing officer and Mr Peter Barlow, a general manager and the appeals officer. For the claimant I heard evidence from the claimant. I also saw documents from an agreed bundle.

7. In relation to credibility, I must be satisfied that the respondent has shown that the decision makers genuinely believed the claimant was guilty of the alleged misconduct and then on a neutral burden of proof, that the grounds for that belief and the investigations conducted, at the stage the belief was formed, were reasonable. Mr Ahmed points to the credibility of the respondent's witnesses and having heard their evidence, I agree with his assessment that they answered the questions concisely, precisely and explained clearly how they reached the decisions they reached when questioned by the claimant and by the Tribunal. Their answers were also supported by the documents that I saw from the bundle.

8. The claimant attacks their credibility and he gave two examples to support his assessment. The first is that Mrs Wareing said in her evidence that for the allegation of deliberate damage to customer vehicles she was '50/50' until she saw the evidence about the Mini, which persuaded her there was sufficient evidence of similarity of damage to more than one vehicle, to convince her that the damage was deliberately done by the claimant. Mr Barlow was questioned about the Mini and why at the appeal hearing stage, when he checked the photographic images, he circled one picture to show the approximate location of a dent as part of the allegation made against the claimant. Mr Barlow said he had made an "educated guess" as to where the dent on the Mini was located, based on the evidence before him at the time. He had obtained a 360' image from the photographs the claimant had taken because the claimant had complained they had been cropped at the disciplinary hearing. The claimant views these answers as evidence that they were not credible witnesses. I did not agree. The answers given were honest answers

to the questions asked by the claimant to explain what the witnesses did and why. The claimant might disagree with the answers given by the witnesses but that did not mean they were not credible.

9. As to the claimant's credibility, Mr Ahmed has pointed to the claimant's failure to answer the questions asked in cross examination and his tendency to give other evidence not relevant to the question asked. This, Mr Ahmed submits is an indicator, that the claimant's evidence is unreliable. While I agree that there were occasions during the hearing when the claimant lost focus, this might be because he was unfamiliar with this type of court process and was nervous. I do not attach any weight to the criticism made by Mr Ahmed.

10. In any event, this was not a case where I was required to make findings of fact on any material conflicts of evidence between the respondent's witnesses and the claimant. I was reviewing the contemporaneous evidence that was before the respondents witnesses in the bundle of documents and as recorded in the minutes of the meetings. In the main that documented chronology was not disputed by the claimant, although he offered a different interpretation for some of the photographic evidence or challenged the statements provided by witnesses at the time.

11. From that evidence that I saw and heard I made the following findings of fact.

    1. On 22 August 2016, the claimant was employed as a vehicle inspector for the respondent working part-time hours of 20 hours a week.

    2. Vehicle inspectors, inspect vehicles on behalf of the respondent before they are sold on behalf of the customer at an auction.

    3. The job description of an inspector requires them to carry out an accurate inspection in accordance with the respondent's standard operating procedures. They are required to provide accurate reports for use in the auction process by customers.

    4. The claimant was also issued with a contract of employment which identifies the procedures and policies that apply to his employment. The disciplinary policy is at pages 44 to 49 in the bundle. Page 45 identifies as examples of gross misconduct "deliberate damage of customer's property" and "violence or offensive behaviour". The claimant accepted in cross-examination that either offence was sufficiently serious, that, if proven, could result in instant dismissal.

    5. In August 2018, following customer complaints, the respondent conducted an investigation into the vehicle inspectors and the number of unclassified gradings made by the inspectors. A 'U' grade is an unclassified grade which means the vehicle is considered uneconomical to appraise and this can affect the sale price obtainable at auction. This grade has cost implications to the vendor and for customers at auction. For an inspector, it is quicker to class a car as a grade U because the precise damage does not need to be identified. Other grades require a more detailed examination of the damage and repairs required. The respondent pays a bonus based upon the productivity of the inspectors and the number of vehicles assessed, so the quicker vehicles are assessed, the greater the bonus.

    6. Allegations were made against the claimant's colleague, Mr Cundall that he had deliberately damaging vehicles. He was suspended on the 22 August 2018, and was subsequently dismissed.

7. The claimant was also suspended on 22 August at a meeting with Richard Robinson(manager) and Laura Fowler (HR officer) for an allegation of deliberate damage to customers vehicles. Laura Fowler was the HR advisor, witness and note taker for the suspension meeting.

