



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Haycock

**Respondent:** Babcock International Group

**Heard at:** Leicester

**On:** 27 August 2019

**Before:** Employment Judge Brewer

## Representation

**Claimant:** In person

**Respondent:** Ms L Shaw, EEF Ltd

## JUDGMENT

**The claimant's claim for unfair dismissal fails and is dismissed**

## REASONS

### Introduction

1. Given that the claimant was representing himself, I set out the process we would be following at the hearing. The claimant gave evidence on his own behalf and he adopted his written statement as his evidence in chief. The respondent called 3 witnesses: Helen Cotton, HR Manager and support to the investigating manager; Paul Atkins, Operations Manager on the HADES contract and dismissing manager; and Ian Brannick, Regional Manager for HADES and appeal manager. They each adopted their witness statements as evidence in chief. As well as written witness statements there was an agreed bundle running to just over 128 pages. I have taken account of all of the relevant documents in reaching my decision.

### Issues

2. This is a claim for unfair dismissal. The issues are:

- a. What was the reason for dismissal?
- b. Was that reason a potentially fair reason for dismissal?
- c. If the reason was conduct, as asserted by the respondent, then:
  - i. Did the respondent have a genuine and reasonable belief in the claimant's guilt?
  - ii. Did the respondent carry out as much investigation as was reasonable in all the circumstances?
  - iii. Was the procedure followed within the band of reasonable responses?
  - iv. Was dismissal within the band of reasonable responses?
- d. If the claimant was unfairly dismissed should there be any reduction in any award of compensation on the basis of **Polkey** or for contributory conduct pursuant to sections 122(2) and 123(6), Employment Rights Act 1996 (ERA)?

### Law

3. I note that it is not for me to substitute my views for that of the employer. The question is whether the dismissal was or was not fair.
4. This case involved anonymous witness evidence and in that context I note the guidelines set out in **Linfood Cash & Carry v Thomson and another [1989] ICR 518** (EAT). In that context I also note the case of **Ramsey and others v Walkers Snack Foods Ltd and another [2004] IRLR 745** (EAT) to the effect that the employer is not obliged to follow the **Linfood** guidelines and the overall question is whether the procedure adopted was fair.
5. I also refer to 2 other cases/principles relevant to this case. First **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721** (Court of Appeal) in which it was held that where the employer heard conflicting evidence which it could not resolve, it was reasonable to reach a 'not proven' conclusion. Second, in the present case no witnesses were called to give evidence at the disciplinary hearing save for the claimant and I have asked whether, in the context of the allegations and the evidence, this was fair – see **Santamera v Express Cargo Forwarding t/a IEC Ltd [2003] IRLR 273** (EAT).

### Findings of fact

6. The claimant was employed as a medical fitness booking call team leader. He managed a team of nine employees whose jobs involved arranging and booking medical fitness tests for UK candidates wishing to join the RAF.
7. The claimant's employment started on 12 October 2015.
8. The respondent is a company delivering services to the civil and defence sectors of the UK. The claimant worked at RAF College Cranwell.
9. Until the incident in respect of which the claimant was dismissed, the claimant had a clean disciplinary record.

10. An Incident occurred on 9 November 2018 between the claimant and one of his team, David Hilton. The allegation was made that the claimant swore at Mr Hilton and also that he used to physical violence towards him.
11. Julie Frost supported by Helen Cotton undertook an investigation. They interviewed the claimant, Mr Hilton and five other members of the team who were all present on nine November.
12. Mr Atkins received the disciplinary report and determined that there should be a disciplinary hearing that he would chair. Prior to the hearing the claimant was given redacted copies of the witness statements. No witnesses were called to the hearing and at the end of the hearing, which took place on 30 November 2018; the claimant was dismissed for gross misconduct therefore without notice or payment in lieu of notice.
13. The claimant appealed against his dismissal. Ian Brannick heard the appeal on the 19 December 2018. He wrote to the claimant on 20 December 2018 rejecting the appeal and upholding Mr Atkins' decision.

### Discussion

14. I turn then to the matters which are in issue in this case.
15. I note the first that the claimant said that he was not prejudiced by receiving only redacted witness statements because he knew who the witnesses were in any event. However what is correct that he knew who the witnesses were, first he did not know which statement was made by which witness and, second, the issue of anonymous evidence goes beyond whether the claimant felt prejudiced. I shall return to this issue below.
16. The respondent's disciplinary policy is at page 24 of the bundle. Section 2.12 sets out the respondent's view of matters that may amount to gross misconduct. One of those matters is "physical violence or bullying of members of staff or the public". I note that at all times the claimant admitted swearing at Mr Hilton. What he has always denied is making physical contact with him. Mr Atkins confirmed in answer to a question from me, that he would not have dismissed that the claimant solely for the swearing. What amounted to the gross misconduct was the fact that the claimant made physical contact with Mr Hilton. I have used the phrase "physical contact" because that is a central issue that is in dispute in this case.
17. In relation to the question of physical contact the allegations set out in the disciplinary hearing invitation letter at page 81 of the bundle refers to inappropriate behaviour including "physical contact which may constitute assault". At no point in the invitation letter is the physical contact described in any detail.
18. At the commencement of the disciplinary hearing the purpose of the meeting was explained by Mr Atkins to the claimant. Mr Atkins said that the purpose was "to investigate allegations of inappropriate behaviour, including shouting,

swearing and physical contact with another member of staff and actions that may damage the company reputation". Again at no point is the allocation of physical contact further detailed.

