EMPLOYMENT TRIBUNALS

Claimant: Mr D Pemberton

Respondent: Timpson Limited

HELD AT: Manchester **ON:** 2 July 2019 and 22 & 23 August 2019

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: Mr Y Bakhsh, Consultant
Respondent: Mr G Hamilton-Fisher, Director

JUDGMENT having been sent to the parties on 9 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION AND ISSUES

1. This is a claim for unfair dismissal made by Darren Pemberton against his former employer, Timpson Limited. Mr Pemberton's case is that it was unreasonable for the respondent to dismiss him for the misconduct concerned. He also says that his dismissal was procedurally unfair. The respondent denies this: its case is that Mr Pemberton was dismissed, fairly, for gross misconduct. It argues that, even if there were deficiencies in the disciplinary process which preceded the dismissal, these would have made no difference to the final outcome. It also argues that, even if the dismissal was unfair, any compensation awarded to Mr Pemberton should be reduced to nil to take account of his contributory fault.

2. I heard oral evidence and submissions over the course of three days. The respondent's witnesses were Keith Shuttleworth (who undertook the investigation into the alleged misconduct); Tony Sharpe (who chaired the disciplinary hearing and decided to dismiss Mr Pemberton); and Brent Sabey (who heard the appeal against dismissal). Mr Pemberton gave evidence in support of his own case but did not call

additional witnesses. I was also referred by the parties to numerous documents which were included in a substantial agreed bundle for the hearing. In addition, I listened to an audio recording of the telephone conversation which formed the central feature of the evidence in this case.

FACTS

3. In 1986 Mr Pemberton commenced work for the respondent as an alarm engineer. After a period of working in a locksmith business elsewhere, Mr Pemberton returned to the respondent's employment in April 2006. By 2009 he had been promoted to the senior position of National Locksmith Manager. By the time of the events with which this claim is concerned in 2018, Mr Pemberton was based at the respondent's Moss Side branch. Prior to those events Mr Pemberton had an unblemished disciplinary record with the respondent and had not been the subject of any previous grievances or complaints. Senior managers regarded him as an excellent colleague and he was well respected for his knowledge and experience of the locksmithing industry.

4. On 14 November 2018, Mr Pemberton had a telephone conversation with "STL", a scheduling team leader based at the respondent's locksmith call centre in Wythenshawe. Mr Pemberton held a more senior position than STL but he was not his direct line manager. It appears that they had professional dealings with each other on a fairly regular basis, and indeed Mr Pemberton regarded STL not just as a work colleague but also as a friend with whom he could share more informal discussions.

5. STL had telephoned Mr Pemberton towards the end of the working day. He called to ask him whether he had heard the news that one of the locksmiths in the central Scotland region had just been dismissed. Although the call was made at work, STL was not making the call in any official capacity; in reality the disciplinary matter was not his concern and he had no real justification for discussing the matter with Mr Pemberton, nor indeed vice versa. The conversation could therefore be described as work gossip, and both men would have understood it as such.

6. The conversation lasted for just over six minutes and it touched upon the way in which the business in central Scotland was being run. At one point, about four minutes into the call, STL suggested that the business might be able to cope without replacing the individual who had just been dismissed. In response, Mr Pemberton said:

> "I swear to God if you say that I want to fucking shoot you, not under any fucking circumstances say that in passing to anybody because you'd be my own worst enemy doing that. Honestly, we need, we need four in the central belt."

7. Slightly later in the same conversation Mr Pemberton added:

> "We definitely need somebody. Honestly, don't even go down that route of saying that we don't with anybody or saying it, because they'll but it 'oh well [STL] said this and that' and we'll never get no fucker."

8. The conversation (which was captured in its entirety by the respondent's call centre telephone recording system) continued for a minute or two after these remarks were made but appears to have ended amicably. STL said nothing to suggest that he

was taken aback by Mr Pemberton's remarks. Nevertheless, he emailed a complaint to his director the next day after seeking support from another manager following the phone call.

9. STL did not give any specifics about the incident in his written complaint, but he did say that he had been threatened during a telephone call with Mr Pemberton and that he was worried that if he did not raise the matter his job would become difficult and maybe he would have to leave. He acknowledged that the call was not "100% professional", but said that Mr Pemberton's comments had been a step too far, and he should not be put in a "no win" situation for simply having his own business opinion.

