



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr O Downswell

v

**Respondent**

Wilson James Limited

**Heard at:** Bury St Edmunds

**On:** 20, 21 and 22 February 2019

**Before:** Employment Judge Cassel

**Members:** Mrs M Prettyman and Mr B Smith

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr Chadwick, Consultant

**JUDGMENT** having been sent to the parties on 25 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Claimant, Mr O Downswell, complains of being unfairly dismissed from his employment with the Respondent and Direct Discrimination on the grounds of race. The Claimant has described himself as a black Jamaican.
2. Under the Employment Rights Act 1996, Unfair Dismissal is provided for under Section 94 and as far as these proceedings are concerned, the relevant provisions are in Section 98. Very simply it is in the following terms:
  - (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*

Under:

- (2) (b) *relates to the conduct of the employee.*

3. Under paragraph 98(4) the following provisions are provided for:
- (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.*
4. Under the Equality Act 2010, Direct Discrimination is prohibited conduct under Section 13, which is in terms:
- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*

Under Section 14(2)(d), Race is a protected characteristic.

5. On 10 October 2018, there was a Case Management Hearing, a Preliminary Hearing, and among other things the issues were laid out in some detail and the Discussion Document is exhibited at page 28 of the Bundle. Pausing there, at paragraph 3.3 of page 28 in respect of Unfair Dismissal, is the following question:

Page 28: 3.3: *“Was there a reasonable investigation?”*

We will refer to this later on in the judgment.

6. The proceedings to determine liability only took place over three days and we heard evidence from Mr Les Reed the Investigation Officer, Mr Angus MacDonald the Disciplining Officer and the Claimant. We had witness statements from three further witnesses but did not hear oral evidence from the following; Mr Nick Vrahimis who was the Appeal Officer, Mr Michael Gower and Mr Daniel Bunce. We also had a bundle of exhibits comprising 129 pages of documents.

## **Background**

7. The Claimant was employed from May 2008 and following a series of transfers under the Transfer of Undertaking (Protection of Employment) Regulations (“TUPE”), the Respondent became his employer on 1 April 2013. The Claimant describes himself in the following terms,

*“I was employed by BPL as a Security Officer on May 2008. This involved securing the property, monitor CCTV, isolate and reinstate alarms, give entry to vehicle and people alike, First Aider, patrol site, carry out products when hospitals and pharmacies need product out of regular hours, take photos and make access cards, give access to staff, contractors and*

visitors.”

8. In any event, he was employed initially as a Security Officer and, we were told, he was promoted to Lead Security Officer. He worked at the same site throughout his employment.

9. There was no dispute that he was of good character and in written evidence from his former manager, Mr Gower, who was his Manager for five years, was described in the following terms:

*“My first impressions of Orville during that period were nothing but positive as he always seemed to have a happy and smiling disposition in a role where many of his fellow officers did not, so in my mind he stood out amongst his co-workers as a cheerful individual... On many occasions Orville would go above and beyond his role as Security Officer in helping out with stranded or broken down vehicles within the car parks and changing tyres when people needed help to get home... I can honestly say that in the entire time I have known and managed him, I have never seen or heard him getting angry or raising his voice in any way other than in laughter. So, to hear of Orville’s current predicament I am frankly disbelieving that he could have behaved otherwise.”*

10. Although Mr Gower did not give evidence, there was nothing to suggest in any of the evidence that we have heard that his assessment was not accepted as being a fair one by the Respondent.

11. The Respondent employs 4,000 people in Great Britain although no description was given in the documentation that we have received of their roles and responsibilities, or the exact nature of the Respondent’s undertakings.

