



EMPLOYMENT TRIBUNALS

Claimant: Mr S Jones

Respondent: Baxter Healthcare Ltd

Heard at: Liverpool

On: 10 December 2020

Before: Employment Judge Benson

REPRESENTATION:

Claimant: Mr Halson - solicitor

Respondent: Mr Santy – solicitor

JUDGMENT having been sent to the parties on 4 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claims that were before me to decide were claims of unfair dismissal and wrongful dismissal. The claimant was involved in two incidents on 24 July 2019 as a result of which he was dismissed without notice. The parties had helpfully agreed a list of issues which included the reasons that the claimant felt that his dismissal was unfair. These were that the decision to dismiss the claimant was outside the range of reasonable responses of a reasonable employer particularly on the basis that:
 - a. The respondent did not give enough consideration to the claimant's case that he was acting in self-defence;
 - b. The only person who had alleged that the claimant had acted aggressively was Gary Cresswell;
 - c. Brian Tung, the witness to the incident confirmed that Gary Cresswell had been the aggressor;

- d. The respondent had already decided prior to the disciplinary hearing that they were going to dismiss the claimant.
2. Mr Halson confirmed that the claimant took no issue with the procedure that was followed or the investigation which was undertaken.

Evidence and Submissions

3. I heard evidence from the claimant, Mr Steven Jones and from Mr Mr Hyung Joon Kim, the respondent's Operations Manager, who made the decision to dismiss and Ms Ruth Taylor a manager from the respondent's Stockport site who heard the claimant's appeal. I was provided with a bundle of documents and heard submissions from Mr Halson and from Mr Santi. I considered the authorities and law to which I was referred and which was relevant to these claims.

Findings of Fact

4. The claimant worked for the respondent from 1 May 2011 until his dismissal on 2 August 2019. He was employed as a Deputy Team Leader. The respondent manufactures a drug for kidney transplants and renal therapy. Within the working environment there are chemicals, it is a manufacturing environment and health and safety is important.
5. On 24 July 2019 the respondent's two sites were understaffed on the night shift as a result of holidays and sickness absence. Gary Cresswell, the claimant and an agency worker were the only staff available to work that shift. It is clear that Mr Cresswell was agitated at that prospect and the claimant sought to allay Mr Cresswell's fears and concerns and calm him down. Management were present on the handover to the night shift and a decision was made to close one of the sites that night. The claimant was instructed to let Mr Cresswell know what was happening and that he was going back to the other site briefly to close it before he then returned. When the claimant approached Mr Cresswell there was an altercation which resulted in the claimant punching Mr Cresswell in the face. Mr Cresswell suffered injuries as seen in photographs produced in the bundle. Shortly after that incident the claimant approached Mr Cresswell again in a corridor and a fight ensued.
6. Both incidents were witnessed by an agency worker, Brian Tung. The claimant had a mark on his neck as a result of those incidents. The respondent immediately commenced an investigation by speaking with the claimant, Mr Cresswell and Mr Tung and notes of those meetings appear at pages 75 to 82 of the bundle. In summary, Mr Cresswell's version of events at page 75 was that Mr Jones said he was going to go to the other site, Mr Cresswell said 'fuck you' and then the claimant hit him. The claimant's version at page 80 was that when he went to tell Mr Cresswell about the arrangements for the night, Mr Cresswell told him to 'fuck off' four times, Mr Cresswell then grabbed the claimant by the throat and hit him. As the claimant thought that Mr Cresswell was going to hit or attack him again, he hit him. Essentially that he acted in self-defence. The claimant was shocked by what had happened and followed Mr Cresswell down the corridor to see if he

was ok, whereupon Mr Cresswell grabbed him again and there was a further incident in the corridor.

