Case Number 2500875/19

THE EMPLOYMENT TRIBUNALS

Claimant Mr John Todd

Respondent Tesco Stores Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields On 9 September 2019
Deliberations 26 September 2019

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: Mr L Bronze of Counsel
For Respondent: Mr C Kelly of Counsel

JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

REASONS (bold is my emphasis and italics are quotations)

1. Introduction and Issues

1.1 The claim is of unfair dismissal only not wrongful dismissal. In the latter a Tribunal may substitute its view for the employer's and unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful, and damages are pay for the notice period. The claimant had Union representation when his claim was submitted and wrongful dismissal was not pleaded . If the claim were to be amended today the respondent would be entitled to a postponement because it has not called the witnesses to the fight which led to dismissal but only the dismissing and appeal officers. Mr Bronze, rightly, did not apply to amend.

1.2 The claimant was a customer assistant. His employment started on 7 July 2001 and was terminated without notice on 23 January 2019. The liability issues are:
1.2.1 What were the facts known to, or beliefs genuinely held by, the employer which were the reason, or if more than one the principal reason, for dismissal?
1.2.2 Were they, as the respondent alleges, related to the employee's conduct?
1.2.3 Having regard to that reason for dismissal, did the employer act reasonably
(a) in having reasonable grounds after a reasonable investigation for its beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal ?

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(*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 dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."

2.2. Abernethy v Mott Hay & Anderson held the reason for dismissal is a set of facts known to the employer, or may be beliefs held by it, which cause it to dismiss. It is an error to over minutely dissect the reason but essential to determine its constituent parts. At this stage an employer does not have to prove, even on balance of probability, the misconduct it believes took place actually did. It simply has to prove its genuine belief.

2.3. Section 98(4) of the Act says:
"*Where an 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 all 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."

2.4. At this stage, the Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for its belief and conducted as much investigation in the circumstances as was reasonable (British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald. In Weddel v Tepper Stephenson LJ said
Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."

2.5. In A v B [2003] IRLR 405, Elias J (as he then was) said
"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most

careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges.This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances".

2.6. In Shrestha v Genesis Housing Association Ltd [2015] IRLR 399, Richards LJ (with whom the rest of the Court of Appeal agreed) said:

" *To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole".*

2.7. In Polkey v AE Dayton the speech of Lord Bridge of Harwich included :
"*…in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …*
Natural justice requires an employee should know the nature of the case against him and be told the important parts of the evidence upon which reliance is placed. Then he must be given an opportunity to state his case and the decision maker must act in good faith Spink v Express Frozen Foods. The Court of Appeal in Strouthos v London Underground said the employee should only be found guilty of disciplinary offences with which he has been charged. If found guilty of and sentenced for something that had not been charged, he will not have received fair treatment.

2.8. Ladbroke Racing v Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules. The standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach, including the degree of gravity. If an employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal he does not satisfy the statutory test by imposing that penalty without regard to the facts or circumstances other than the breach itself. But rules are not irrelevant. Employers are entitled to place weight on matters important to them. In Meyer Dunmore International v Rodgers, Phillips P said:
"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that it is plainly adopted, that it is plainly and clearly set out, and that great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed. "

2.9. If the circumstances of two employees are essentially indistinguishable, it may be unfair to dismiss one but not the other (Post Office-v-Fennell and Hadjioannou-v-Coral Casinos) The latter case contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument one employee received a greater sanction than others is relevant where
(a) there is evidence that employees have been led to believe that certain conduct will be overlooked or dealt with by a sanction less than dismissal
(b) where other evidence shows the purported reason for dismissal is not the genuine principal reason
(c) where , in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.

2.10. In Santamera v Express Cargo Forwarding the Court of Appeal said
"The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means. That is why cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct.

2.11. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process. Denying everything in the face of sound evidence may count against him Retarded Childrens Aid Society v Day held if an employee does not appear to recognise what he did was wrong, it would be reasonable for the employer to conclude a warning would be futile and it may fairly dismiss even for a first offence. Conversely, if the employee admits fault, apologises and promises never to do the same again, no reasonable employer would dismiss on the basis the apology and promise was "insincere" without some factual basis for concluding it was so.

2.12. Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

2.13. When considering the sanction, previous good character and employment record is always a relevant **mitigating** factor. I agree with Mr Bronze submission "*not only can long service such as in the Claimant's case be a factor in mitigation but that it should also usefully and quite properly be used to evaluate the likelihood of whether something in fact happened*" but even the most exemplary employee may, in a moment of temper, commit an act of gross misconduct.