12. In any event, an incident occurred on 24 September 2017 at approximately 11:30pm. The Claimant was working overtime at the request of Mr Reed and working with two others, Mr Robert Smith and Mr K Kow. The Claimant said that he had previously written an email to Mr Reed about difficulties that he had had with Mr Smith. We did not see that email. Mr Reed told us there was not one, however, following the incident, in his interview Mr Smith confirmed that there was difficulty and we refer to page 76, which is an interview of Mr Smith by Mr Reed on 25 September 2017 in which the following is recorded,

*“Robert then went on to explain to Les Reed that he had suffered months of selfish behaviour from Orville and mentioned occasions where Orville had left Robert in the gate house for longer than an hour which Robert felt was pushing the limits of what was reasonable, bearing in mind Robert was new in the role at BPL. Robert also expressed he did not feel he would be able to work with Orville in the future due to this alleged attack”.*

13. That is the background to the dispute.

## Findings of Fact

14. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention has been drawn:
- (1) On his tour of duty, the Claimant attended the premises at approximately 1850 hours on 24 September 2017. He was told by Mr Smith to undertake a check call of the premises. The Claimant stated he had not received an email to confirm this. In any event, this request caused some kind of ill feeling between the Claimant and Mr Smith.
  - (2) At about 2330 hours, the Claimant went to the gate house. He sought entry to use the toilet having left his security pass in his car.
  - (3) Words were exchanged between the Claimant and Mr Smith. Whatever the words the Claimant used then, and we make no finding of fact, probably showed insistence in gaining entry, Mr Smith said something along the lines of *"use the word 'please'"*.
  - (4) The Claimant felt belittled and used the word *"fuck"*. The Claimant says he said, *"I am not a child, fuck off"*. Mr Smith and Mr Kow, who was also present, who is also described as a black Jamaican, both in later statements stated that the Claimant had said *"fuck you"*.
  - (5) When the Claimant was later interviewed he accepted that he did say *"fuck you"*.
  - (6) There was a dispute as to how many times he used that expression and in view of the subsequent reasons given for his dismissal it is probably not necessary to make a finding of fact.
  - (7) Once the Claimant had gained entry to the gate house, his temper was raised. He described himself as, *"annoyed"*, although it seems to us more likely that he was frustrated and irate.
  - (8) As he rushed to the toilet he made the following comment in terms according to the Claimant, *"The nigger tree you are climbing up, you should stop because you will fall and break your neck"*.
  - (9) The two other witnesses were subsequently interviewed. They gave different accounts but both agreed that the word 'nigger' was used. There was some disagreement whether he said *"his"* or *"your"* neck.
  - (10) However, it is apparent that the incident lasted no more than three minutes.
  - (11) Of particular significance is the fact that there was a CCTV recording of the reception and gate house areas. For reasons explained later, that recording was not available either to the Claimant or to the Tribunal. Mr Reed saw the recording and after

seeing the recording for the time period covering half an hour before and half an hour after the incident that the behavior of the three, in his words was “normal”.

- (12) However, at 0014 hours, Mr Smith sent a written complaint to Mr Reed which was copied to Mr MacDonald. The email is produced at page 68. Mr Smith described what had happened as an unprovoked attack with menaces.
- (13) The Claimant phoned Mr Reed the following day and accepted that he had used both the words “fuck” and “nigger” and later when interviewed he seemed to refer the word “nigger” to himself.
- (14) All three were interviewed and Mr Reed sent a report to Mr MacDonald recommending disciplinary action.
- (15) Prior to the hearing taking place, an investigation summary was prepared and included with the report was the CCTV recording.
- (16) The summary was produced at page 80 and under “CCTV” was the following comment,  
  
*“evidence available to show incident was 23.23 – 23.26. No obvious signs of confrontation”.*
- (17) The matter was not progressed because the Claimant was off sick and was subsequently suspended from work on 27 October 2017.
- (18) Documents were sent to him on 30 October 2017 and in an email of 2 November 2017 the Employee Relations Co-coordinator Ms Roley Adeosun made the following comment when writing to both Mr Reed and Mr MacDonald,  
  
*“I have asked if he would like any arrangements for the meeting and he requested for Jason Reed to accompany him and also for CCTV footage of the night. I said I am unsure if the CCTV would be used but will see if Jason Reed will attend”.*
- (19) A letter was sent to him on 2 November 2017, again from Ms Adeosun. The following was contained within that letter which is exhibited at page 100,  
  
*“As requested by you, CCTV footage will be available to view during the hearing”.*
- (20) The hearing took place on 9 November 2017. Mr MacDonald Chaired the meeting, notes were taken by Steve Bemyone and the Claimant was accompanied by Jason Reed. The hearing lasted 24 minutes. The Claimant accepted that he had used the word “fuck” but explained he had wanted to go to the toilet. He did not think he had over reacted and did not accept that his behaviour was intimidating or threatening and he specifically denied threatening anyone.

