



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr C Turner

and

Respondent

Bibby Distribution Limited

Held at Cambridge on 17 February 2020

Representation

Claimant:

In Person

Respondent:

Mr E Garcia, Legal Executive

Members

Employment Judge Kurrein

Mr T Chinnery

Ms K Johnson

JUDGMENT

- 1 The Claimant's claim alleging race discrimination is dismissed on withdrawal.
- 2 The Claimant's claim alleging unfair dismissal is not well founded and is dismissed.

REASONS

- 1 On 18 October 2018 the Claimant presented a claim to the tribunal alleging unfair dismissal, race and age discrimination. On the 7 December 2018 the Respondent presented a response in which it resisted those claims and sought further particulars of them.
- 2 A preliminary hearing took place before Employment Judge Bloom on 15 May 2019. At that hearing the Claimant withdrew his claim alleging age discrimination and it was dismissed.
- 3 The Claimant's claim alleging race discrimination was clarified as relating to the fact that his colleague, Mr Peck, was not sent home following an altercation between them. The Claimant is of black African ethnic origin. Mr Peck is of white European ethnic origin.
- 4 Later in the hearing, when we were trying to clarify if this was correct the Claimant told us that this had never been a race discrimination case. We took time to ensure this was his position before accepting his withdrawal of that claim.
- 5 Before the hearing started we received a bundle of documents containing 81 pages and witness statements on behalf of three witnesses for the Respondent. We read those documents, together with the Respondent's skeleton argument, before we convened.

- 6 We were also handed a further bundle containing in excess of 50 pages of documents, many in manuscript and some others detailed spreadsheets.
- 7 When we convened, having introduced ourselves to the parties and given the Claimant an overview of our jurisdiction, we asked the Claimant whether he had prepared a witness statement. It appeared he had not, but had sent two or three letters setting out his case to the Respondent's representatives. We obtained copies of those for our benefit.
- 8 We were then informed by the Respondent that it would be seeking leave to induce the additional documents, and evidence from its witnesses in chief to deal with them. The Claimant had been provided with a copy of those documents that morning. It was the Respondent's case that the documents had been disclosed pursuant to its ongoing obligation to give disclosure and inspection. It considered them relevant because they went to show consistency in the Respondent's decision making process.
- 9 It appears to us that all the documents, save possibly the lengthy and detailed spreadsheet, post-dated the Claimants dismissal on 7 August 2018.
- 10 We refused to admit that evidence for the following reasons: –
- 10.1 It appeared to offend against the rule in *Devis v. Atkins* [1974] ICR 323.
- 10.2 It was only in exceptional circumstances that a tribunal would be justified in examining the consistency of the Respondent's decision-making. There were no such circumstances.
- 10.3 The Claimant, particularly as a litigant in person, had had no opportunity to consider the documents, and would not hear the Respondent's evidence concerning them until it was given. In reality a postponement of a long-overdue hearing would be necessary.
- 10.4 The prejudice to the Claimant in admitting the documents far outweighed that to the Respondent.
- 10.5 It was not in the interests of justice to do so.
- 11 We heard the evidence of the Claimant on his own behalf. We heard the evidence of Mr Richard Dodd, operations manager, Mr Derek Griffiths, assistant general manager, and Mr David Dylan, regional general manager, on behalf of the Respondent. We read the documents to which we were referred and heard the parties submissions. We make the following findings of fact.
- 12 The Claimant was born on 16 May 1957 and started his employment with the Respondent as a warehouse operative/forklift truck driver on 1 August 2015. He signed a contract a few days later.
- 13 Under the Respondent's disciplinary policy one of the examples given of Gross misconduct, which might lead to termination without notice, was, "acts or threats of physical violence against others".
- 14 The Claimant's employment was uneventful until 24 July 2018 when, at about 04:00am, an incident occurred involving the Claimant and an agency worker, Mr Peck. That resulted in the supervisor, Mr Foxton raising his arm to prevent

