



# THE EMPLOYMENT TRIBUNAL

---

**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mr M Bah**

**Berendsen UK Limited**

**Held at London South (By telephone)**

**On 26 May 2020**

**BEFORE: Employment Judge Siddall (Sitting Alone)**

## **Representation**

**For the Claimant: Mr R Robison, FRU**

**For the Respondent: Mr B Jones, Counsel**

## **RESERVED JUDGMENT**

The decision of the tribunal is that the claim for wrongful dismissal does not succeed and is dismissed.

## **REASONS**

1. The Claimant was summarily dismissed for gross misconduct on 13 November 2017. He claimed that he was unfairly and wrongfully dismissed. Following a hearing on 26 February 2019 I determined that the claim for unfair dismissal did not succeed. Unfortunately I omitted to deal with the wrongful dismissal claim. The claimant appealed to the EAT who remitted the claim for wrongful dismissal back to this tribunal.
2. During the course of the hearing in February 2019 I had heard evidence from the Claimant, from Mr Stuart Duell, Production Manager of the Respondent, Mr

Laurence O'Donovan, previously a Production Manager of the Respondent and from Ms Enorr Erhuero, Head of HR, South East Region.

3. As evidence in the case had already been heard, on 9 March 2020 I proposed to the parties that the wrongful dismissal claim should be dealt with by way of submissions only. The hearing of the claim was listed for 26 May 2020. In the event, an 'in person' hearing could not take place due to the restrictions imposed as a result of the coronavirus pandemic. I therefore proposed on 12 May 2020 that the hearing could take place by telephone in accordance with rule 46 of the Employment Tribunal Rules of Procedure. No objection to this proposal was received. Both representatives provided helpful written arguments in advance of the hearing and Mr Jones also put together a supplementary bundle of documents which included the EAT decision, grounds of appeal and correspondence from the tribunal.
4. I refer to the facts I found in my reserved judgment dated 9 March 2019 which sets out the history leading up to the claimant's dismissal, and what happened after that. The claimant was accused of violent misconduct in relation to an incident during the night of 3 July 2017 at the respondent's Brixton site. He had been removed from the premises following alleged verbal and physical abuse towards colleagues. He was dismissed on 13 November 2017. He asserts that his dismissal was wrongful, ie a breach of contract, and that he was entitled to his notice pay. I must therefore consider whether the claimant's actions amounted to a repudiatory breach of contract which entitled the respondent to dismiss him without notice.
5. In my reserved judgment dated 9 March 2019 I applied the *Burchell* test and concluded that the respondent had a genuine belief that gross misconduct had occurred, based on reasonable grounds and after reasonable investigation. However Mr Robison submits and I accept that a different test applies when a claim for wrongful dismissal is being considered. The claim must be considered in the context of common law principles relevant to breach of contract. He refers me to the case of *Rawson v Robert Norman Associates Ltd* [2014] UKEAT/0199/13/RN. The judgment of Mr Justice Langstaff stresses that the question in a claim for wrongful dismissal is not what the employer *believed* to have happened but what, on a balance of probabilities, *did* happen. He

makes the point that it is quite possible for a tribunal to find that an employee had been fairly dismissed in accordance with the *Burchell* test, but that his claim for wrongful dismissal should succeed because gross misconduct could not be proven. I remind myself of this important distinction as I consider the claim before me today.

6. I have reviewed the evidence about what happened on the night of 3 July alongside the notes of the evidence given at the tribunal hearing on 26 May and the facts I found as part of my decision on the unfair dismissal claim.
7. The respondent's disciplinary procedure notes that 'physical violence or bullying' is an example of what will be categorised as gross misconduct.
8. The allegations against the claimant are recorded in an email that the production manager NC wrote at around 4.40am on 3 July 2017 which I deal with at paragraph 7 of my earlier judgment. NC states that he has written the email 'because of [the claimant's] threatening and intimidating behaviour towards myself and my staff members at 1.30am'. This email is significant because it is a near contemporaneous account of what NC says had occurred.
9. In the email NC describes the sequence of events that occurred that night. First, he sets out the background to this dispute. The claimant had asked for holiday at short notice around one week earlier. He had not been permitted to take all the holiday he asked for, and NC says that he became angry. The claimant returned to work on 3 July and NC called him into the office to discuss his holiday request. NC was apparently concerned about the reasons the claimant had given the previous week for requesting holiday at such short notice. NC states that the claimant became 'angry and threatening' towards himself and another employee, JS. The claimant abused JS and threatened to hit him. He told the claimant to leave the office and gave him five minutes to calm down. However NC goes on to report that when the claimant returned to the packing area he started to threaten a colleague, (whom I refer to in my judgment as 'CF') 'lifting his fist and aiming it at [CF] and I had to stand in front of him because I feared he was going to hit [CF]'. He says that the claimant then started threatening another colleague, SU, who pushed a trolley of stock between himself and the claimant. NC called security. The police arrived at some point. As I make clear in paragraph 7 of my judgment, it is not clear