19. In the letter of dismissal which appears at page 82 of the bundle the reason for dismissal is given as follows: "you behaved inappropriately towards a member of your team including the use of foul and abusive language, shouting and physical contact which may constitute assault". Again the nature of the physical contact is not specified.
20. Given the significance of the allegation of physical contact it seems to me that reasonableness requires the employer to be specific about the nature of the contact. Not all physical contact could be described as violence, which is the word, used in the respondent's disciplinary procedure.
21. I turn them to the evidence that was before Mr Atkins. The first point to note is the evidence of the alleged victim, Mr Hilton. At his investigation meeting with Ms Frost, Mr Hilton says "I can't remember if he touched me but I said don't touch me, don't touch me..." Mr Hilton recalls the claimant calling him a "shit" and a "fucking twat".
22. The next witness was Ms Spurle. Her evidence was that the claimant pushed Mr Hilton using both hands on Mr Hilton's chest. In relation to the swearing but She says that the claimant used the words "fucking twat" and "stroppy shit".
23. The evidence of Ms Hickie was that the claimant pushed Mr Hilton with both hands and called him a "fucking twat" and a "shit".
24. The evidence of Ms Hill was that the claimant pushed Mr Hilton on his chest and had his fists clenched. She recalls that the claimant called Mr Hilton a "little shit".
25. Finally the evidence of Ms Hawthorne was that the claimant pushed Mr Hilton on the shoulder and also swore at him using the terms "little shit" and "fucking twat".
26. Thus Mr Atkins had witness evidence which was reasonably consistent in relation to the swearing and reasonably consistent in relation to the alleged physical contact, the differences being the evidence of Ms Hawthorne who refers to they push on the shoulder and Mr Hilton himself who does not recall being touched. The question is whether it was reasonable in those circumstances, for Mr Atkins to conclude that the claimant pushed Mr Hilton. In my judgment that was a reasonable conclusion to draw in all circumstances.
27. During the course of the hearing is I raised a concern about the role played by Helen Cotton. She was involved in the investigation and as an advisor to Mr Atkins at the disciplinary hearing. In evidence she made it clear that she was present to take notes and to advise on process to advertise on process. However it is quite clear that at points during the disciplinary hearing Ms Cotton gives evidence. For example at page 84 there was a discussion during the

disciplinary hearing about the alleged pushing and the claimant and denies touching Mr Hilton at which point Ms Cotton says: "why would the team say this". There is a further exchange with the claimant following which Ms Cotton, referring to Mr Hilton's evidence, says: "Dave says he can't remember because he was in shock..." But there is no evidence the Mr Hilton said he could not remember being pushed by the claimant because he was in shock. That was simply evidence being given by Ms Cotton. I have considered whether this has tainted Mr Atkins' decision but on balance I have concluded that it did not. The reality was that there was sufficient for him to conclude that whether or not Mr Hilton recalled being pushed, however, there was evidence from 4 other witnesses that the claimant did push Mr Hilton with only the minor difference that one of the witnesses referred to the push being on Mr Hilton's shoulder rather than his chest.

28. I have considered whether the anonymous evidence and not calling any of the witnesses to give evidence, even in private without the claimant present, was sufficient to make the procedure unfair. To his credit the claimant did not suggest that he was treated unfairly for this reason. He knew who the witnesses were and he was able to read what each of them said. He did not suggest that any of the witnesses had any reason to lie and Mr Atkins was entitled to rely on that as part of his reasoning. If the witnesses had no reason to lie and the evidence was reasonably consistent it was clearly a reasonable conclusion for him to reach that the claimant did indeed push Mr Hilton and that this is amounted to conduct which could be described as violence for the purposes of the respondent's disciplinary procedure.
29. In the circumstances it seems to me that on balance the respondent had a genuine belief that the claimant pushed Mr Hilton, that is much investigation as was reasonable in all circumstances having undertaken and that therefore this belief was reasonably held. The claimant did not criticize the respondent's procedure and in my judgment the procedure followed was clearly within the band of reasonable responses. That just leaves whether dismissal was within the band of reasonable responses and in my view it was. It is not possible to say that no employer acting reasonably in similar circumstances would have dismissed.
30. For all of those reasons of the dismissal it was fair and the claim for unfair dismissal fails.

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Employment Judge Brewer

Date 16 September 2019

JUDGMENT SENT TO THE PARTIES ON

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