2.14. In all aspects, substantive and procedural, Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt) held a Tribunal must not substitute its own view for that of the employer unless the view of the employer falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson put it thus:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

3. Findings of Fact

3.1. I heard the evidence of the dismissing officer Mr James Delaney; the appeal officer Mr James Crowther; the claimant and his union representative at the appeal Ms Lisa Collins . The investigating officer, Ms Amanda Taylor, was not called, neither were any witnesses to the incident which led to the dismissal, nor the union official, Mr Colin Raffo, who accompanied the claimant at the disciplinary hearing. I make no criticism of the parties because on the tests I have to apply it is the thought processes of the dismissing and appeal officers I have to scrutinise. I had a bundle of documents of nearly 300 pages many of which were relevant. Both Counsel cross examined effectively but there was never going to enough time for submissions as well to finish in one day. At their suggestion I adjourned for written submissions which arrived by 23 September and were both excellent.

3.2. It is common ground the claimant was a good worker with no disciplinary record. There had been a history of tensions him and Mr Paul Graham which had resulted in a mediation 18 months earlier. Following that relationships did not really improve although their mutual animosity may have become less visible to others. A serious disagreement arose between them in the warehouse on Friday 21 December 2018. The claimant's account, which I believe, is Mr Graham pushed trays off a "dolly" the claimant had stacked. The claimant told him to pick them up and a verbal confrontation ensued. I find, verbally. Mr Graham was provoking the claimant by daring him to hit him. The claimant made his way towards swing doors which lead from the warehouse onto the shop floor . Mr Graham kneed or kicked him in the back just as he got to the doors impelling him through them .I find this is consistent with evidence later given by Mr Scott Nicholas that he heard the doors "*blow open*". There was divergence between the claimant and Mr Graham in the statements they gave to the investigating officer, Ms Taylor, as to what led to that point.

3.3. When the confrontation spilled out onto the shop floor, Mr Nicholas, a man of about 18 years of age and 5 foot 6 inches tall, who had not worked in the shop very long, turned towards the sound and said he saw the claimant aim a head butt at Mr Graham which did not connect then, as Mr Graham turned away, throw a punch which struck Mr Graham on the right hand side of the back of his neck. A later photograph showed an abrasion at that location. The claimant's version was he only put out his arm in self defence and the back of his hand caught Mr Graham on the neck. I doubt that would cause the abrasion I see in the photograph. The claimant's evidence was Mr Graham said " *This is where I get you sacked* ". At the time the claimant did not report that. Neither did Mr Graham report he had been assaulted. Mr Bronze submits Mr Graham himself said he was shouting, so Mr Nicholas's statement " *Paul did not respond*" is inconsistent and casts doubt on his veracity. I disagree. In context he probably meant did not respond **physically**.

3.4. The claimant then went back into the warehouse with Mr Graham following him and the claimant says Mr Graham punched him to the right hand side of the face. A colleague, Ms Marie Rushforth, did not see any blow struck but because of the continuing verbal exchanges pulled a "cage " containing flowers between them. An employee Alan Thompson said words to the effect "*Come on lads, it's not worth losing your jobs*" to which Mr Graham said "*Fuck Off Santa Claus*". Ms Rushforth said later she saw no blows but verbally the two were as bad as one another.

3.5. This all happened around 13:30. At about 13:50 a "What's App" was sent by Mr Callum James to a manager Malcolm Simpson saying there had been a scuffle . There is no evidence Mr James had seen it. Before the claimant went home as arranged at about 14.30 that day, Mr Simpson had a word with him. He found out from someone the altercation had been in a public area and, on 22 December, by which time he had Mr Nicholas' statement. He decided to suspend the claimant after he gave an account which meant Mr Nicholas would have to be lying or very badly mistaken. He followed the respondent's procedural template for suspension to the letter. Mr Graham was not suspended but he too was investigated. No CCTV was available which showed the actual physical conflict on the shop floor.

3.7. The suspension letter makes the charge against the claimant clear as being an allegation of physical violence .He was invited to an investigation meeting conducted by Ms Taylor who also investigate Mr Graham. In the respondent's disciplinary rules at page 42 of the bundle examples of gross misconduct listed includes "*physical or serious verbal abuse of colleagues*".

3.8. The claimant said in evidence he saw Mr Graham and Mr Nicholas talking on 21 December and that points to collusion. It may, but why then did Mr Graham not report the incident in furtherance of his threat to get the claimant sacked ? There is no merit in the argument later put by Mr Raffo on behalf of the claimant at the disciplinary hearing that the investigation was fundamentally flawed because certain people, for example Mr Craig Barron who gives the claimant a good character reference and Mr Graham a poor one , were not interviewed. There was no-one apart from Mr Nicholas who came forward, who could offer evidence of what actually happened. Doubtless some customers saw it but none came forward and tracing any would be practically impossible. Photographs were taken of the injuries although it is not clear on what dates. Some may be "selfies" on the day, but Mr Raffo at the disciplinary said some were taken 9-10 days later. The claimant's allegation he was punched on the right-hand side of the face is not supported by the photos which show only a slight scuff on his cheek whereas there is a clear abrasion on the right-hand side of the back of Mr Graham's neck.

3.9. When Ms Taylor had finished her investigation, she was of the opinion there was sufficient for both the claimant and Mr Graham to go to disciplinary hearings. Mr Nicholas' account of what he saw was given to her in what she believed to be a very genuine manner. She knew of no reason why he would say the claimant had attempted to head-butt Mr Graham then struck a punch with his right hand which, because Mr Graham was turning away from the claimant landed on the right side of his neck, if that was not what Mr Nicholas saw.