8. At this suspension meeting, the claimant was alleged to have behaved in a threatening and aggressive manner, witnessed by Laura Fowler and Mr Robinson. Mr Robinson prepared a statement dated 22 August 2018 setting out his recollection of that meeting and the behaviour of the claimant. Laura Fowler also prepared a witness statement on 23 August 2018. Both refer in detail to the claimant's behaviour during and after the suspension meeting. Laura Fowler describes the claimant as being angry at the suspension decision and that afterwards he became angry and aggressive making threatening comments which she has identified in her statement. The same comments were identified by Mr Robinson in his witness statement specifically "I will cowl man down. I swear down on my dad's grave I will get arrested for assault". Ms Fowler asked the claimant to leave the site. She recalls that he did not leave immediately. She asked Mr Robinson to stay in the Portacabin where the suspension took place, because she wanted to diffuse the situation. She then escorted the claimant off the site. Ms Fowler provided a detailed account of the events she witnessed to the respondent. She was a HR officer acting as a witness and note taker at a suspension meeting. In the disciplinary process, the claimant did not suggest any reason why Ms Fowler would make this up in her statement.

9. As a result, of this alleged behaviour, a further disciplinary charge was added for consideration at a disciplinary hearing of "aggressive and threatening behaviour". The claimant describes this, as the respondent 'changing' their case which he says points to unfairness in his dismissal. It is not unfair for an employer, to add a charge that arise out of the disciplinary process, as part of an ongoing disciplinary investigation, providing that charge is dealt with fairly.

10. Investigation meetings took place with the claimant and Mr Danny Entwistle, the investigating officer, on 22 August, 23 August, 28 August and 30 August 2018. Mr Entwistle decided this was a matter that should proceed to a disciplinary hearing.

11. By letter dated 30 August 2018, the claimant was invited to a disciplinary hearing on 5 September 2018 (page 41 in the bundle). The letter sets out three allegations of deliberate damage of customers property, to a Volvo, a Polo and a Jetta. It includes all the evidence gathered during the investigation process. It provides copies of all minutes of the investigation meetings and suspension meeting and a copy of the employer's disciplinary policy. It warns that dismissal is a possible sanction and informs the claimant of his right to have representation. As a result, the claimant would know the case he was facing at the disciplinary hearing to enable him to prepare his case in defence/mitigation.

12. The disciplinary hearing was conducted by Mrs Wareing. She is an independent manager who had not been involved in the earlier process and was not known to the claimant. At the hearing she reviewed the evidence with the claimant and questioned him. The claimant denied damaging the vehicles but could not explain how the damage identified might have occurred.

13. In her witness statement at paragraph 19.1 she sets out how she dealt with her questions regarding the damage to the Jetta, at paragraph 19.3, her questions

regarding the damage to the Polo, and at paragraph 19.4 her questions regarding the damage to the Volvo. She sets out what the claimant said in his defence during the disciplinary hearing and how she put to the claimant her view that the damage appeared to be consistent and similar in characteristic to the other vehicles identified. In one answer, the claimant referred to the tailgate of the Polo having fallen off on a valeter, which he reported to his manager, Mr Cameron. He said there was no reason for him to deliberately damage the vehicles because the amount of time he took to grade an unclassified car was the same as a classified grade and was about 10 minutes.

14. In relation to the allegation about the threatening and aggressive behaviour the claimant denied being angry at his suspension or making the comments alleged. He referred to a customer that he recalls had greeted him on his way out with Laura Fowler but he did not know that customer's name. Mrs Wareing agreed to the claimant's request to postpone the hearing to a later date, because the claimant wanted to seek legal advice.

15. As a result of the information provided by the claimant, Mrs Wareing conducted some further investigations. She obtained statistical data about the time taken to grade classified and unclassified vehicles. She spoke to Mr Cameron on 10 September 2018, regarding the polo and took a statement from him. Mr Cameron recalled the incident but referred to another vehicle, a Mini that he thought related to the tailgate issue. He recalled that the tailgate was damaged and that he had written that, on the back of the mini, to warn the valeters. He thought that the claimant might be confused about which car had the tailgate damage. Mrs Wareing looked into the Mini further and in doing so it appeared to her that the dent on the Mini was damage consistent with the damage she had seen on the other vehicles that the claimant was alleged to have deliberately damaged. She reviewed three photographs which had been taken by the claimant at 10:41:31; 10:41:58 and 10:42:21. On the first photograph, there was no damage to the vehicle but on the third photograph there was damage to the rear panel showing a dent. She also spoke to Ms Fowler and Mr Robinson about their recollection of the suspension. Neither of them could recall a customer being present during their interaction with the claimant.

