Case Number: 2402322/2020(V)

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr C Hogg **v** SMH Fleet Solutions Limited

Heard at: Manchester Employment Tribunal (by Cloud Video Platform ('CVP'))

On: 16 October 2020

Before: Employment Judge Johnson

Appearances
For the First Claimant: Mr S Garsden (claimant's friend)
For the Respondent: Ms L Gould (counsel)

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed. This means that the claimant is unsuccessful.

REASONS

Background

1. These proceedings arise from the claimant's claim of unfair dismissal following which was presented to the Tribunal on 20 March 2020 following a period of early conciliation from 12 March 2020 to 19 March 2020.

2. The case was listed by the Tribunal for a final hearing today and due to the restrictions placed on it due to Covid 19, it was heard by Cloud Video Platform ('CVP').

The Evidence Used in the Hearing

3. The claimant gave witness evidence and was supported by his friend Mr S Garsden.

4. The respondent relied upon the witness evidence of Ms J Lowe (investigating officer), Ms R Williams (dismissal officer) and Mr J Smith (appeal hearing officer). They gave evidence relating to the disciplinary process which resulted in the claimant's dismissal and which they asserted was for the potentially fair reason of conduct.

5. The respondent had prepared a hearing bundle which was exchanged with the claimant. Mr Garsden said he did not receive the bundle until 8 October 2020 and instead, relied upon a provisional bundle agreed earlier during the proceedings. While I was satisfied that he had not been put at a disadvantage by receiving the final bundle when he did, (as the documentation did not appear to have changed), Mr Garsden explained that he had prepared for the case using the old bundle. As a consequence, the pagination in his bundle did not correspond with the bundle used by Ms Gould, the respondent witnesses and me. This resulted in the occasional delay when documents were being located, but it did not prevent the claimant and Mr Garsden participating fully in the case.

6. As this was an unfair dismissal claim and there was no dispute that the claimant had been dismissed, the respondent's witnesses gave their evidence first.

7. It was not possible to complete the case on 16 October 2020 and a further date was set for the hearing of final submissions, in order that I could determine the claim.

8. Initially, it had been hoped that the parties would be able to find a mutually convenient date which would allow a remedy hearing to take place before the end of 2020. It then became clear that this was not possible and I ordered that the parties instead, provide written final submissions in order that I could reach a decision in private without the need for a further hearing. Unfortunately, although the parties provided their written submissions to the Tribunal before Christmas 2020, I did not receive them until the beginning of January 2021.

9. Both Mr Garsden and Ms Gould cooperated during the case in accordance with the overriding objective and this was of assistance to the Tribunal in allowing me to hear the evidence during the hearing day.

The Issues

10. *Unfair dismissal*

    a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the

Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Findings of fact

11. The respondent provides vehicle management and ancillary services relating to transport. It is reasonably large employer, employing 417 staff and 41 staff were employed at the claimant's former workplace.

12. The claimant started his employment with the respondent on 4 January 2016 and was employed as a paint technician.

13. On 10 January 2020, the claimant had completed more than 4 years continuous service with the respondent. However, on 10 January 2020 an incident arose where a fellow employee Liam Worrall made a complaint against the claimant. He said in a reported incident log on the same day, that he walked into the mixing room to collect a paint regulator which belonged to a colleague. He saw the claimant talking with a colleague and noting the claimant's haircut, said; *'I walked up to Craig* [the claimant] *and rubbed the back of his head, gave him a little slap and said "Fresh Trim". He (Craig) just lost his head, pushed me into the wall…and punched me twice in the side of my head'.* Mr Worrall said in this log that when he asked why the claimant had reacted in that way, he replied and said *'you hit me in the back of the head, what the fuck did you expect?'*

