



# EMPLOYMENT TRIBUNALS

## Claimant

Mr K McCully

v

## Respondent

Done Brothers (Cash Betting)  
Limited t/a Betfred

**Heard:** by video conference (CVP)

**On:** 18 August 2020

**Before:** Employment Judge Hawsworth (sitting alone)

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr J Gilbert (consultant)

## RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal fails and is dismissed.

## REASONS

### Claim, hearing and evidence

1. The claimant was employed by the respondent as a Group Sales Manager from 15 November 2005 until his dismissal on 16 September 2019.
2. In a claim form presented on 1 December 2019 after a period of Acas early conciliation from 25 November 2019 to 26 November 2019, the claimant made a complaint of unfair dismissal. The respondent presented its response on 7 January 2020. The respondent defends the claim and says the claimant was fairly dismissed for gross misconduct.
3. The hearing took place on 18 August 2020 by video conference (CVP). There was a bundle of 174 pages.
4. I took some time at the start of the hearing to read the witness statements and the documents referred to in the statements. I heard evidence from the respondent's witnesses Mr Slater, Mr Streatfield and Mr Farley. I then heard evidence from the claimant. All the witnesses had exchanged statements.

5. During his questions to the claimant, Mr Gilbert showed some short clips of CCTV recordings (by using the share screen function). Mr Streatfield was recalled after the claimant's evidence to answer questions arising from the CCTV evidence.
6. Mr Gilbert and the claimant both made closing comments.

### **The Issue**

7. The issue I have to decide is whether the claimant's dismissal was fair in accordance with the guidance set out in the case of British Home Stores v Burchell.

### **Findings of fact**

8. I make the following findings of fact based on the evidence I heard and read.
9. The claimant was employed by the respondent as a Group Sales Manager from 15 November 2005 until his dismissal on 16 September 2019.
10. On 27 August 2019 an employee of the respondent made a complaint against the claimant of 'sexual harassment, groping and bullying' (page 34). Her complaint included allegations of inappropriate touching, sexual comments and innuendos. The claimant was the complainant's manager. The complainant said she felt stressed, uneasy and unsafe at work.
11. Later on 27 August 2019 the complainant made a further complaint, alleging that another incident of touching had occurred that day.
12. Mr Slater, area supervisor, was asked to investigate the complaint. He had a meeting with the complainant on 28 August 2019. The complainant provided copies of text messages she had been sent by the claimant. In one text on 2 August 2019 the claimant texted the complainant saying 'Are you gagging yet' with an emoji with heart eyes. When she replied '?' he responded 'Lol for me silly'. In another text on 10 August 2019, replying to a text from the complainant about something she watched on Netflix, the claimant said 'You mean pornhub surely lol'. In another text on 19 August 2019 responding to a photo the complainant sent about her friend who likes potatoes, the claimant said 'I know what a potato looks like whats your friend look like [winking emoji] As I can't have you' (pages 29 to 33).
13. Mr Slater had a meeting with the claimant on 29 August 2019. He told the claimant that the complainant had made allegations of sexual harassment against him. The claimant immediately said that he denied it, adding 'That's all I'm saying until I get some representation'. Mr Slater asked, 'Do you want to see the evidence first?' The claimant replied, 'No, I'm not doing anything until I've got representation'. Mr Slater suspended the claimant (page 48).
14. After the meeting, the claimant sent a statement to Mr Slater (page 160). It said:

“I have at no time ever acted inappropriately towards [the complainant].

While I admit to occasional adult banter conducted both by her and myself, I categorically deny ever touching or acting inappropriately towards [her].

I am a very tactile person and being aware of the current climate had informed ALL staff if they ever felt my behaviour was unacceptable to tell me”.