16. Mrs Wareing invited the claimant to a further meeting on 20 September 2018, to discuss the results of her further investigation and to show the claimant the evidence that she had obtained, to give the claimant the opportunity to comment on it. The claimant denied using aggressive and threatening behaviour and alleged that Laura Fowler and Mr Robinson's account were fabricated.

17. In relation to the deliberate damage allegation, the claimant had said at the earlier hearing that the amount of time taken to grade an unclassified car was the same as a classified grade. Mrs Wareing showed the claimant the statistical data she had obtained which demonstrated that was not true. The 'mean' time it took the claimant for a classified grade was 21 minutes and an unclassified grade was 11 minutes. The claimant had said it was about 10 minutes for both types of grades. She decided based on the evidence available that she did not believe the claimant's version of events.

18. Mrs Wareing sets out in her outcome letter her detailed reasoning for the conclusions she reached (pages 109-110 in the bundle). She records that the claimant was unable to confirm why the damage on the vehicles had similar characteristics and had occurred during inspections. She concludes "*it is my*

belief from the evidence available that you intentionally damaged the cars, in order to complete your work more quickly and to reach your bonus targets".

19. In cross-examination, she said the evidence relating to the Mini had been persuasive and she had been 50/50 on that allegation before that point. She concluded that because of the number of vehicles showing similar damage it was more probable than not, that the damage had been deliberately caused by the claimant.

20. For the behaviour allegation, she found that Mr Robinson and Ms Fowler had independently recalled the behaviour and had provided consistent and detailed accounts. Neither had recalled a customer being present during their discussions with the claimant. She preferred and accepted their account to the evidence of the claimant. On those grounds she found that both allegations were proven and therefore the claimant should be summarily dismissed.

21. The claimant then appealed the decision, out of time. The respondent allowed that appeal, which was heard by Mr Barlow. Mr Barlow was willing to consider any matter raised by the claimant at the appeal hearing, even though the claimant had only identified two grounds of appeal. Mr Barlow expanded upon the points the claimant raised, to identify four grounds which were: adding the 'behaviour' allegation as a second allegation: obtaining a statement from Mr Cameron during the investigation in relation to the Mini, which the claimant considered was an attack on the claimant's integrity and character: the disputed statements of Ms Fowler and Mr Robinson: and that Mr Robinson should have taken control at the suspension meeting, Ms Fowler as a female should have been sent away.

22. Mr Barlow dealt with those 4 grounds in the outcome letter which is at pages 145-148. After investigating each ground raised, he made his findings in relation to each ground, dismissing the appeal and upholding the dismissal decision. Mr Barlow had approached the appeal with an open mind. He questioned Mrs Wareing about her interview with Mr Cameron because Mr Cameron had left the business and could not be questioned. He obtained 360' degree images of the Mini from the photographs the claimant had taken, because the claimant alleged the images used in the disciplinary hearing were cropped. He was satisfied that the reason why the Mini was investigated was because the claimant had requested that Mrs Wareing check the damage to the tailgate that had been reported to Mr Cameron. He interviewed Laura Fowler to understand how the suspension was delivered, what the claimant's reaction was, how she managed it and why she stepped in. It is clear from the notes that his questioning of all the witnesses was open, designed to explore the points raised by the claimant at the appeal hearing. He wanted to satisfy himself that the decision made by Mrs Wareing was properly made.

Applicable Law

23. The claimant accepts and I found that the claimant was dismissed for misconduct (a conduct related reason) which is a potentially fair reason in accordance with section 98(2)(b) of the Employment Rights Act 1996.