- (21) Mr MacDonald said during the meeting, towards the end of the meeting, that he saw the video clip which had been downloaded onto a memory stick and was in the possession of Mr Reed. Mr Reed took the view in his words that, *"if it had exonerated the Claimant he would have kept it"*. In any event the two watched the video clip in the Security Control Room on Mr Reed's computer.
- (22) In his words giving evidence, Mr MacDonald described that the destruction of the CCTV *"as a humongous mistake"*.
- (23) In evidence he said that he reached the decision to dismiss based on the admission of the Claimant only.
- (24) In evidence and in the dismissal letter, no consideration was apparently given to his assertion that he had to consider the Claimant's length of service and good character. He told us that as Mr Smith had perceived the actions as threatening that was a breach of the company policy. He dismissed the Claimant for repeated use of the words *"fuck off"* and that he had used racially offensive language in front of his colleagues and that he had threatened his colleague when he referred to breaking his neck.
- (25) The Claimant appealed the day following the receipt of his dismissal letter. The email was dated 16 November 2017 and produced at page 112. The Claimant complained that the CCTV evidence was not made available to him. What we find difficult to understand, is that the hearing took place on 9 November 2017, the dismissal letter was written on 15 November 2017, the appeal letter was written on 16 November 2017, but within hours, and probably no more, of the dismissal letter, the CCTV clip was not retained.
- (26) The letter of appeal set out fully the dispute in evidence and apologies were given by the Claimant. There was no further investigation, although at least one further allegation was made that Mr Kow himself used the word *"nigger"* regularly.
- (27) The hearing took place on 30 November 2017. The meeting was chaired by Mr Vrahimis who we have already noted did not give evidence but he has prepared a statement dated 12 February 2019.
- (28) The Claimant asserts that the meeting started as he described in the ET1 with Mr Vrahimis saying something in terms, refer to page 8,  
  
*"At the start of my appeal hearing I was asked if I was busy job hunting by the person who was hearing the appeal"*.
- He repeated this assertion in giving oral evidence during the hearing.
- (29) This allegation is not addressed in any way by Mr Vrahimis in his

written statement. The notes show that the appeal lasted from 1005 to 1023 hours. Notes produced at pages 121 and 122 demonstrated that Mr Vrahimis had adjourned the hearing for 11 minutes to consider his decision and confirmed the dismissal, adding that there was a risk that the Claimant might act in the same manner again.

- (30) At paragraph 19 of his statement, he referred to the CCTV recording in the following way,

*“During the appeal hearing Mr Downswell did not raise with me that he wanted to see the CCTV. In any event by the time I heard the appeal the CCTV would not have been available”.*

That is a curious choice of words.

- (31) The Claimant was not sure that he had all of the documents and that was one of the things that he raised in his letter of appeal. We know that an email from Mr Kow was missing but there was no evidence that Mr Vrahimis took the trouble simply to see whether those documents had in fact been received by the Claimant.