14. Mike Shields who was present when this incident took place, also completed a log and confirmed that Mr Worrall '*rubbed* [the claimant's] *head and "skin fade" (it's something you do after a skin fade) and gently slapped the back of Craig's head'.* He then went on to say *'Craig flipped, gripped Liam and smashed him into the back wall of the mixing room. I was walking out at this point and thought it was playful at first. But when Craig threw multiple punches I realised it was very serious'.* Mr Shields said that he separated Mr Worrall and the claimant, told the claimant he was wrong to do what he did. The claimant responded by saying that he had not done anything wrong. Mr Shields concluded the incident log by saying that the claimant was *'very aggressive and out of control, he fully lost it and became very volatile'.*

15. On 10 January 2020, the claimant was invited to a meeting with Darren Dronfield the body shop manager. Also present was Mr Shields and Zoe Taylor, who was an administrator. Mr Dronfield explained that he had been

made aware of the incident that had happened earlier that morning and confirmed he had spoken with Mr Shields and Mr Worrall already. The claimant told Mr Dronfield that he had been slapped on the back of the head by Mr Worrall and as it hurt because he had previously had surgery for a fractured skull, he pushed Mr Worrall into the wall. Mr Mr Dronfield informed the claimant that because of the serious nature of the incident being investigated and because of what had been said in the witness statements provided, the claimant would be suspended on full pay. The claimant was informed that the suspension did not infer any blame on anybody. The claimant was unhappy and suggested that suspension was not fair as Mr Worrall had started the incident by putting his hands on the claimant first.

16. The claimant was also informed of his suspension by letter on 10 January 2020. He was told that he was being investigated concerning an alleged assault of a work colleague. He was informed that if the investigation proceeded to a disciplinary hearing he could be accompanied by a colleague or an accredited trade union official. The letter confirmed that the suspension did not constitute disciplinary action.

17. An issue did arise during the dismissal process concerning the original handwritten notes which had been used to complete the incident logs contained in the hearing bundle. I noted an email was included within the bundle dated 4 July 2020 from Andy Kavanagh, who was the Technical Operations Manager to Caroline Reeves of the respondent. He explained that the handwritten notes had been destroyed "*due to data protection*". On balance of probabilities, I find that no adverse inferences should be drawn from the decision by Mr Kavanagh to destroy the handwritten notes and the typed notes reflected the contents of the notes which were destroyed.

18. On 13 January 2020, the claimant presented a grievance arguing that the decision to suspend and investigate the claimant for a disciplinary matter was unfair and contrary to ACAS guidelines because no investigation had taken place into Mr Worrall. He also said that Mr Shields who observed the incident on 10 January 2020, was a friend of Mr Worrall. This grievance was acknowledged by Alison Perks the respondent's HR director in her (presumably erroneously dated) letter of 10 January 2020. However, she confirmed that an investigation meeting for the grievance will take place on 21 January 2020 at 1pm.

19. No further action took place in the disciplinary process while the grievance was resolved. This was a fair and reasonable action on the part of the respondent given that the grievance related to the disciplinary process. The hearing took place on 21 January 2020 as arranged and the hearing officer was Rachel Williams, a VDM manager. The claimant was present

and in addition, Caroline Reeves who was from HR and acted as notetaker and the claimant's employee representative Andy Hogg. The claimant produced his grounds for the grievance in a typed document and argued that his suspension should be removed, and he should be allowed to return to work.

20. Ms Williams had interviewed the claimant's colleagues connected with the incident and having heard the claimant, she concluded that the suspension was appropriate and necessary. She confirmed her opinion in a letter dated 24 January 2020. She noted that the claimant was being investigated for a matter involving gross misconduct and as a consequence, a suspension would be appropriate. She did however inform the claimant that no decision had been made regarding any disciplinary action. The claimant is also given notice of his right of appeal.

21. The claimant decided to appeal against the grievance and gave notice on 25 January 2020 by letter. He felt the grievance did not answer all the points that he had raised, and that the respondent had failed to follow ACAS guidelines in dealing with his grievance. He also asked for the minutes of the original grievance meeting and notes of any interviews that took place as part of the process. In the meantime, the claimant received a letter dated 5 February 2020 inviting him to a grievance appeal meeting on 11 February 2020. The claimant is advised that he could be accompanied at this meeting.

