



EMPLOYMENT TRIBUNALS

Claimant: Mark Retter

Respondent: Morrisons Utility Services Ltd

Heard at: London South

On: 13 February 2020

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: J Platt-Mills, of Counsel, instructed by Simkins LLP, solicitors

JUDGMENT

The claim is dismissed

REASONS

1. This is a claim brought by Mr Retter against his former employer, which dismissed him after an incident at work on 28 March 2019. The dismissal was by letter of 22 May 2019 following an investigation and a hearing taken by Stephen Gibbs. An appeal heard by Lawrence Summers was unsuccessful, on 28 June 2019 following a hearing on 17 June 2019.
2. Mr Retter held a senior position for the respondent and was highly paid. He had been there since 2004, and was a contractor before that, so over 25 years with the respondent.
3. There is no real dispute about what happened on 28 March 2019. Mr Retter was in the supervisor's room. Someone came to ask him to allocate resources for a particular task. He indicated forcefully that there were no such resources. One of his line reports made a comment along the lines of "*No surprise there*". This annoyed Mr Retter, and he said so. The subordinate told Mr Retter to "*shut up*". This made Mr Retter the more annoyed. He went over to his subordinate, who, as the argument developed twice more told him to "*shut up*". This was stated in the subordinate's complaint, and is not in

dispute. This made Mr Retter angry and he went over to the subordinate, who then stood up. They were then face-to-face, in close proximity. There was shouting. Mr Retter said to his subordinate that they should go out to the yard and sort it out. The subordinate then brushed passed him, heading for the office Mr Retter shared with his own line manager. That line manager had heard the commotion and was heading in their direction. They all went into an empty office and there the matter was resolved by the line manager.

4. Complaint was made to Mr Gibbs who instructed that Mr Retter was to be suspended because the report reaching him was that Mr Retter had threatened violence to his subordinate.
5. An investigation was carried out by the human resources department who interviewed Mr Retter, the subordinate and everyone else who was thought to have been in the vicinity. There was a parallel disciplinary process for the subordinate. The outcome as far as he was concerned was an informal discussion and no formal disciplinary sanction. Mr Retter was unapologetic, and blamed his subordinate for, in effect, insubordination and provocation. It was the subordinate who was, Mr Retter maintained, the real aggressor.
6. The investigation turned up various other comments about Mr Retter. Some people found him helpful, others complained of his manner to the effect that he could be a bully, but tempered with observation that he was all right when you got to know him, and just somewhat mercurial.
7. Mr Gibbs decided to dismiss Mr Retter. He did not consider relevant the lengthy period of time Mr Retter had worked for them. He did not accept that the investigating manager had cherry picked witnesses. He did not accept that the subordinate had been the real aggressor. He felt that after so long a manager it was not really appropriate for Mr Retter to say he was "*not the finished article*" and could be "*a bit black-and-white*" and "*bullish*". Mr Retter had pointed out that bad language and shouting was normal in the office where he worked, and Mr Gibbs accepted that was so, but did not think that made it any less unacceptable.
8. Mr Gibbs considered that the subordinate had been frightened and intimidated because that is what the subordinate said. He considered that it had taken a more senior manager to defuse the situation. He was concerned about three other incidents where it seemed that Mr Retter had behaved inappropriately to three different colleagues. He thought that Mr Retter as a senior manager should set an example and it was irrelevant that a more junior member of staff shouted at him first. He was concerned that Mr Retter's approach, which was that he did not think that he had done anything wrong and was unapologetic.
9. Mr Summers took the appeal. Mr Retter told him that thought there was an agenda to remove him from the organisation for other (organisational and historic) reasons. He thought that Mr Gibbs had not been impartial because they had met before. He thought it was unfair that he had been dismissed that the other person not sanctioned at all. He denied any violence or intention to commit violence, and he thought the report very one-sided and slanted to paint a bad picture.