whether they were responding to a call from the claimant or the respondent – possibly both. NC says that the claimant was removed from the premises by the police. The claimant does not dispute that he left the area with the police although he denies that he was removed by them. He agrees that the police attended, which he says was at his request. I accept that NC had also directed that the police be called.

10. A statement from JS dated 4 July says that the claimant had become angry and aggressive towards him and had threatened to hit him.
11. Statements were taken from CF and SU the same night. As I set out in my judgment, the statements are very short and not particularly helpful. However I have noted that CF's statement says that the claimant was having an altercation with NC in the packing area. When CF started to record the exchange the claimant 'became very aggressive towards me and attempted to uproot the dynamics server and tried to hit me with it'. He reported that NC 'intervened to protect me'.
12. SU's witness statement reports that the claimant 'started shouting at me with an aggressive attitude'. He says that he moved a case between himself and the claimant in order to protect himself.
13. The claimant's account of what had happened to him on the night of 3 July is found in the notes of the investigation meeting conducted by Mr Duell on 10 July 2017. He says that during the meeting in the office on 3 July he had become frustrated because he could not get his holiday sorted out. He said that JS started 'cussing' him but denies that he had used bad words back to him.
14. He agreed that CF had started filming him with his mobile phone. He said CF had told him that 'if you talk to me again I am going to slap you'. He denied having any conversation with SU. He denied touching anyone at any point.
15. The next significant piece of evidence is a recording taken by the claimant on his phone which was played to the tribunal and which the claimant asserts is an exchange between himself and JS on the night of 3 July. Two transcripts of this recording were in the bundle, although the respondent's transcript is incomplete. JS and the claimant can be heard being verbally abusive to each other. At paragraph 12 of my judgment I found that it was 'possible' that the recording was made on 3 July 2017.

16. There was history between the claimant and JS. I refer to this at paragraph 33 of my earlier judgment, and I mention it again here because it is an important part of Mr Robison's argument that the claimant did not commit gross misconduct and that he had been 'provoked' into his actions on the night of 3 July. Essentially the claimant alleged that JS and others were abusing the holiday booking system and forcing staff to give them money before they would be allowed to take holiday on particular dates. The allegation had been brought to the respondent's attention on 27 May 2017. The claimant raised this allegation in the investigation meeting on 10 July 2017 although he was not interviewed about it until 9 August 2017. Following the allegations, the respondent carried out an investigation and JS was dismissed. In my earlier judgment whilst I did not accept that the claimant's dismissal was 'retribution' for making the allegation (because he did not raise the matter himself prior to 3 July 2017) I accepted that the allegations had an 'indirect effect' on the events of 3 July. I said this because, as NC made clear in his email of 3 July, the background to the verbal altercation that started in the office on that date was a dispute about the claimant's holiday. I found that 'the corrupt practices going on around the booking of annual leave would have heightened the tension when the claimant was called into the office to discuss the booking of his leave with [NC]'.

17. Finally there was CCTV evidence of what happened after the claimant left the office on the night of 3 July. This was not available for the tribunal hearing as it had previously been deleted. However both Mr Jones and Mr Robison accepted that there was contemporaneous evidence of what had been seen on the CCTV footage by Mr Duell who sent an email dated 12 July 2017 that said: 'looking at the CCTV [claimant] assaulted [CF] by grabbing his arm so I really need the statement from him before I can progress to disciplinary..' When shown the CCTV evidence at the disciplinary hearing on 8 November 2017 the claimant asserted that it had been faked.

18. Two events took place well after the incident of 3 July. At paragraph 20 I record that the respondent had purported to dismiss the claimant on 16 October 2017 after he had failed to attend a disciplinary hearing. It was later realised that the invitation letter and dismissal letter had been sent to the wrong

address. When the claimant turned up at the site on 1 November 2017 to find out why his pay had stopped, he was told that he had been sacked. Understandably, he became angry.