22. The grievance took place before John Halloran, who was a director with the respondent. The claimant was accompanied by Andrew Hogg and the notetaker was Colette Patterson. Mr Halloran questioned the claimant concerning his reasons for bringing the appeal. Mr Halloran wrote to the claimant on 12 February 2020 confirming that he had considered the claimant's appeal but that felt that the suspension was justified due to the nature of the incident being investigated. He confirmed that the disciplinary process would continue, and that the claimant would not be treated as having committed the alleged disciplinary act as suspension was a neutral act.

23. While the claimant was unhappy with the outcome of the grievance process, I noted that the disciplinary process was suspended while this process was resolved. I also noted that the respondent's HR team were involved in the decision to suspend. It arose from an incident involving an alleged assault and workplace relationships. The claimant was suspended on full pay and to some extent, his continued suspension was increased in length because of the grievance which necessitate the halting of the disciplinary procedure.

24. The claimant was also informed on 13 February 2020 by letter that following the conclusion of the grievance process the investigation into the disciplinary action matter would continue in the claimant was invited to an interview on 17 February 2020. He was advised that the claimant could be accompanied by a trade union representative if he wished. As part of the investigation, witness statements have been obtained from Mr Worrall and Mr Dronfield and Mr Shields. The witnesses signed their statements.

25. The investigation meeting took place on the 17 January 2020. Justine Lowe was the investigating officer, Colette Patterson was the notetaker and the claimant was accompanied by his father Andrew Hogg. The claimant was allowed to produce a summary sheet which he used at the hearing. The claimant was informed at the meeting that her role was to investigate the matter and would not constitute disciplinary action. Ms Lowe in particular asked questions of the claimant concerning skull fracture and the nature of the relationship between Mr Worrall. The claimant appeared to think that his relationship with Mr Worrall was good and it appears that there was no ill feeling beef between the claimant and Mr Worrall. Also asked about the "fresh fade/skin fade" and the rubbing of heads and tapping on the back of the neck. The claimant disputed that this was something done routinely in the workplace and argued that it was a sort of thing that you would expect to take place at school rather than work.

26. The claimant also felt that he had been 'set up' and that Mr Dronfield was using the incident as a means of undermining the claimant. The claimant suggested that the witness evidence was not consistent and that he felt Mr Worrall, Mr Shields and Mr Dronfield worked on their statements together without the claimant being present. The claimant felt that he had been hit by Mr Worrall and as he was really close to him, he has simply pushed Mr Worrall away and punched him on the arm. He denied that he had hit Mr Worrall on the head. The meeting ended with the claimant suggesting that as Mr Worrall had started the incident, he should have been treated no differently and the claimant. In his summary sheet the claimant suggested that Mr Worrall had not 'intended to hit him as hard as he did', he panicked after the event and the 'whole situation got out of hand.'

27. Following investigation, Ms Lowe decided that there was a case for further formal action against the respondent in accordance with its disciplinary procedure. Ms Lowe gave reliable and convincing evidence during the hearing and I am satisfied that she behaved in reasonable and appropriate way as the investigating officer. She genuinely sought to establish the facts of the case.

28. The claimant was invited to a disciplinary hearing on the 24 February 2020. Ms Perks from HR sent a letter to the claimant on 20 February 2020,

confirming that it related to an alleged assault of a work colleague explaining the procedure and confirming that he could be accompanied.

29. The hearing took place on 24 February 2020 as arranged. The disciplinary manager hearing the case was Rachel Williams and the claimant was accompanied by his father Andy Hogg, and Colette Patterson who was the notetaker. I accept that the structure of the hearing was described to the claimant and that the hearing was a formal disciplinary hearing. The claimant confirmed that he understood the allegations against him, and he confirmed that he had seen the witness statements which have been obtained during the investigation process and had seen the investigation notes.