15. At the time he sent this statement, the claimant had not been told that the complaint included allegations of touching.
16. On 30 August 2019 the claimant’s GP sent a letter advising that the claimant had been given a diagnosis of depression, that he had been started on medication and counselling had been organised. The letter asked for this to be taken into consideration at the next meeting on 31 August. It did not say that the claimant was not fit to attend the meeting or ask for the meeting to be postponed (page 51).
17. Mr Slater had a further meeting with the claimant on 31 August 2019 (pages 52 to 56). At the meeting the claimant said he had provided a statement admitting to the use of adult humour on both his and the complainant’s part, and that he would not be answering any questions. Mr Slater asked the claimant whether he wanted to see the complainant’s statement or have it read to him. The claimant said he did not. Mr Slater replied saying ‘Just to be clear, her statement may still be used at a disciplinary stage so at some point you may need to hear it’.
18. Mr Slater went on to say that he had investigated the complaint by viewing CCTV footage and that the complainant had provided screen shots of several text conversations. The claimant said he did not want to see the screen shots. He asked how far back the CCTV had been looked at. Mr Slater said he had looked at the two dates raised by the complainant, but he had the ability to go back several weeks. Mr Slater asked the claimant to confirm that he definitely did not want to see the CCTV evidence and the claimant replied ‘I’m happy with that too’.
19. Also on 31 August 2019 another employee of the respondent made a complaint against the claimant of inappropriate touching, jokes and sexual innuendo. She said she feared for her safety (page 65). Mr Slater held an investigatory meeting with the second complainant. He also reviewed the relevant CCTV footage. He noted that there were 31 instances of the claimant touching the second complainant’s legs, hair, face and side.
20. On 1 September 2019 the claimant sent an email to Mr Slater. It confirmed that he had chosen not to see text messages and CCTV footage. It said he denied any touching of a sexual nature (page 66). He said his behaviour with the first complainant was reciprocal and that she had offered to clean his house, cook a meal and wait in bed for him. Referring to the texts and the CCTV footage, it said

“What are the dates of these texts? Not their content I don’t deny the possible use of adult humour. Why just two occasions mentioned on CCTV? As it is the case I am a tactile person and will probably have touched her in a friendly manner most days we worked together.

...

I am aware that further footage may paint me in an even worse light it will however also prove that any touching of a friendly manner was reciprocated and sometimes instigated by [the first complainant].”

21. On 2 September 2019 Mr Slater had a further meeting with the complainant. He told her that the claimant no longer denied touching her but said it had been done in a friendly manner. The complainant said that the touching made her feel extremely uncomfortable (pages 67-74).
22. He also asked her about the claimant’s suggestion that the complainant had cleaned the claimant’s house. She confirmed that she had done this and had been paid to do so by the claimant. She denied saying she was waiting in the claimant’s bed for him. She said it was a comment made by the claimant, not by her.
23. Mr Slater reviewed the CCTV for other dates when the claimant and the complainant had been working together. He could not find any occasions of the complainant instigating physical contact with the claimant.
24. Mr Slater had another meeting with the claimant on 6 September 2019. He told him about the second complaint which had been made and about his observations from the CCTV footage. The claimant did not want to read the second complainant’s statement or look at the CCTV footage. He said that she often hugged him. Mr Slater said she had told him she did this to remove the claimant’s hands from other parts of her body that she did not like the claimant touching. The claimant replied by saying ‘I am well aware that I playfully touch the girls. I emphasise the word playfully’ (page 94). He acknowledged that his humour could cause offence to some members of staff.
25. The claimant provided Mr Slater with a handwritten letter from a customer who had been in the shop on the day the claimant said the complainant had offered to clean for him. The customer had heard the complainant say this (page 154). The letter also said that the complainant was ‘all over’ the claimant, ‘stroking his back out in the kitchen area’. It did not mention the complainant saying she would wait in the claimant’s bed for him. Mr Slater did not contact the customer about the letter.
26. Mr Slater produced an investigation summary report. He decided that there was a case to answer.
27. The claimant was invited to a disciplinary hearing to consider “allegations of bullying and sexual harassment” (page 100). The letter made clear that dismissal was a possibility.

