



EMPLOYMENT TRIBUNALS

Claimant: Mr Papa M'Bow

Respondent: Benhurst Court Limited

Heard by CVP (London South Tribunal)

On: 09 July 2020

Before: Employment Judge Martin

Representation

Claimant: In person

Respondent: Ms Meenan - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim is unsuccessful and is dismissed

REASONS

1. This hearing was heard by CVP as it is not currently practicable to hold an in-person hearing due to the Covid-19 pandemic and social distancing rules. I had before me an electronic bundle of documents, witness statement of all witnesses, the Respondents draft list of issues and case referred to by the Respondent as set out below. Both parties have all the relevant documents with them for the hearing. I heard from the Claimant, and for the Respondent from
2. The Claimant presented a claim on 7 June 2019 for unfair dismissal. The Claimant's claim is of automatic unfair dismissal pursuant to section 100(1)(e) Employment Rights Act 1996. The Claimant had less than two years' service at the effective date of termination of employment. The Claimant is therefore unable to bring a claim of ordinary unfair dismissal.
3. S100(1) (e) provides:
100Health and safety cases.

- a. (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

.....

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

4. The issues before the Tribunal are:

Automatically Unfair Dismissal: s100(1)(e) Employment Rights Act 1996

- 4.1 On 20 March 2019, were there circumstances of danger which the Claimant believed were serious and imminent?
- 4.2 Was any such belief on the part of the Claimant reasonable?
- 4.3 Did the Claimant take or propose to take steps to protect himself or other persons from the danger?
- 4.4 Were the steps taken by the Claimant appropriate by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time?
- 4.5 If so, was the Respondent's sole or principal reason for dismissal was that the Claimant had taken or proposed to take such steps?
- 4.6 If so, was it (or would it have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them?
- 4.7 If the Claimant succeeds on any part of his claim, to what extent was the dismissal caused or contributed to by the action of the Claimant?

5. The Claimant was employed by the Respondent between 20 September 2017 and 5 April 2019 when he was dismissed for gross misconduct. The Claimant worked as a caretaker at Benhurst Court. The premises were undergoing refurbishment and contractors were appointed for this purpose. The Claimant was very critical of the contractor in relation to several matters including workmanship and use of facilities on the Estate. One matter was the use of a

garage used by the Claimant, which had within it a small kitchen at the back and a toilet. It was also where he stored tools which he used in the course of his work. For most of the time that the refurbishment was taking place the contractor had on site kitchen and toilet facilities for its workers. However, towards the end where there were less workers these were removed. These workers therefore wanted to use the facilities in the garage. The Claimant says that he was told by his employer that only Mr Raghbeer and his second-in-command were able to use the facilities but that the other workers also used them. He complained that his supplies were being used which he had paid for.

6. In his evidence, the Claimant said that he was on good relations with the builders except when they wanted to use the facilities. Given that he complained that they wanted to use these facilities constantly, the inevitable conclusion is that the relations between him and the builders was strained for most of the time. He also alleged that the builders had damaged his car and that items of tools and other supplies and tools had gone missing. The Claimant was clearly very angry about these matters during the hearing when giving evidence and in submissions was very agitated and clearly still very angry about the builders despite it being over a year since his dismissal.
7. On balance my finding is that the Claimant did not have a good relationship with the builders and that he became angry and frustrated by their constant use of the facilities in the garage, the damage to his car which he blamed on them and what he considered to be substandard work.
8. On 20 March 2019 an incident occurred for which the Claimant was dismissed. There is no dispute that Mr Raghbeer came to the garage and was in the kitchen. The Claimant's evidence was that Mr Raghbeer was allowed to use the garage and its facilities, but not all the other builders. There was therefore no reason Mr Raghbeer should not have been there. There is no dispute that an argument ensued between Mr Raghbeer and the Claimant. Mr Raghbeer received an injury to his face which he said was because the Claimant head-butted him. Mr Raghbeer called the police who were concerned about the injury to such an extent that they called an ambulance to take him to hospital. Mr Raghbeer telephoned Mr Duggan to report what has happened. A contemporaneous note appeared in the bundle which said:

AD Call from Keshava Raghbeer 13.47 Wednesday 20th March 2019

Keshava called and reported that 'Pape assaulted me.'

He headbutted me. I have had to call the police.

Pape was going on about toilet on site. It got heated from that.

Keshava said 'You're winding me up now'. He walked away. Pape ran up behind him. head butted him, and Keshava has a lump on his head.

Keshava is now standing outside of Benhurst Court.

There are two witnesses - Keshava's workers.