30. Ms Williams spent some time considering what happened on 10 January 2020. She noted that the claimant did not exchange any words of Mr Worrall before he reacted to the tap on the back of his head. She also felt that Mr Worrall, when tapping the claimant's head, did not behave in a malicious way. The claimant suggested he had been punched in the back of the head by Mr Worrall and that he had acted in self-defence. He felt Mr Worrall had been inappropriate. The claimant still maintained that it was Mr Worrall's actions which caused the incident and that anyone tapped on the back of the head would have reacted in the way that he did. The claimant said that he felt that Mr Worrall was believed more than he was. The claimant said that he wanted to ask the witnesses to incident further questions, but was unhappy that he had been not allowed to do so. He felt nobody was interested in his side of the argument. While this might have been the claimant's belief, the claimant had not asked for the witnesses to be called at the hearing. Had he done so, I accept that he would have been allowed to call them by Ms Williams.

31. There was a short adjournment in order that Ms Williams could consider the matter further. She resumed the hearing shortly afterwards and explained to the claimant that his actions on 10 January 2020 were "aggressive and unpredictable". She recognised that the claimant believed Mr Worrall's actions were also aggressive but explained that her role was to consider the claimant's actions and how he reacted. The issues were so serious that she had no alternative but to dismiss the claimant due to gross misconduct. Ms Worrall explained to the claimant that the outcome will be sent in writing to him it would have five days in which to appeal decision.

32. Mr Williams when giving oral evidence, confirmed that she believed that the claimant's behaviour justified her decision to find gross misconduct and that he should be dismissed. While the claimant took issue with the witnesses to the incident not being present at the hearing, (despite him not calling them to attend), I find that taking into account his own evidence as

to his behaviour during the disciplinary hearing, Ms Williams behaved reasonably in reaching the decision which she did. As she confirmed during her own evidence before me, the differences in the witnesses' statements prepared during the disciplinary process were minor and did not affect the actual issue being investigated, namely the claimant's assault of a colleague.

33. Ms Williams' letter confirming the decision to dismiss was sent to him on the 24 February 2020. She confirmed that the dismissal was with immediate effect because it involved gross misconduct and that the claimant would not be entitled to any notice pay. She also explained to the claimant that he had a right of appeal and should let Mr Smith know within five working days.

34. The claimant gave notice of his appeal on 28 February 2020 when he sent an email to Mr Smith. He felt that he had not been provided with the relevant documents prior to the disciplinary hearing that he had been misled as he thought it would be able to ask Mr Shields, Mr Worrall questions and that this was contrary to the disciplinary code. He also felt that Ms Williams failed to explore the material differences which the claimant identified between the witness's statements which are being produced during the investigation process.

35. Ms Perks from HR replied to the claimant on 3 March 2020 acknowledging the notice of his appeal and confirming that an appeal hearing will take place on 11 March 2020 and would be heard by Mr Julian Smith. Claimant was informed he could be accompanied, and a copy of the disciplinary procedure was being occluded which detail the appeals process.

36. Meeting took place on 11 March 2020 and in addition to Mr Smith and the claimant, Ms Reeves was present as the notetaker. The claimant was asked to provide details of his three grounds of appeal. The hearing concluded with Mr Smith saying that even if the claimant's questions concerning the appeal had been resolved, it still did not deal with the disproportionate action which he had taken against Mr Worrall. He was therefore comfortable with the decision that Ms Williams made. He felt that the process was handled properly the claimant had been able to interview the witnesses at the disciplinary hearing, he would not have been able to challenge the seriousness of what happened in the mixing room on 10 January 2020. As a consequence, he would not uphold the appeal. Ms Perks confirmed the decision of Mr Smith in a letter to the claimant dated 20 March 2020. She confirmed that the formal process was now concluded and that the appeal confirmed the decision to dismiss the claimant for gross misconduct.