10. On 16 November, Keith Shuttleworth (who is the respondent's Head of Security), visited Mr Pemberton at work at the Moss Side branch and informed him that he was being suspended pending a disciplinary investigation. He told Mr Pemberton that a grievance had been made against him, but he did not reveal any details of the complaint itself. There is some disagreement about how the conversation unfolded, but it is clear that the possibility of a gross misconduct charge was mentioned at this stage.

11. On the same day Mr Shuttleworth interviewed STL. Mr Shuttleworth formed the impression that STL was still unsettled and upset following his conversation with Mr Pemberton. STL said that he could not remember the call fully, but that Mr Pemberton had stated that he would shoot him and make his life hell at work. STL felt that Mr Pemberton was threatening him to shut him up. He did not think that Mr Pemberton would actually shoot him but that he was giving him a powerful message to keep quiet. STL also said that as a former soldier he was not shaken up to the point of being scared of Mr Pemberton, but he was worried that Mr Pemberton would make his life hell. STL had not listened to the recording of the call, and Mr Shuttleworth did not play it to him during the interview.

12. On 19 November, Mr Pemberton received a letter informing him of the allegation that he had used threatening and abusive language during his telephone conversation with STL. He was invited to attend an investigation meeting with Mr Shuttleworth on 22 November. At that meeting Mr Pemberton handed over a pre-prepared written statement of his version of what had happened in which he said, among other things:

> "I apologise upfront for any anxiety and stress this may have caused [STL]. I'm sorry. I can see how it sounds, and I never meant any malice or menace."

13. The recording of the conversation was played and discussed. Mr Pemberton acknowledged that he had used "industrial language" but said that he had spoken in this way because he had felt comfortable with STL and thought that he could express himself candidly. He did not accept that he had actually threatened STL as he had not meant his remarks to come across as threatening. He said he was sorry for saying what he did and that he had made a poor choice of words.

14. Mr Shuttleworth told Mr Pemberton that he would be recommending that the matter be progressed to a formal disciplinary hearing. This appears to have prompted Mr Pemberton to attempt to make direct contact with James Timpson, to whom he sent a text message on the same day. The message was clearly intended as a plea

for mercy at the most senior level within the company. In that message (to which there seems to have been no reply) Mr Pemberton expressed his commitment to the locksmith business and stated that both he and his family felt devastated by recent events. He said:

> "I've been a total idiot and know can't change what already done, but in short genuinely sorry … very bad case of using mouth before putting brain in gear."

15. On 23 November, Mr Pemberton received another letter from the respondent, this time telling him that the matter was to proceed to a formal disciplinary hearing in relation to an allegation of gross misconduct. The allegation was that he had:

> "wilfully or negligently caused harm or physical or emotional injury to another colleague, client, customer or visitor, physical violent, assault, fishing, malicious or slanderous comments, bullying or grossly offensive or aggressive behaviour or language".

In particular, and more to the point, it was alleged that Mr Pemberton:

> "used threatening unacceptable and abusive language towards [STL], threatening to shoot him".

16. The disciplinary hearing went ahead on 29 November. It was chaired by Tony Sharpe. At that hearing Mr Pemberton admitted that his choice of words had been poor, indeed he said it was stupid, but he attempted to contextualise his remarks. He also took issue with some of the allegations which STL had made against him during STL's interview with Mr Shuttleworth, such as an allegation that Mr Pemberton would make his life hell in work. Mr Pemberton stated that he had been instructed not to contact colleagues during his suspension but that he was willing to apologise to STL for his remarks. He said that he was genuinely sorry for how STL had been made to feel, and he wished he had an opportunity to address this and sort it out.

17. On 3 December, Mr Pemberton received a letter from the respondent informing him that he had been found guilty of gross misconduct and that was being dismissed with immediate effect. The letter explained that Mr Sharpe had concluded that Mr Pemberton had threatened to shoot STL and that he had stated that STL would be his worst enemy. The letter noted Mr Pemberton's view, which was that the remarks had been taken out of context, but stated that it was unacceptable for him as a senior manager to threaten another colleague, particularly one over whose career and working environment he could have an influence. Mr Sharpe was not absolutely convinced by Mr Pemberton's show or remorse, and the letter's findings concluded by referring to "the sheer seriousness of your actions and the effect on your victim, [STL]".

18. Mr Pemberton appealed against his dismissal and, on 10 January 2019, he attended an appeal hearing chaired by Brent Sabey.