- the Claimant moving forward. He took Mr Peck to the canteen, and then sought HR advice, before returning to send the Claimant home. He told Mr Peck to go home too.
- 15 The Claimant, who drove to and from work, got in his car and left the premises. Mr Peck, on the other hand, relied on getting a lift to and from work and was permitted to stay in the entrance gatehouse, which was controlled by a transport operator, Ms Brown. Mr Peck's mother later collected him from the gatehouse at about 5 am.
- 16 Later that day Mr Dodd held investigatory meetings with the Claimant, Mr Pegg, and Mr Foxtan. It appears Mr Pegg also produced a hand written statement for Mr Dodd which is signed, but not dated.
- 17 Mr Dodd suspended the Claimant on full pay pending the outcome of his investigation. That suspension and its terms were confirmed in a letter dated 24 July 2018.
- 18 On the 25 July 2018 Mr Dodd completed a summary of his investigation, which he believed showed the Claimant to have been the aggressor, so that the matter should proceed to a disciplinary hearing to consider an allegation of gross misconduct.
- 19 The Claimant was informed of that outcome and invited to a disciplinary hearing by letter of 31 July 2018. It also informed him of his right to be represented and enclosed copies of the disciplinary policy and procedure as well as the investigation meeting notes.
- 20 The disciplinary hearing took place as planned on 7 August 2018. It was conducted by Mr Griffiths and a manuscript note was taken. In the course of that hearing the Claimant admitted, for the first time, that he had raised his fists to Mr Peck. He also alleged that Mr Peck had said something "black".
- 21 At the conclusion of the hearing Mr Griffiths adjourned for half an hour before returning to inform the Claimant that it was his decision the Claimant be summarily dismissed for gross misconduct.
- 22 Mr Griffiths wrote to the Claimant on 8 August 2018 setting out in some detail his reasons for coming to the conclusion that the Claimant was guilty of gross misconduct in raising his fists to Mr Peck. He took the view on the evidence that the Claimant had been more aggressive towards Mr Pegg than vice versa. We thought that to be open to him on the basis of the evidence he had to consider. It was not only supported by the evidence of Mr Peck, but also partly supported by the evidence of Mr Foxtan and by the admissions made by the Claimant.
- 23 Only 11 August 2018 the Claimant appealed the decision, alleging inconsistencies between the statements of Mr Peck and Mr Foxtan, and also asserting that Mr Peck had broken company rules. He thought that the "lies did not add up".
- 24 On 22 August 2018 he sent a further letter of appeal. He made similar points to those above, and also alleged that there had been collusion between Mr

Peck and Mr Foxton and he had had the right to defend himself against Mr Peck's aggression.

- 25 Mr Dillon wrote to the Claimant on 3 September 2018 to invite the Claimant to attend an appeal hearing on 6 September 2018. He was advised of his right to be accompanied but attended alone. The meeting lasted nearly 45 minutes. The Claimant has not complained about the conduct of this or any other meeting.
- 26 In the course of this meeting the Claimant alleged that Mr Peck had called him a, "black bastard", but later retracted that to say he had not heard anything but the word black. He again admitted that he had raised his fists.
- 27 On 24 September 2018 Mr Dillon wrote to the Claimant setting out in detail his findings on each of the grounds of appeal raised by the Claimant in his two letters. He took the view that the Respondent had carried out a thorough and fair investigation in accordance with its procedures; there had been no breach of policy in allowing Mr Peck to stay in the gatehouse; he did not see any inconsistencies worthy of attention in the statements taken during the investigation and thought there to be more than adequate evidence to support the finding that the Claimant had been the aggressor
- 28 He thought the Claimants allegation of race discrimination concerning Mr Peck to be unsatisfactorily evidenced. The Claimant could not provide an explanation of why he had not raised it in his first interview. Similarly Mr Dillon could not accept that the Claimant had been intimidated by Mr Peck, because Mt Foxton had had to restrain the Claimant. He dismissed the appeal.
- 29 It is neither necessary nor proportionate to set out the parties' submissions.
- 30 The law relating to unfair dismissal is set out in S.98 Employment Rights Act 1996:-

98 General

- (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
 - (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—
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c)
- (3)
- (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."

- 31 We are assisted in applying that provision by the following authorities:-

British Home Stores Ltd v. Burchell [1978] IRLR 379
Iceland Frozen Foods v. Jones [1982] IRLR 439
Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23
Taylor v OCS Group Ltd. [2006] IRLR 163
Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

- 32 We make the following further findings of fact.
- 33 There was undoubtedly an altercation involving the Claimant and Mr Peck in the early hours of 24 July 2018. It is not the role of the Tribunal to investigate and make findings of what actually happened that day. That is the role of the employer. We are expressly forbidden from substituting our view for that of the Respondent: *Iceland*. What we have to do is consider whether the Respondent acted fairly and reasonably in investigating and dealing with what took place.
- 34 Unfortunately, the Claimant did not understand the limited nature of our role: he thought we were akin to a further appeal, so we explained our role to him, which clearly came as a disappointment.
- 35 We were unanimous in reaching the following conclusions:-
- 35.1 Mr Foxton had acted appropriately in restraining the Claimant and sending him and Mr Peck home. There was no evidence at all that he had colluded with Mr Peck.
- 35.2 Mr Dodds had acted entirely reasonably in the manner in which he investigated this incident. He interviewed all the witnesses known to him. He asked relevant questions, explored the answers he was given, and compiled a suitable report.
- 35.3 The Claimant accepted that he was given adequate notice of the hearing and was informed of his rights. He made no complaint about the hearing, which we thought Mr Griffiths conducted entirely properly. We have no doubt that he honestly believed the Claimant to be the aggressor, and he had reasonable grounds for that belief.
- 35.4 It is clear from the Respondent's policy documents that acts such as those of the Claimant constitute gross misconduct. In those circumstances the penalty of dismissal was not disproportionate.
- 35.5 The Claimant was afforded his right of appeal, which was handled by Mr Dillon with the utmost propriety and thoroughness.
- 36 In light of all our above findings the Claimant claim alleging unfair dismissal is not well founded and must be dismissed.

Employment Judge Kurrein

18 February 2020

Sent to the parties and
entered in the Register on 25/02/2020

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For the Tribunal

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.