Keshava recognises that there is a job to be done and is considering the bigger job.

Keshava reported that yesterday Pape did no work. He sat in his box all morning. Went for lunch and came back at 2.30 then left at 4pm.

9. The Respondent initiated an investigation on 20 March 2019 which was conducted by Ms Alice Duggan. The investigation recommended disciplinary action be taken. Witness statements were taken from Mr Raghbeer and from Ms Katy Bryne who worked for the contractor and witnessed part of the incident. The investigation notes state that Mr Raghbeer said he did not raise his hands or retaliate during the incident:

“Around 1.35pm KR returned from Tesco with pot noodle for lunch. He came into the garage, knocked on the door and asked if he could use the kettle. PM said yes. KR boiled the kettle

PM: what happened to the portaloo?

KR: It was off-hired. We have permission to use this one from Stephen Britton.

PM: Why didn't Stephen tell me?

KR: Probably because he is on holiday.

PM went on to complain about people using his toilet.

KR: It's not yours. It belongs to the company.

PM then talked about the kettle and doesn't like it being used.

KR: I asked and you said yes. Is it now a problem?

PM: Yes.

KR turned off the kettle and walked out. PM was ranting and raving about the kettle and toilet.

KR: You're annoying me now. I'm leaving (although used some expletives)

PM was standing by the kitchen door. There was around 7ft between them. KR turned to leave the garage through the door, motioning that he was leaving the space. The garage door was open. He heard a noise (rustling) behind him. He turned around and PM's head was coming towards him. There was no physical contact between them prior to this point.

KR swayed to the left and PM's head hit him on the eyebrow. Had he not moved he would have hit him square on the nose or not turned he would have been hit on the back of the head.....

....

KR backed out of the garage and was followed by PM. PM pushed him and then went right. PM tried to punch KR three times and KR dodged them. PM then launched himself into the air toward KR. KR deflected him and PM tumbled to the floor. This was directly outside of the garage”.

And Ms Byrne said:

Kesh wanted a pot noodle. He went into the garage to Use the kettle. The other guy (Paps M'Bow) complained about the use of the kettle and toilet by others.

Kesh said 'you're annoying me now' and walked out. PM head butted KR. Kesh stumbled out. The guy (PM) was swinging his arms around. Katy got in the middle them.

The Claimant said:

It was Wednesday and PM usually collects the waste. At around 1pm — 1.30pm he returned to the garage to get changed. When PM entered KR was there using the kettle / getting ready to make a pot noodle (boiling the kettle). PM saw this and asked why KR did not buy his own kettle to use for him and his staff. PM asked what going forward what would happen regarding the toilet now the SSW toilet was removed? KR became aggressive, verbally aggressive and shouted 'Fuck you Pape' three times. KR started pushing PM and became physically aggressive. They were very close together. KR was not happy about being questioned. PM pushed KR back to defend himself KR started backing

up. They were both pushing each other. They moved out of the garage. PM defended himself against KR who was still shouting and pushing. PM might have hit KR with his hands.

AD: KR says that you head butted him?

PM: I didn't head but him. I never intentionally head but him?

Two workers came out of their garage (adjacent) but they did not see what happened at the start. It is likely they have been told what to say. There was an Asian-Chinese guy and a girl who has given a witness statement. The guy and the girl separated KR and PM. At this point PM said not to do this anymore. PM returned to his garage and KR left the area with his staff. PM went back to mow the law. He didn't see anyone for 30-45 minutes. Afterwards he returned to get changed and the police arrived and arrested PM.

10. The disciplinary hearing was conducted by Mr Britton and Ms Favre Broady on 29 March 2019. Contemporaneous notes were taken of the investigation and disciplinary meetings which are both read out to the Claimant at the meetings and sent to him afterwards. The Claimant did not suggest at that time that the notes were incorrect or suggest any amendments to them. I therefore find that the notes are an accurate reflection of what occurred during both the investigation and disciplinary hearing despite the Claimant alleging during his evidence that they were not accurate.
11. During the disciplinary hearing the Claimant said "There was some contact but there was no intention to strike KR. PM said it was 50/50 and that it has been blown out of proportion and that he is not an aggressive person"..... PM said that there was some "pushing" and any contact with his head was unintentional although he did not recall it. He did not mean to hurt him and KR started it so he was defending himself."....."PM said that he felt a "picture of him" appears to indicate that he is violent. He would not refuse access to toilet and is not violent person. PM did not object to using kettle and microwave and said they can use toilet. He has let people borrow his coats when it was cold".
12. On 29 March 2019 the Claimant was charged by the Police in relation to the incident.
13. The outcome of the disciplinary hearing was communicated to the Claimant on 5 April 2019 by letter. The decision was that the Claimant was found to have injured Mr Raghbeer and that he was the protagonist. On this basis, the Claimant was dismissed for gross misconduct. The dismissal letter said:

On 27th March 2019 you were informed that Benhurst Court Limited was considering dismissing you following a violent incident that took place on 20th March 2019.