3.10. The letter summoning the claimant to a disciplinary hearing sets out charge in clear terms that he " *physically assaulted a colleague in that you punched Paul Graham on 21/12/18*". At the hearing on 16 January 2019 Mr Delaney followed the company's procedural templates impeccably. The first meeting took 2 hours 20 minutes and was adjourned to 23 January during which time Mr Delaney took the precaution of speaking to both Mr Simpson and Mr Nicholas himself . He inspected the scene of the physical conflict with Mr Nicholas to ensure he was in a position to see what he alleged. He pressed them politely on their versions and they "held up". Mr Delaney checked with "security" there was no CCTV record. On Mr Graham's account to Ms Taylor the attempted headbutt may have been earlier in the warehouse. Mr Delaney did not find either the claimant or Mr Graham were telling the whole truth or all lies. Neither did he find Mr Graham was an innocent victim who had not provoked the claimant. The difference in circumstance between them was that although Mr Graham may have been active in the verbal confrontation before and after the punch ,on the version given by Mr Nicholas the only blow was struck by the claimant and it was done in a public area.

3.11. Having no reason to disbelieve Mr Nicholas and some reasons to doubt the consistency and accuracy of what the claimant was saying, who did not speak much during the disciplinary hearing but rather left it to Mr Raffo to speak for him , Mr Delaney came to the conclusion it was more likely than not the claimant had struck Mr Graham and done so in a public area . On that basis he made his decision to dismiss without notice. Another manager decided to give Mr Graham a final written warning. The letter dismissing the claimant, dated 23 January 2019, states:
I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reasons for this are:
1.Various evidence of an incident between Paul Graham and John Todd taking place on the 21/12/18.
2.A witness statement and a witness interview which supports and confirms the allegation.
3.Photographic evidence that confirms and supports the allegation showing bodily harm and injury.
The notes of what Mr Delaney told the claimant at the meeting are much the same.

3.12. Mr Delaney, under professional cross examination, did not come across as very confident and some of his answers were a little ambiguous or inconsistent , but that made him all the more believable when he refuted any suggestion that he was biased against the claimant , favoured Mr Graham , or had any reason or motive to do either. Mr Bronze says in his submissions "*JD admitted that the evidence given by Scott Nicholas ("SN") was a key part of his decision to dismiss. JD even accepted that the disciplinary outcome could have been different but for SN's evidence. Indeed, the letter of dismissal supports the contention that what SN had to say was pivotal. However, the information provided by SN does not stand up to the first sign of scrutiny*." I did not hear Mr Nicholas , but I cannot agree with Mr Bronze that his youth, height , view of the area or inexperience means his evidence did not in Mr Delaney's reasonable view , stand up to scrutiny.

3.13. The claimant appealed. Mr James Crowther heard from the claimant and his union representative Ms Collins .Mr Crowther was checking the procedure followed by Mr Delaney had been fair . Ms Collins concentrated on picking fault with the

respondent's handling of the situation. Even worse, she said the penalty was too harsh when, if guilty, even the claimant today accepted it was not. On 11 February the appeal was rejected. In his oral evidence I found Mr Crowther somewhat blasé . If there had been anything seriously wrong with the investigation or Mr Delaney's decision, this appeal would not be thorough enough to correct it.

4.Conclusions

4.1. It was somewhat difficult to understand why only one person was suspended but that apart I do not see any major defect or lack of impartiality in the investigation. Parts could have been better but Ms Collins when giving evidence said it should be "*airtight* " . That is not what the law requires. I agree with Mr Bronze this respondent has such size and administrative resources that it would be right to expect them to do a thorough investigation but thorough does not mean flawless. In respect of both the investigation and disciplinary stages Mr Bronze has , rightly, taken every available point of criticism which can be directed at them but even their cumulative effect does not render either stage outside the band of reasonableness . As Mr Kelly puts it , Mr Bronze's submissions are close to a " *counsel of perfection*".

4.2. It is important to record the given, and I conclude genuine, reason for dismissal was that the claimant punched a colleague in a part of the store to which the public are admitted. My task is to decide whether (i) that was reasonably investigated (ii) the claimant was charged with that and given the opportunity to show he was not guilty (iii) the respondent's conclusion he was guilty and that dismissal was an appropriate penalty fell within the band of reasonableness.

4.3. The investigation and disciplinary process were within that band even applying the highest test in A-v-B. The claimant was clearly charged and given the opportunity to show he was not guilty. He did not do so. Mr Delaney acted in good faith without bias and his decision as to guilt and sanction was reasoned and well within the band of reasonable responses. That I, or another manager, may have reached a different conclusion is irrelevant to the legal tests, as is the fact another manager may have dismissed Mr Graham too. On that basis the claim must fail.

TM Garnon Employment Judge
Date signed 27 September 2019 .