19. On 18 January 2019, Mr Pemberton received a letter informing him that his appeal had been unsuccessful. Mr Sabey did not accept Mr Pemberton's view as to the context in which the offending remarks had been made, and rejected any suggestion that the whole episode may have been designed to entrap Mr Pemberton. He concluded that Mr Pemberton had purposefully used tone and specific words to threaten STL, which entitled STL to complain and which justified Mr Pemberton's

ultimate dismissal. Although the appeal outcome letter did not say so, Mr Sabey told me during his evidence that his decision to uphold the dismissal was also influenced by his view that Mr Pemberton was not sufficiently remorseful and/or that he did not appear to recognise that what he had done was unacceptable.

LAW

20. Section 98 of the Employment Rights Act 1996 places the burden upon a respondent to show that the reason, or if more than one the principal reason, for dismissing the claimant was a potentially fair reason, being either one of the reasons set out in section 98(2) of the Act, which includes misconduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. If the respondent can show that the principal reason for dismissal was indeed a potentially fair reason then, under section 98(4) of the Act, the Tribunal must go on to consider whether dismissal was fair or unfair having regard to the reason shown by the respondent, and this will depend on whether in all the circumstances, including the size and administrative resources of the employer's undertaking, the respondent acted reasonably or unreasonably in treating the reason as sufficient for dismissing the claimant. The burden of proof at this stage is neutral as between the parties, and the Tribunal must determine the question in accordance with equity and the substantial merits of the case.

21. In cases concerning conduct dismissals, it is well established following the principles laid down in the case of **British Home Stores Ltd v Burchell [1980] ICR 303 (EAT)** that to be satisfied that an employee was validly dismissed for misconduct the Tribunal must be satisfied that the employer believed the employee was guilty of the misconduct in question; 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. If the Tribunal is satisfied on each of these matters, then it must find the dismissal to have been fair if dismissal for the misconduct in question falls within the range of responses which a reasonable employer could make in the same circumstances. The relevant question is whether dismissal does fall within that range of reasonable responses, and the Tribunal must be careful not to substitute its own judgment for that of the employer in respect of the question whether the claimant should actually have been dismissed.

CONCLUSIONS

22. Mr Pemberton was dismissed for misconduct: for threatening STL. At no point was it thought (by anybody) that Mr Pemberton had threatened literally to shoot STL, or even to cause him physical harm, but the 'threat' was interpreted as being that, if STL expressed his views about staffing levels to others within the respondent's management structure, Mr Pemberton would, in some unspecified way, use his management influence to the detriment of STL's future career. The respondent viewed this as unacceptable, particularly in view of Mr Pemberton's seniority within the business, and thus it treated the matter as one of gross misconduct.

23. However, its decision to dismiss, both at first instance by Mr Sharpe and on appeal by Mr Sabey, was also influenced by a belief that Mr Pemberton was not remorseful and/or was not accepting of his wrongdoing and, in addition, by a

perception of the effect which the incident had had on STL. Mr Sharpe, I noted, described that effect as "phenomenal".

24. Clearly, there is no doubt about the words actually used by Mr Pemberton during the telephone call on 14 November 2018, and I accept that the respondent's managers genuinely believed that those words did constitute a threat; that they believed what he said had a serious impact upon STL; and that they also believed that Mr Pemberton was not sufficiently remorseful for his actions.

25. As far as ascertaining the words used themselves was concerned, no investigation was necessary beyond listening to what was said on the tape. However, in order to properly understand the context of the conversation and the effect it had on STL, further investigation *was* necessary. Here I find there were deficiencies in the investigatory steps that were undertaken. The investigating officer did not go through the recording of the call with STL in order to fully understand what STL's concerns were, notwithstanding the evident deficiencies in STL's recollection of what exactly had been said. Nor did the investigating officer allow for the fact that STL's apparently unsettled demeanour during the interview might have been the result of extraneous factors (which I was told were, in fact, a real possibility). At a later stage in the process, inconsistencies in the additional evidence which was obtained by Mr Sabey for the appeal hearing did not give rise to further investigatory action. Given the nature of that evidence it would have been reasonable for it to have done so.

26. Notwithstanding these failings, though, I do accept that both Mr Sharpe and Mr Sabey had reasonable grounds to conclude that the words that Mr Pemberton had used were threatening in nature. Mr Pemberton has consistently argued that he had not intended to come across as threatening, but he also recognised that his choice of language was very ill-advised and the respondent was, in my view, entitled to conclude that it amounted to misconduct.