10. After the hearing Mr Summers made some other enquiries, without telling Mr Rutter, but in the event they did no more than confirm what Mr Rutter had already told him.
11. Mr Summers did not think there was any possibility of an ulterior motive. He was troubled by the length of time Mr Retter had been with the company, but a combination of factors led him to uphold the dismissal. They were the fact that there was a power imbalance because Mr Retter was a senior manager, and he should have taken control of the insubordinate line report, and not threatened violence, and he could see no other way these words could be taken. He was concerned at the lack of insight displayed by Mr Retter, who continued to say that he was the wronged party.
12. The first question to decide is the reason for the dismissal. I decide that there is no evidence of any ulterior motive. The reason for the dismissal was, solely, the altercation took place on 28 March 2019. That is a potentially fair reason for dismissal.
13. I considered carefully whether the process followed was fair. Everyone that Mr Retter wanted interviewed was interviewed. I was concerned that Mr Summers had spoken to people after he heard the appeal, but I am satisfied that this made no difference to the outcome; no one said anything different to what they said before. Mr Retter was accompanied. He had adequate notice of the hearings, and was provided with the relevant documentation. In particular he was given the same bundle of documents as the people making the decisions. There was a very unfortunate expression in the emails about whether to suspend Mr Retter, when Mr Retter's line manager said to his own line manager "*Don't bite an animal unless you're big enough to take it down*". (This in that line manager's own account of matters.) That individual, and the person to whom it was said did not play any part in the decision to dismiss or the appeal. Mr Gibbs had met Mr Retter before, on one occasion, and he deals with that in his witness statement. Mr Retter did not challenge what was said there, and I find that Mr Gibbs was impartial.
14. The task, then, is to decide whether the dismissal was fair or unfair bearing in mind the words of Section 98(4) of the Employment Rights Act 1996. There is no burden or standard of proof. It is an evaluative exercise. The question to be answered is whether the dismissal was within the range of responses of the reasonable employer, and it is not a matter where a judge should substitute his own decision for that of a reasonable employer.
15. I make clear that my decision would not have been to dismiss Mr Retter. However for the reasons that follow the decision was not outwith the range of responses of the reasonable employer.
16. The factors indicating that it could have been unfair are as follows.
 - 16.1. Mr Rutter had a series of appraisals, none of which were other than positive.
 - 16.2. He had an unblemished disciplinary record.

- 16.3. His somewhat aggressive management style, on occasion, was well known to his line manager whose view was "*well that is just Mark*". This was a substantial management failure to guide Mr Retter.
 - 16.4. It is plain that Mr Retter was greatly provoked by the subordinate.
 - 16.5. Mr Retter had very long service.
 - 16.6. Account was taken of three matters from the past, about which there had been no complaint at the time.
 - 16.7. The word of the subordinate was given full credence, even though he was himself facing a disciplinary process and would have every reason to maximise culpability in Mr Retter and minimise his own actions.
 - 16.8. That subordinate was not disciplined and should have been.
 - 16.9. Those reporting back on the claimant had a very mixed view, and quite a few had no issue with him at all.
 - 16.10. Mr Gibbs felt that not to dismiss would be to condone the behaviour, which is not a logical conclusion. A final written warning condones nothing.
17. The factors which I find of greater weight than these very considerable factors are as follows.
- 17.1. In the context of an industrial workplace like this the invitation to "*go outside and sort it out*" can only be seen as a prelude to a fistfight. It was not that Mr Retter said that they should go to his office and sort it out. I accept Mr Retter's evidence (the whole of which was given with sincerity and honesty) that at no time did he intend physical violence, but anyone listening to this, bearing in mind that it was said in anger and with the precursor of much shouting, would have no other impression.
 - 17.2. This was a senior manager, in a public place, and a subordinate. There is a power imbalance.
 - 17.3. It was not defused by Mr Retter but by his own boss.
 - 17.4. Any senior manager in 2020 really should know that this is simply not acceptable.
 - 17.5. The company has a disciplinary policy which expressly states that this is gross misconduct and Mr Retter knew of this policy.
 - 17.6. The company has a dignity at work policy, again of which Mr Retter knew, and plainly his actions breached that policy.
 - 17.7. Within the previous 12 months Mr Retter had been on a course, two days a week for six weeks, about management; it is not that he had no training in how to be a manager.
 - 17.8. Mr Retter does not see that there is any great blame to be laid at his door, so that management concern that there was a long-term attitudinal difficulty was a reasonable factor for them to apply.
18. Had Mr Rutter received no management training, and had he been apologetic to the other individual (however much provoked), to Mr Gibbs and to Mr Summers it is entirely possible that the outcome of this hearing could have been otherwise. As it is, it would be perverse to find that while I would have come to a different decision to that of Messrs Gibbs and Summers, the decision to dismiss was not one that a reasonable manager might take.
19. Whatever management failings there were in not addressing the "*culture*" at Mr Retter's place of work, ultimately a senior manager is responsible for his own actions. Threatening to take someone outside to resolve matters

physically is a matter which an employer is entitled to treat as gross misconduct (and Mr Retter did not dispute that it was). It was unsatisfactory that there were previous matters taken into account, but the accepted facts were sufficient in themselves. Mr Gibbs should have taken note of the length of service, but Mr Summers did give this weight. The unfairness so far as the lack of action for the other, and giving what that person said too much credence, do not minimise the actions resulting in the dismissal. The facts are not in dispute, and Mr Retter's feeling that he was wronged does present an obstacle for him.

20. For all these reasons Mr Retter has not succeeded in showing that the dismissal was outside the range of responses of a reasonable employer, and so I must dismiss his claim.

Employment Judge Housego

Date 13 February 2020