28. The disciplinary hearing was held on 13 September 2019 and was chaired by Mr Streatfield. The claimant was accompanied by his union representative. At the hearing the claimant said that the first complainant had made up the allegations against him so that she could become manager of the shop. He said that his text messages to the complainant were adult humour.
29. Mr Streatfield showed the claimant some of the CCTV footage including a section where the claimant brushed the hair away from the complainant's shoulders, placed his hand on her shoulders and kissed her head. The claimant said he was consoling her as a date had cancelled. In another clip the claimant put his hand on the complainant's leg before she got up and left. The claimant said he may have asked her to do something like make a cup of tea.
30. The claimant did not want to view any more CCTV footage. He said his actions were honest and not sexually motivated. Mr Streatfield suggested to the claimant that his position was that he did not deny touching the complainant but said that his actions had been taken out of context. The claimant agreed.
31. Mr Streatfield took into account the sexual nature of the text messages sent by the claimant and the CCTV footage. He decided that on the evidence before him it was clear that the claimant had carried out the alleged conduct and that his conduct towards the claimant was unwanted, one sided and of a sexual nature. He decided that the claimant was guilty of bullying and harassment which amounted to gross misconduct. He considered the mitigation put forward by the claimant including his length of service and previous disciplinary record. He did not attach any weight to matters raised in the second complaint (as this had not yet been fully investigated) or to a previous disciplinary warning the claimant had received. He considered whether he could impose a sanction other than dismissal but decided that because of the severity of the conduct and the respondent's loss of trust and confidence in the claimant, he should be summarily dismissed (page 122).
32. The claimant appealed against his dismissal, raising six points. The appeal was heard by Mr Farley on 17 October 2019. The claimant was accompanied by his union representative. At the appeal, Mr Farley invited the claimant to outline his six points of appeal. After the appeal Mr Farley carried out further investigations. He spoke to the complainant, to Mr Slater and to Mr Streatfield. He also telephoned and spoke to the customer who had provided the letter in support of the claimant. He also reviewed the CCTV evidence.
33. On 19 November 2019 Mr Farley wrote to the claimant. He upheld the decision to dismiss. In his letter he addressed each point raised by the claimant in his appeal (pages 149 to 153).
34. In his evidence the claimant said that the outcome of the disciplinary process should have been a final written warning and that this would have been a fair sanction.

## The Law

35. A reason that relates to the conduct of the employee is a potentially fair reason for dismissal pursuant to section 98(2)(b) of the Employment Rights Act 1996.
36. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

*“whether in the circumstances (taking into account the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal.”*
37. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer, and must not substitute its own view of the appropriate penalty for that of the employer.
38. In a complaint of unfair dismissal where the reason for the dismissal is misconduct, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in British Home Stores v Burchell requires the tribunal to consider a three stage test:
  - 38.1 whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct;
  - 38.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
  - 38.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

## Conclusions

39. The respondent must show that misconduct was the reason for dismissal, by reference to the three stage test set out above.
40. Mr Streatfield made the decision to dismiss the claimant. At the time of dismissal, he had a genuine belief that the claimant was guilty of misconduct. He believed that the claimant’s conduct towards the complainant was unwanted, one sided and of a sexual nature. He believed it amounted to sexual harassment.
41. I have considered whether there were reasonable grounds for Mr Streatfield’s belief that the claimant was guilty of misconduct. At the time of the decision to dismiss:
  - 41.1 The complainant had made a written complaint of ‘sexual harassment, groping and bullying’ including allegations of inappropriate touching, sexual comments and innuendos;