## Conclusions

15. The Respondent maintains that the Claimant was fairly dismissed for the potentially fair reason of misconduct and that a fair process was followed. There is also a submission that there is no evidence of Race Discrimination.
16. We deal firstly with the claim of Race Discrimination and we remind ourselves of the provisions of Sections 136 of the Equality Act 2010 which is entitled ‘Burden of Proof’ and is in the following terms,
- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
17. It was submitted and with some force, that race was only raised during the currency of these proceedings. It is fair to say, however, that in addition to the allegation of race, the Claimant alleged that in some way the Transfer of Undertakings, which suggestion was raised in his letter of appeal, was behind the decision to dismiss him.
18. Dealing with the allegations of unlawful behaviour based in race, there are three comparators on whom the Claimant relies. The only evidence in relation to their treatment is at paragraphs 29 and 31 of his statement of evidence and at page 32 of the bundle of documents. The view that we unanimously take is that in effect there is nothing more than a series of allegations. Apart from a verbal assertion which was reduced to writing,

there is no evidence before us on which in our view we could infer that there are facts on which the Respondent is required to give an explanation.

19. As far as Unfavourable or Unlawful Treatment which is alleged as a result of the Transfer, we were told and accept that the relevant transfer took place some four years earlier. We were also told that one of those who transferred resigned and the other one remained in employment. There is nothing in our judgment to suggest that the decision to dismiss was either based in the Transfer of Undertakings or was tainted by it.
20. As far as the dismissal is concerned, during the proceedings the Tribunal explained at some length the concerns that we had regarding the missing CCTV. Mr Chadwick submitted that it made no difference because of the admissions made by the Claimant. However, what we took the Claimant to be saying is that without the opportunity of seeing the CCTV, the context of the dispute is lost. He also contended that the perception of a threat expressed by Mr Smith is one that has to be a reasonable one. Three points were made. First, that shortly after the incident Mr Smith's behaviour was said to be normal; secondly, that at page 80 Mr Reed commented that there were no obvious signs of a confrontation; and thirdly, we were told that Mr Smith was of a substantial build, an ex-soldier although Mr Reed said he was still shaken the following day.
21. We remind ourselves that we should not put ourselves in the position to decide guilt or innocence. There is no claim of breach of contract. What we have to decide is whether the process undertaken by the Respondent was a reasonable one.
22. Burchell v British Home Stores is often cited as the Burchell test. We refer to Sheffield Health Social Care NHS Foundation Trust v Crabtree [2009] UK EAT 00331-09-1211, where HHJ Peter Clarke clarified the position for the benefit of Tribunals hearing conduct dismissal cases. At paragraph 14 he makes the following comment,  
  
*"It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases. That would be a misunderstanding. The first question raised by Arnold J, 'Did the Employer have a genuine belief in the misconduct alleged?' goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions reasonable grounds of belief based on a reasonable investigation go to the question of reasonableness under s.98(4) and there the burden is neutral. To combine all three questions as going to the reason for dismissal is wrong."*
23. We are satisfied that the reason for dismissal is conduct. There cannot sensibly be said to be another reason.
24. We are not satisfied, however, that the manner in which the investigation was undertaken was a reasonable one. We have focused on the opportunity of the Claimant to see the video and to comment on it. That is the substance of what he says. He says that would give the incident context. This should have been fairly considered by the Dismissing



Officer.

- 25. We also refer to the Acas Code of Conduct which we are required to consider and in particular we look to guidance which is given in relation to the Code of Practice. Under 'Taking Action After the Disciplinary Meeting' is the following in the guidance,

*“What should be considered before deciding any disciplinary penalty?”*

*When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to...”*

And there are a number of factors, but it includes,

*“Whether standards of other employees are acceptable and this employee is not being unfairly singled out, whether the employee’s disciplinary record (including current warnings), general work record, work experience and position and length of service has been taken into account and any special circumstances.”*

- 26. There is no evidence that length of service and previous good character had been taken into account.
- 27. If we are wrong, the appeal was neither a rehearing nor a fair review. The Claimant’s perception as to the fairness of the appeal is well founded. It was cursory to say the least. The video evidence had been destroyed and there was no evidence before us that the points in appeal raised by the Claimant had been considered.
- 28. For these reasons we find the claim of Unfair Dismissal succeeds.

\_\_\_\_\_  
Employment Judge Cassel

Date: 2 July 2019

Judgment sent to the parties on

....12.07.19.....

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For the Tribunal office