19. I refer also to the letter of dismissal written by Mr O'Donovan on 13 November 2017 in which he noted that the claimant had become angry and abusive during the disciplinary hearing that he attended on 8 November 2017.
20. I mention these two incidents as it is clear that Mr O'Donovan took them into account when reaching his decision that the claimant's behaviour had been physically and verbally abusive on 3 July. During the hearing on 26 May I asked Mr Jones whether he relied on these later incidents as part of the respondent's case that gross misconduct had occurred, ie did he submit that the incidents were cumulative and that taken together they amounted to a repudiatory breach of conduct? Mr Jones submitted that they did but that in any event the respondent's case was that there had been gross misconduct on 3 July on a 'stand alone' basis.

### **Decision**

21. As I made clear in my earlier decision, there were significant problems with the investigation carried out by the respondent. The witness statements were not satisfactory. CCTV evidence was deleted (although available for the disciplinary hearing in November 2017). No minutes were taken of the disciplinary hearing on 8 November 2017 which led to the claimant's dismissal, and a number of letters to him were either sent to the wrong address or contained inaccurate details. Those matters were all relevant to the claim for unfair dismissal.
22. In considering the claim for wrongful dismissal I have considered all the available evidence about what happened on the night of 3 July.
23. NC provided a near contemporaneous account of what he described as 'threatening and intimidating behaviour' that night. He provides the most comprehensive account of the sequence of events which resulted in the police being called and the claimant leaving the premises.
24. NC states that the claimant became angry and threatening in the office. I accept this evidence on the balance of probabilities. I find that it is more likely

than not that a verbal altercation between the claimant and JS took place. This is supported by the statements of NC and JS. The claimant alleged (correctly it appears) that JS was engaging in corrupt practices around booking holidays. The claimant himself agrees that he became 'frustrated' because he says that he could not get a straight answer about his holiday arrangements. I am not able to establish whether the recording produced by the claimant is of the conversation between himself and JS in the office on the night of 3 July. As I have said it is possible that it took place at some point that night. Whenever it took place, the recording demonstrates that feelings between the claimant and JS were running very high. They can both be heard speaking aggressively and abusively to each other. It seems very likely to me that the claimant would have become aggressive and abusive to JS in the office if he felt that he was being challenged over his own holiday arrangements, as he could be heard speaking abusively to him on the recording.

25. Key sections of the next part of NC's account are supported by the statements of CF and SU, even though these are very short. For example, NC reported that after the claimant left the office, he threatened [CF] and 'I had to stand in front of him because I feared that he was going to hit [CF]'. CF agrees that his manager had to intervene to protect him.
26. NC also recorded that SU had to push a trolley of stock between himself and the claimant. In his witness statement, SU agreed that he 'moved a case between myself and [the claimant] to protect myself'.
27. There are differences in the various accounts as to whether the claimant actually made contact with CF during their altercation. In his statement CF said that the claimant 'attempted to uproot the dynamics server and tried to hit me with it'. NC said that the claimant lifted his fist and aimed it at [CF] and that 'I feared he was going to hit [CF]'.
28. As I noted at paragraph 43 of my judgment, Mr Duell's report on the CCTV footage is inconsistent with the statement made by CF who alleged that the claimant had tried to throw a dynamics server at him. Mr Duell made no mention of equipment but said that the CCTV showed that the claimant 'assaulted [CF] by grabbing his arm...'

29. Human memory can be unreliable, especially in the 'heat of the moment'. Recorded evidence may be seen as more objective in the absence of evidence that it has been tampered with. During the course of the earlier tribunal hearing the claimant did not dispute Mr Duell's account of what the CCTV showed but alleged that the footage had been 'faked'. I found no evidence to support the claimant's allegation and paragraph 46 of my judgment makes it clear that I did not accept it.
30. I note that after viewing the CCTV and noting the inconsistency, Mr Duell went back and interviewed CF again who agreed that the recording was accurate. I therefore give greater weight to Mr Duell's record of what he saw on the CCTV footage than to CF's witness statement of 4 July 2017 in which he said that the claimant had picked up a piece of equipment.
31. I conclude that there was no evidence to suggest that the claimant had tried to throw a piece of equipment at CF. Did an assault take place? The claimant and CF both agreed that CF had taken out his mobile phone to film the claimant. NC says that the claimant raised his fist to CF and Mr Duell formed the impression that the claimant had assaulted CF by grabbing his arm. I was not able to view the CCTV myself in order to determine whether it clearly shows contact or not. NC does not state that there was an actual assault but rather that he feared that the claimant was 'going to hit [CF]'. The claimant's statement to Mr Duell confirms that CF was filming him but denies that there was any contact. In the absence of the CCTV evidence I am not able to conclude that it is more likely than not that the claimant grabbed CF's arm as the claimant denies it and NC does not go this far. Taking all the evidence into account I find on the balance of probabilities that the claimant tried to stop CF from filming him and that he raised his arm towards CF's arm for this reason. On the basis of the accounts of the claimant, NC, CF and the CCTV report of Mr Duell I find that it is more likely than not that there was at least an *attempted* assault.
32. I also accept that it is more likely than not that the claimant behaved in a threatening manner to SU, on the basis that both he and NC report that he had to move a case of stock between them to protect himself. The statements of NC and SU support each other in this respect and I therefore prefer this



evidence to that of the claimant who told Mr Duell at the investigatory meeting that he had not spoken to SU.