37. Mr Smith also gave credible evidence at the hearing before me. He confirmed that he had given the claimant every opportunity to ask questions. He held a reasonable view that the statements obtained during the investigation concurred, in that they demonstrated a serious incident involving the claimant punching Mr Worrall took place, which was assault, gross misconduct under the company disciplinary procedure and therefore an act which could be subject to dismissal.

38. I noted that the company disciplinary policy was included within the hearing bundle. As the 'version' produced was dated 22 October 2019, it could be assumed that it was in force at the time of the incident on 10 January 2020.

39. The policy contained general principles, and which required the case to be investigated, that suspension may be necessary, but should be on full pay and be as brief as possible. Additionally, the claimant should be informed of the nature of the complaint against him at every opportunity and be provided with copies of relevant witnesses if possible. There was a right to be accompanied by union representative or work colleague and that employee should be given a reasonable opportunity at meetings to ask questions present evidence and call relevant witnesses.

40. I did note however, that under the policy, it was for the employee under investigation to request their own witnesses and they could not expect that the respondent would call the witnesses for the employee to cross-examine.

41. Gross misconduct under the policy could include assault or offensive behaviour. It also provided that in the event an employee was found to have committed gross misconduct, they should be suspended from work on full pay while an investigation takes place and if gross misconduct was found to have occurred, it would normally result in summary dismissal without notice.

The Law - Unfair Dismissal

42. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

43. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take

account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

44. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

45. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

46. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

47. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

48. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is

whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

49. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

50. It was said in London Ambulance Service NHS Trust v Small [2009] IRLR 563 "It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

51. Inconsistency of treatment between employees accused of the same offence is a factor Tribunals will take into account, although the respective roles each employee played in the incident, their past records, and their level of contrition may justify different treatment. The guiding principle is whether the distinction made by the employer was within the band of reasonable responses open to it; see Walpole v Vauxhall Motors Ltd 1998 EWCA Civ 706 CA. Consistency must mean consistency as between all employees of the employer; see Cain v Western Health Authority [1990] IRLR 168. However, the emphasis in section 98(4) is on the particular circumstances of the individual employee's case and the crucial question is whether the decision to dismiss fell within the range of reasonable responses. An argument by a dismissed employee that the treatment he received was not on par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances:

(a) if there is evidence that employees have been led to believe by their employer that certain categories of conduct will be overlooked or not dealt with by the sanction of dismissal;
(b) where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal
(c) evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the

particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate in the circumstances.

See Hadjioannou v Coral Casinos Ltd [1981] IRLR 352. It was stated in that case that it is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

52. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).

53. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

    (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

    (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

54. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

55. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

56. The Tribunal must award compensation that is just and equitable. Even if the loss arising from the dismissal is substantial, the Tribunal can still award no compensation if it would be unjust or in equitable for the employee to receive it. This might be the case where acts of misconduct discovered after the dismissal means that it would not be just and equitable to award compensation; see W Devis & Sons Ltd v Atkins [1977] IRLR 314.

57. In her submissions, I noted that Ms Gould referred to a number of the cases contained within this section.

Discussion and Analysis

Jurisdictional matters

58. The claimant had more than 2 years continuous service with the respondent when he was dismissed and therefore had sufficient qualifying service in accordance with section 108 of the Employment Rights Act 1996 ('ERA').

59. The claimant's effective date of termination was 24 February 2020. He notified ACAS of a potential claim on 12 March 2020 and an early conciliation certificate was issued on 19 March 2020. As his claim form was presented within 3 months of the effective date of termination, the complaint of unfair dismissal could be accepted by the Tribunal in accordance with section 111 of the ERA.

60. As a consequence, the complaint of unfair dismissal was properly presented and could be accepted by the Tribunal.

Potentially fair reason for the respondent's decision to dismiss the claimant.