- 41.2 The complainant's complaint of sexual comments and innuendos was supported by copies of text messages from the claimant to the complainant some of which were of a sexual nature;
- 41.3 The claimant had admitted to what he called adult banter/adult humour;
- 41.4 There was CCTV footage which supported the complainant's allegations that the claimant had touched her at work;
- 41.5 In an investigation meeting, the claimant said 'I am well aware that I playfully touch the girls' and in the disciplinary hearing he did not deny touching the complainant, but said it was taken out of context.
42. Mr Streatfield had seen and was aware of all this information at the time he made his decision. I conclude that these were reasonable grounds for Mr Streatfield's belief that the claimant was guilty of misconduct.
43. I next consider whether the respondent carried out as much investigation as was reasonable in the circumstances, that is whether the investigation fell within the range of reasonable responses. Mr Slater held two investigation meetings with the complainant and three meetings with the claimant. The claimant was provided with copies of the documents and texts and given the opportunity to view the CCTV footage during the investigation.
44. At the request of the claimant, Mr Slater viewed the CCTV footage he had for the shifts on which the claimant and the complainant were working together, not just the days the complainant had referred to.
45. Mr Slater did not speak to the customer who had written in support of the claimant, but Mr Farley did at the appeal stage. It was reasonable for Mr Slater to consider the texts provided by the complainant without requiring her to provide copies of all texts between her and the claimant. The texts included enough of the exchanges so that it was clear what was being discussed.
46. For these reasons, I conclude that the investigation was reasonable.
47. The respondent has therefore established that the reason for the claimant's dismissal was a reason relating to conduct. This is a potentially fair reason for dismissal.
48. I now consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient grounds to dismiss him (whether dismissal was in the range of reasonable responses). The burden of proof here is neutral.
49. I have considered the circumstances of the claimant's case and reached the following conclusions:
- 49.1 The claimant was made aware of the detail of the allegations against him and it was not unreasonable to describe the alleged conduct as 'bullying and sexual harassment';

- 49.2 The claimant's GP provided the respondent with evidence about his health and asked for this to be taken into account. The claimant's doctor did not ask the respondent to postpone the investigation or the hearing for health reasons, and in those circumstances it was reasonable for the respondent to proceed;
- 49.3 It was reasonable for Mr Slater to tell the claimant at an investigatory meeting that the complainant's statement may still be used at a disciplinary stage even if he did not read it. That did not mean that the outcome of the investigation was prejudiced;
- 49.4 The employer's decision not to include the second complaint in the disciplinary hearing was within the range of reasonable responses. An initial investigation was carried out into the second complaint, but the employer decided to proceed to a disciplinary hearing to consider the allegations by the first complainant only. This did not prejudice the disciplinary hearing. Mr Streatfield did not take the second complaint into account when reaching his decision;
- 49.5 The claimant's evidence was not ignored. When considering whether conduct has taken place as alleged, the employer has to make a decision as to what happened on the balance of probabilities, that is it has to decide what it thinks is most likely to have happened. The claimant's evidence was considered during the investigation by Mr Slater and it was taken into account by Mr Streatfield. Mr Streatfield's decision to accept the complainant's evidence was a reasonable one, in particular because it was supported by the text messages, CCTV and by the admissions the claimant had made. The customer who wrote in support of the claimant was spoken to by Mr Farley, and this corrected any earlier failing in the process in relation to this witness;
- 49.6 Having reached the decision that the allegations against the claimant were proven, Mr Streatfield went on to consider whether the claimant's conduct warranted summary dismissal. He considered the mitigating circumstances put forward by the claimant including his length of service. The claimant's previous disciplinary record was considered as a mitigating circumstance, that means it was considered to be in his favour, and no weight was attached to any unproven disciplinary allegations or a previous disciplinary warning. Mr Streatfield concluded that the serious nature of claimant's conduct had resulted in a breach of trust and confidence and that summary dismissal was the appropriate sanction rather than a lesser sanction. This decision was within the range of reasonable responses.
- 49.7 When it considered the claimant's case, the respondent adopted a procedure which was within the range of reasonable responses. The procedure complied with the Acas Code. The respondent made the claimant aware of what was being investigated. An investigation was carried out and the claimant was given opportunities to respond to the complaint. A disciplinary hearing was held by another manager and the claimant was told of the risk of dismissal. The claimant was accompanied at the disciplinary hearing. He was provided with copies



of the documents and shown CCTV footage which the respondent considered when reaching its decision. The claimant was offered an appeal. On appeal, the appeal manager reviewed all the evidence again, and spoke to the relevant individuals. He also spoke to the customer who had provided letter of support to the claimant.

- 50. I have concluded that, in these circumstances, dismissal was within the range of reasonable responses open to the respondent.
- 51. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

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Employment Judge Hawksworth  
Date: 24 August 2020

Judgment and Reasons sent to the parties  
on:.....

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For the Tribunal Office