33. In summary having considered all the evidence relating to the events of 3 July I find it more likely than not that an aggressive verbal altercation took place in the office that night, mainly between the claimant and JS, whom the claimant later accused of behaving fraudulently. The claimant left the area, but the argument did not end there. The claimant then became angry with CF who was trying to film him with his mobile phone. He appears to have raised his arm towards CF, most probably to try and grab his phone and NC had to get between them. The claimant then continued to behave aggressively towards another colleague SU, who pushed a case of stock between them to protect himself. Mr Jones points out that the incident took place within an industrial setting – a busy laundry area with machinery and with stock being moved around.
34. I do not give significant weight to the respondent's assertions that the claimant behaved aggressively on two further occasions: first when he was told that he had been dismissed on 1 November 2017 and secondly when he attended the disciplinary hearing on 8 November 2017 and was shown the CCTV evidence. It is clear that the allegations which the claimant faced before he was dismissed related to his conduct on 3 July 2017. The dismissal letter suggests that Mr O'Donovan viewed the later incidents of aggressive behaviour as providing corroboration for the allegations of aggressive behaviour on 3 July. In considering the claim for wrongful dismissal, I have focussed on the alleged misconduct which took place on that earlier occasion.
35. In his submission Mr Robison accepts that there may have been a degree of frustration on the part of the claimant but he points to the discrepancies in the evidence. He also suggests that there was evidence that the claimant was provoked, and that this should be taken into account when considering whether he committed gross misconduct. He places weight upon the transcript of the telephone conversation which the claimant says took place on 3 July 2017.
36. As I have said, it is not possible to determine exactly when that conversation took place. In considering the argument put forward by Mr Robison, I shall take the claimant's case at its highest and assume that the recorded conversation

took place on 3 July, either during the altercation in the office or soon afterwards.

37. Neither the transcript nor the recording itself contain any reference to the claimant's allegation that JS had been behaving corruptly over holiday arrangements. The transcript at page 78a of the bundle records JS and the claimant being gratuitously offensive and abusive to each other. I accept that even if this was not a recording of the actual conversation in the office that night that it is more likely than not that a very similar conversation took place. I also accept that the context, of the claimant being called in to discuss his holiday arrangements, and the background of staff being forced to pay to get their holiday booked, provides some explanation as to why the claimant became so angry on the night in question.
38. That said, there is no evidence to suggest that the claimant said to NC that he was getting angry because of what JS was up to. He only mentioned this when called to an investigation meeting on 10 July.
39. Whatever the background, the evidence makes it clear that the dispute did not end when the claimant left the office and that he remained angry. At the very least, he lunged towards a colleague who was filming what was going on and his manager had to step between them; and he then went on to threaten a third person, who does not appear to have otherwise been involved in the discussion at all and who pushed a physical barrier between himself and the claimant to protect himself.
40. Whilst therefore I can accept that the claimant may have had some justification for being angry with JS, he did not report his concerns to NC or explain why he was feeling so frustrated. In addition, the matter did not end with the altercation between JS and the claimant in the office. It continued into the packing area where the claimant continued to be angry and aggressive towards two colleagues who had no part in the initial dispute, and to whom he behaved in a physically threatening manner. Any provocation supplied by JS did not excuse the claimant's conduct towards CF and SU. He displayed conduct in the packing area which was of such concern that security and the police were both called.

41. I conclude on the balance of probabilities that the claimant was both verbally and physically aggressive on the night of 3 July 2017 and that his conduct cannot be sufficiently excused by the history of his relationship with JS or with any corrupt practices that were occurring within the respondent's operations that were addressed later. Physical violence is labelled as an offence of gross misconduct under the respondent's disciplinary procedure, and is in any event usually treated as such at common law. In all the circumstances I find that the claimant's conduct amounted to a repudiatory breach of his contract of employment which entitled the respondent to dismiss him without notice.
42. In all the circumstances the claim for wrongful dismissal does not succeed and it is dismissed.

---

Employment Judge Siddall  
Date: 9 June 2020.