61. The parties will be aware that the nature of an unfair dismissal complaint is that the Tribunal is asked to consider whether the decision of the respondent's 'dismissing officer' to dismiss was for a potentially fair reason and if so, whether it was reasonable to reach this decision taking into account the nature of the investigation, the information available at the disciplinary hearing and whether the procedure had been followed.

62. It is not for me to consider what I would have done if dealing with this disciplinary process on the part of the respondent for the reasons explained above.

63. The respondent asserts that the claimant was dismissed by reasons of gross misconduct.

64. It was clear from the evidence before me, that the disciplinary action was commenced on 10 January 2020 by reason of conduct and because of the claimant's reaction to Mr Worrall. The claimant was informed that he was being investigated for assault and that this could amount to gross misconduct and that this could amount to gross misconduct. This was reflected in the respondent's disciplinary procedure and that assault could amount to gross misconduct warranting dismissal. The dismissing officer Ms Williams considered the incident as one involving an assault under the disciplinary procedure and clearly the hearing arose under that procedure.

The reasonableness of the decision that gross misconduct had occured

65. Ms Williams was clearly of the view that the claimant had committed gross misconduct and this was because of his assault on Mr Worrall. She said so at the disciplinary hearing when she decided to dismiss him and also in her letter confirming the dismissal.

66. Ms Williams also had the reasonable grounds for reaching this conclusion. This was because the incident in question had been witnessed and contemporaneous statements had been obtained from Mr Worrall, Mr Shields and Mr Dronfield. While the claimant was unhappy with the witness statements which had been produced by these witnesses during the investigation, I saw no reason to conclude that any inconsistencies were material to the incident in question and suggested that the claimant had not reacted violently to Mr Worrall.

67. There had been a considerable investigation under the disciplinary process and the claimant had had every opportunity to put his case to his employer's managers. The disciplinary hearing was carried out in accordance with the disciplinary process and the claimant did not seek to argue that the incident had not occurred. The claimant continued to argue that the incident was started by Mr Worrall and he failed to recognise that his reaction was uncalled for and that he had overreacted. She was therefore faced with an employee who had behaved violently and who did not show unequivocal contrition.

68. It simply cannot be acceptable for an employee to behave in the way in that the claimant did and while Mr Worrall's conduct was unwanted by the claimant, it was an unfortunate and stupid workplace prank. It simply could not be self defence to push a person against the wall and to punch them hard. It was not a reasonable action or reaction. Ms Williams was reasonable to conclude that a previously sustained fracture to the skull justified the reaction which took place.

69. Ultimately, Ms Williams reached her decision in a reasonable way and did so following a thorough and reasonable investigation which afforded the claimant every opportunity to put his case.

Whether fairness is affected by Mr Worrall not being similarly treated by the respondent

70. The claimant believed that Mr Worrall started the incident on 10 January 2020 and as such, it was unfair for the claimant to be subject to a disciplinary process and to be dismissed for gross misconduct.

71. While superficially, this may appear to be a compelling argument, it does not stand up to any real examination. Mr Worrall did behave foolishly and should not have done what he did. This was a workplace incident and began when an employee engaged in horseplay, which the claimant rightly attributed to something which would take place in the playground at school. However, whether at school or in the workplace, it is wholly unreasonable for a person who is the subject of that horseplay to react in the way which the claimant did. People react to intrusions in their personal space and interference with their hair in different ways. It is understandable Mr Worrall's behaviour was unwanted and may provoke a reaction. But the claimant's reaction was physically violent, involved excessive force and it is fortunate that no serious injuries took place. Mr Worrall should certainly be criticised for what he did, but it does not correspond with the claimant's reaction and could not be considered as a matter for investigation for potential gross misconduct.

72. Accordingly, the claimant has no reasonable grounds to argue that Mr Worrall should have shared the same disciplinary process as he did and should have been dismissed.

Was dismissal within the range of reasonable responses?

73. The claimant was involved in a serious physical assault and that amounted to gross misconduct whether we consider the ACAS guidance or the respondent's disciplinary procedure. That procedure clearly states that assault would amount to gross misconduct and that would usually result in dismissal.