This was discussed in a meeting on 29th March 2019. Following this meeting, Benhurst Court Limited directors considered the findings of the investigation and disciplinary meetings. It was decided that your conduct was unsatisfactory and that you be dismissed without notice or payment in lieu of notice.

The reasons for your dismissal are:

You are guilty of gross misconduct for your use of physical violence and aggressive behaviour in the workplace.

I am therefore writing to you to confirm the decision that you be summarily dismissed and that your last day of service with the Company will be 5th April 2019.

14. The Claimant was given a right of appeal which he did not exercise. On 14 April 2019 he purported to resign on the basis that he was not protected against the contractors.
15. Both parties gave submissions. The Claimant's submissions were animated and forceful. He showed his continued anger at the contractors for using the garage and facilities despite it now being over a year since he left the Respondent's employment. He maintained he was not to blame for the incident. This is in contrast to his purported resignation letter which stated that: **"Also during the incident, both side were responsible - not just me as the reports suggest"**.
16. The Claimant continued to criticise the contractors for using the toilet and facilities despite in his disciplinary hearing saying: **"PM said that he felt a "picture of him" appears to indicate that he is violent. He would not refuse access to toilet and is not violent person. PM did not object to using kettle and microwave and said the they can use toilet. He has let people borrow his coats when it was cold"**.
17. For the Claimant to succeed in his claim the burden of proof is on him to show that the provisions of section 100 (1) (e) apply. The tribunal must consider whether s.100 (1)(e) conditions are met by answering the following questions:
 - a. were there circumstances of danger which the employee reasonably believed to be serious and imminent?
 - b. did he or she take or propose to take appropriate steps to protect themselves or others?
 - c. did he or she take appropriate steps to communicate these circumstances to his or her employer by appropriate means?

The tribunal should then ask whether the employer's principal reason for dismissal was that the employee took or proposed to take such steps. If yes, then the dismissal is unfair.

18. The Tribunal does not find that the Claimant was in serious or imminent danger or that he believed he was. Even if he was, the Tribunal does not think that headbutting Mr Raghbeer was an appropriate step to defending himself. The Tribunal accept the evidence that Mr Raghbeer did not instigate the incident by any physical means and did not retaliate. There was no injury to the Claimant. In any event there was no effort to communicate these circumstances to his employer prior to dismissal. The Claimant's purported letter of dismissal appears to be an attempt to satisfy this test retrospectively. It does not.
19. Given the Claimant had less than two years' service the only issue is whether he can rely on s100(e). To succeed he must show he was in imminent threat. After the incident the Claimant did not appear to be upset or shocked after the incident and continued with his work without notifying anyone at the Respondent of the incident.
20. The Respondent's position is that the Claimant did was not in a situation of imminent danger and that even if he was he did not take steps to minimise the risk (such as leaving the garage). He acknowledges in his purported resignation letter that he was 50% to blame. The Tribunal's view is that it would never be to inflict such serious injury. Resulting in the police being called.
21. The Respondent concluded that the Claimant had started the fight, and this was as a result of his long-standing irritation about the contractors using the facilities on

site. The Tribunal accepts this and finds that the Claimant was not happy with this and that his relations with the contractors was not good. Indeed, he said in evidence that "they made my life hell". The Respondent preferred the evidence of Mr Raghbeer and Ms Byrne who corroborated his statement. They were entitled to do so. The Tribunal finds the investigation to be fair and reasonable even though this is not an issue in this case. The Respondent did not dismiss the Claimant because he took or proposed to take appropriate steps to protect himself, but because the Claimant acted violently in the workplace.

22. The Tribunal does not find that the Claimant has satisfied the tests set out in s 100 (1) (e). The Tribunal accepts the Respondent's submission this is a case of a physical altercation at the workplace resulting in contractor being taken to hospital and the police being called and the Claimant gave no credible or consistent explanation of the incident. In contrast the Mr Raghbeer and Ms Byrne consistent accounts. Even if there was an imminent threat and danger, this is conduct so negligent any reasonable employer would dismiss.
23. In the circumstances the Claimant's claim is dismissed.

Employment Judge Martin
Date: 14 August 2020