27. I do not, though, think the respondent had reasonable grounds to conclude that Mr Pemberton was not sorry for what he had done. He had expressed sorrow and regret on several occasions and had wanted the opportunity to convey that to STL personally. Maintaining an honestly-held position that no threat had been intended, whilst at the same time acknowledging that the words he had actually used could be construed as threatening in certain circumstances, is not the same thing as not being remorseful. Nor do I think the respondent had reasonable grounds to conclude that the incident had had such a serious impact on STL. Neither Mr Sharpe nor Mr Sabey themselves asked STL about the incident in any detail, and a more thorough review of the evidence that was readily available would have shown that STL himself said that the alleged threat had not scared him as such as they thought. Nor does it seem to have exacerbated any underlying stress or anxiety he may have been suffering from. He was, for example, able to attend an interview for a new and more senior role with the respondent the very next day, and he was successful in securing that role.

28. Certain criticism may also be levelled against the procedural fairness of aspects of the disciplinary process that the respondent adopted. However, such procedural criticisms are not the reason for my finding that this dismissal was unfair. Instead, that finding flows from the fact that, in my judgment, no reasonable employer faced with the situation that confronted the respondent in this case would have responded by dismissing Mr Pemberton.

29. There are obviously circumstances in which dismissal for threatening a colleague at work would be well within the range of reasonable responses for an employer, even for a first offence. Threats of physical violence are an obvious example of this, but not the only example.

30. However, I do not believe that this case falls into that category. There are a number of factors which in my view would have led a reasonable employer to conclude that a disciplinary sanction falling short of dismissal would have been the appropriate course to take. Those factors are as follows:

(1) Mr Pemberton's long service and unblemished disciplinary record.

(2) The high standing which Mr Pemberton held within the business, and his past contributions to its growth and success.

(3) The true nature of the perceived threat – it was not one of violence in reality, and indeed the respondent has struggled even during these proceedings to articulate quite what the claimant was thought to have been threatening to do in terms of causing detriment to STL's career.

(4) The context in which the telephone conversation took place. It was in truth an informal exchange which took place outside of the dealings which the two men needed to have in order to perform their respective duties. That does not mean that 'anything goes', but it does give relevant context to the manner of the interaction between them.

(5) The fact that, in stark contrast to the conclusion reached by the respondent's managers, Mr Pemberton clearly did express remorse for his actions and did show concern for the wellbeing of STL.

(6) The fact that there was no reason to suppose that misconduct of this type would be repeated by Mr Pemberton or that he could not be trusted to continue to perform in his role properly and effectively.

31. In terms of any award of compensation for unfair dismissal, there are a couple of findings of principle which I make at this stage. The first is that this is not a case in which a "Polkey" reduction should be made to the compensation, (being one which is intended to allow for the possibility that a claimant may still have been dismissed, and dismissed fairly, if any procedural failings in the disciplinary process had been remedied). As I have said, this is a case in which I regard the decision to dismiss as substantively unfair, and therefore such a reduction is not appropriate.

32. However, I do consider that any award of compensation should be reduced to take account of Mr Pemberton's contributory fault. The Tribunal has a discretion to reduce the award it makes if it is satisfied about three things:

(1) That there is conduct on the part of the claimant which is culpable or blameworthy;

(2) That the conduct actually caused or contributed to the dismissal; and

(3) That it is just and equitable to reduce the award by the proportion specified.

33. I am satisfied that by making the remarks in question to STL, Mr Pemberton was guilty of misconduct. What he did was blameworthy. The respondent had a duty to investigate it when the matter was brought to its attention, and I have no doubt that the conduct caused, or at least contributed to, Mr Pemberton's dismissal.

34. I consider it to be just and equitable for this to be reflected in any eventual award of compensation by virtue of a percentage reduction in that award. Assessing what that percentage reduction should be is not an exercise which is amenable to any scientific process; it is rather a matter of my assessment of what is appropriate given all the circumstances in order to do justice between the parties.

35. In the present circumstances, I have concluded that whatever basic and compensatory awards I would otherwise make should in due course be reduced by 25% to reflect Mr Pemberton's contributory fault.

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Employment Judge Holbrook

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Date 14 January 2020

REASONS SENT TO THE PARTIES ON

17 January 2020

FOR THE TRIBUNAL OFFICE