74. The claimant did explain that his previous fracture to his skull may have provoked his reaction. But while this might be the case, the claimant still was unwilling at the disciplinary hearing to concede he had overreacted and that his reaction was disproportionate. The respondent was faced with an employee who did not show sufficient contrition, and this was displayed at the hearing before me. I have no doubt that this was the approach maintained by the claimant throughout the disciplinary process

and this was supported by the documents in the hearing bundle relating to that process.

75. As a consequence, the respondent decision to dismiss was within the range of responses available to a reasonable employer.

Polkey

76. This is not a case where the respondent's dismissal was procedurally unfair. The respondent behaved properly and followed the principles of its disciplinary procedure and ACAS guidance on disciplinary and grievance procedures.

77. The claimant did challenge the witness evidence available and had argued that he should have been able to interview the witnesses present at the incident. It seems that the claimant expected these witnesses to be present at the hearing, but had he wanted to call witnesses to the hearing, he should asked for them to come. It was not for the respondent to decide to call the witnesses whom the claimant might wish to call.

78. In any event this evidence was obtained, and written statements were available. In reality, the claimant's challenge was about minor details and not matters which related to the substance of the incident, namely his violent act towards Mr Worrall. It was noted that during the hearing, great emphasis was made about the equipment which Mr Shields was retrieving from the mixing room when the incident took place. However, there was no suggestion that these individuals did not witness the incident on 10 January 2020.

79. However, even if there was any procedural defect, I am satisfied that had that defect been corrected, this would have resulted in the claimant being dismissed in any event.

Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992

80. This was a case where the respondent was an employer of a sufficient size where it could be expected to have in place appropriate procedures relating to disciplinary matters. It had access to a HR team and they were actively involved in the disciplinary process involving the claimant.

81. The claimant was suspended following a suspension meeting, was informed of the disciplinary action he was being investigated for and was able to participate at all meetings and was allowed to be accompanied. He received letters from the respondent explaining each stage of the

process. He was allowed to produce his own evidence and was afforded the right of an appeal.

82. The decision to suspend was a reasonable one given the serious incident being investigated and which could amount to gross misconduct. The suspension was upheld for the duration of the disciplinary process, but the process was not unduly long and was concluded within fewer than 2 months.

83. It is fair to say that during evidence, the respondent's witnesses did acknowledge there may have been things that they might have done differently. Mr Smith for example, acknowledged that he with benefit of hindsight, should have adjourned the meeting to investigate the question of the handwritten notes of the witnesses. But I agree with him that this issue did not materially affect the decision to dismiss and as such was not a procedural defect.

Contributory fault

84. As I am satisfied that the claimant was fairly dismissed, it is not necessary to determine contributory fault. However, if I was wrong in determining that the claimant was unfairly dismissed, it would be necessary and appropriate to reduce any award because the claimant had contributed or caused the decision to dismiss. This was because the claimant had behaved in a way which was wholly inappropriate and reacted violently and disproportionately towards Mr Worrall following the tap to the back of his head.

85. Under these circumstances, had a deduction for contributory fault been appropriate for consideration, such an award would be substantial.

Conclusion

86. In reaching my decision, I have taken into account the decision taken by the respondent's dismissing officer, Ms Williams. It is not my role to consider what I would have done had I had 'stood in her shoes'. Ms Williams clearly identified that the claimant's behaviour on 10 January 2020 as one of gross misconduct. Conduct is a potentially fair reason for a dismissal and she had reasonable grounds to hold this belief taking into the investigation which had taken place and the witness evidence available to her. Dismissal was a reasonable response available to Ms Williams, because of the seriousness of the claimant's conduct.

87. Accordingly, the claimant's complaint of unfair dismissal is not well founded and is dismissed. This means that his claim is unsuccessful.

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Employment Judge Johnson

Date: 21 January 2021

Sent to the parties on: 26 February 2021

For the Tribunal Office