24. Section 98(4) provides that where a potentially fair reason for dismissal has been shown the next question to consider is whether the dismissal for that conduct related reason was fair or unfair when applying the requirements of section 98(4) of the Employment Rights Act 1996. This section provides that "*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:

(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,

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

25. In the case of Iceland Frozen Foods Ltd-v- Jones1982 IRLR439 EAT the employment appeal tribunal gave guidance on the application of section 98(4). Reminding the tribunal to start with the words of that section, that in applying it the tribunal must consider the reasonableness of the employer's conduct, not whether they consider the dismissal to be fair, and must not substitute its decision as to what the right course to adopt, for that of the employer. The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, 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.
26. For conduct dismissals a three-fold test applies, which was explained at the beginning of the hearing. The employer must show that it believed the employee guilty of the misconduct, and on a neutral burden of proof that it had in mind reasonable grounds upon which to sustain that belief, and at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. British Home Stores Ltd-v- Burchell 1980 ICR 303. This means that the employer need not have conclusive direct proof of the employee's misconduct-only a genuine and reasonable belief, reasonably tested.

Conclusions

27. The first question I had to consider was whether Mrs Wareing, at dismissal, genuinely believed that the claimant was guilty of both allegations of misconduct. Mr Ahmed points out that in cross examination, the claimant did not challenge or question her genuine belief. I accepted her evidence that she genuinely believed that the claimant was guilty of both allegations.

28. The second question is whether her belief was based on reasonable grounds and a reasonable investigation: was it reasonably tested. Mrs Wareing did not simply rely on the evidence gathered by Mr Entwistle in his investigation, she went further. She reasonably followed up points raised by the claimant in his defence during the disciplinary hearing, to explore the veracity of the information he provided. The problem for the claimant, was that the information obtained, did not support him.

29. I was satisfied that a reasonable investigation had been carried out. Mrs Wareing had reasonable grounds for finding the allegations were proven and reached that decision based on the evidence obtained during the investigation. Her approach and willingness to investigate matters raised by the claimant in his defence, demonstrates her open minded and fair approach. If those enquires had supported the claimant, there is no reason why she would have ignored that evidence, having taken the step of obtaining it.

30. At the appeal stage, I was satisfied that Mr Barlow genuinely believed that the claimant was guilty of the two allegations of misconduct. His belief was formed at that stage on reasonable grounds, based upon the reasonable investigation conducted previously and his own reasonable investigation of the matters raised by the claimant. He considered and explored the claimant's answers and questioned witnesses in an open way. He fully considered the points raised by the claimant and addressed all the points made in his detailed outcome letter.

31. The claimant may not have any idea of what sort of investigations are normally conducted by employers in cases of this type. The Tribunal on the other hand sees many investigations of differing levels, depending on the size and resources of the employer. The investigation carried out in this case was thorough, fair and reasonable. Both Mrs Wareing and Mr Barlow made their own enquiries to explore areas raised by the claimant in his defence. One example is the fact that Laura Fowler was interviewed at the disciplinary and appeal stage to test her recollection of the events and investigate whether there was a customer present at the time. Mrs Wareing and Mr Barlow could simply have accepted her statement made at the time, without investigating it with her, but they chose not to. In the end the decision makers were faced with two consistent detailed accounts describing aggressive and threatening behaviour by the claimant identifying threatening comments, against the claimant's account, denying that anything untoward had happened. That disciplinary charge of aggressive and threatening behaviour if proven was of itself enough to entitle tan employer to treat it as serious misconduct which could result in dismissal.

32. The claimant accepted both allegations were capable of being treated if proven as sufficiently serious offences which could result in dismissal, the disciplinary invitation letter and policy made that clear. The question is whether the dismissal for that proven conduct falls within the band of reasonable responses open to a reasonable employer faced with those circumstances. The words of section 98(4) require the particular circumstances to be considered. This includes the type of misconduct under consideration by the employer and the seriousness of that misconduct and any mitigating circumstances. It cannot in my view be outside the band of reasonable responses for a reasonable employer that finds an employee has deliberated damaged cars and has behaved in aggressive and threatening manner, to dismiss that employee. The claimant was denying the conduct had occurred. He was not presenting a case of accepted misconduct with mitigating circumstances which might lessen the sanction imposed.

33. As stated at the beginning of this hearing, in a complaint of unfair dismissal it is not about the claimant proving his innocence to me. I do not make any findings as to whether I find the claimant was guilty or innocent and I do not step into the shoes of this employer and say I would have made a different decision. That is not the function of the tribunal. I know that the claimant won't take any comfort from this decision but my role is to apply the law to the facts as I have found. Having considered the requirements of section 98(4) of the Employment Rights Act 1996, I am satisfied claimant's dismissal was fair, therefore the complaint of unfair dismissal fails and is dismissed.

Employment Judge Rogerson

Date: 20 June 2019

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