7. Mr Brian Tung's version of events was that Mr Cresswell said 'fuck off' when the claimant told him he was going to go to the other site and Mr Cresswell grabbed the claimant by the throat or neck to hit him with the other hand, but the claimant moved out of the way and hit him in the face. Mr Cresswell then went to the toilet and Mr Tung and the claimant walked down the corridor, met Mr Cresswell again and after some words they started fighting again. Mr Tung said that both started fighting not only one of them.
8. Formal statements were taken the next day. The statements confirmed roughly the same version of events but in more detail. The claimant said that Mr Cresswell had told him to 'fuck off', had squeezed the claimant's neck and came at him with his fist raised and the claimant punched him. He again said that he had punched Mr Cresswell in self-defence. The claimant then went to see how he was, Mr Cresswell pulled his shirt over his head and the claimant was seeking to restrain him when they ended up on the floor.
9. Mr Cresswell (at page 85) said that when the claimant came to speak to him, he said he was going home, Mr Cresswell said 'fuck off home then'. Mr Cresswell made no mention of grabbing the claimant and he said that the claimant had thrown the first punch. He suffered injuries he said when he fell back against a lectern. In relation to the second incident Mr Cresswell said the claimant had a go at him again and it was Mr Cresswell who was restraining the claimant.
10. The claimant was suspended. He was invited to attend a disciplinary hearing which took place before Mr Kim on 2 August. The allegation was that the claimant was involved in physical violence, fighting and assault in the workplace.
11. At that hearing, the claimant said that he acted in self-defence, that it had happened very quickly and he didn't know what else to do. He didn't mention that Mr Cresswell had hit him first though he referred to him 'coming at him'. He accepted that he might have said 'he'd had enough' when first approaching Mr Cresswell.
12. Mr Kim considered the notes and statements from the investigation. He found the allegation proved and decided to dismiss the claimant. His reasoning for his decision was that the claimant had accepted that he had punched Mr Cresswell; there had been violence on both sides; the claimant had shown no remorse but blamed Mr Cresswell for starting the fight; that as a Deputy Team Leader he should not have reacted violently to Mr Cresswell's behaviour; there was no evidence that Mr Cresswell had hit the claimant first, though he accepted that he had been grabbed by the throat. In relation to the second altercation Mr Kim considered that had increased the seriousness of the claimant's behaviour. He couldn't find who was responsible for starting the second fight but given that there was some time between the two incidents, he considered that the claimant should have reflected and not escalated the situation by following Mr Cresswell. Mr Kim decided that the claimant's violent behaviour in a workplace where there were health and safety risks and the

subsequent incident of fighting with Mr Cresswell amounted to gross misconduct. He came to that conclusion having considered mitigating factors which included the claimant's length of service, Mr Cresswell's previous aggressive behaviour that evening and the claimant's argument that he was acting in self-defence. He decided that that dismissal was the appropriate sanction and he confirmed his decision in writing (page 111).

13. That letter was dated 31 July. It was put to Mr Kim that the date of the letter showed that the decision to dismiss was predetermined. I accept Mr Kim's evidence that the date of the letter of 31 July was incorrect by reason of a typographical or similar issue. I do not find that this letter by itself showed that the decision to dismiss was pre-determined. There is no other evidence which supports this and I accepted Mr Kim's evidence that the decision to dismiss was his decision and that it was made after he had conducted the disciplinary hearing.
14. The claimant appealed against that decision and the appeal was heard by Ruth Taylor. She considered the grounds of appeal. These were set out at paragraph 8 of her statement but for the reasons she sets out at paragraphs 9, 10 and 11 she did not accept that they were sufficient to alter Mr Kim's outcome.
15. Mrs Taylor considered that there were options open to the claimant other than hitting Mr Cresswell. She believed that he could have run away or he could have backed down such that he didn't have to punch Mr Cresswell. Again, she noted in relation to the second incident that Mr Tung did not consider that only one of them was responsible for the fight. In her view, as a Deputy Team Leader and noting the safety aspects of his role, there were other options open to the claimant in relation to the first incident. She found that Mr Kim's decision to dismiss was an appropriate one and she confirmed that to the claimant on 10 September 2019.

The Law

Unfair Dismissal

16. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

17. It is for the respondent to show the reason for the dismissal.

Section 98 reads as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or, if more than one, the principal reason) for the dismissal and

- (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this sub-section if it ... relates to the conduct of the employee ...
 - (3) ...
 - (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - (a) 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
 - (b) shall be determined in accordance with equity and the substantial merits of the case".
- 18. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal.
- 19. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?
- 20. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.
- 21. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
- 22. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.
- 23. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.
- 24. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses

test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

25. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for characterising the misconduct as gross misconduct. The position was explained by HHJ Eady in paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd [UKEAT/0439/13]**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment.

Wrongful Dismissal - Notice Pay

26. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.
27. An employee is entitled to notice of termination in accordance with the contract unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Conclusions

Unfair Dismissal

28. The respondent says that the reason for the claimant's dismissal was conduct being the physical violence, fighting and assault during the two incidents on 24 July. Conduct is a potentially fair reason for dismissal. I must consider the principles set out in **British Home Stores v Burchell** which, summarised, require me to decide whether the respondent held a genuine belief in the claimant's guilt, whether that belief was based upon reasonable grounds and whether it was following a reasonable investigation. I must then consider whether the decision to dismiss fell within a band of reasonable responses open to a reasonable employer.
29. The claimant takes no issue with the investigation or procedure and the basis of his complaints is set out in the list of issues described above. Essentially that the respondent did not give consideration to the claimant's case that he was acting in self-defence; that the only person who alleged that the claimant had acted aggressively was Gary Cresswell; that Brian Tung, the witness to

the incident, confirmed that Gary Cresswell had been the aggressor and that the respondent had already decided prior to the disciplinary hearing that it was going to dismiss the claimant.

30. I accept from the evidence that I have heard from Mr Kim and Mrs Taylor that they both believed that the claimant was guilty of the allegations of which he was charged. Mr Halson seeks to argue that because the claimant was acting in self-defence, certainly in relation to the first incident, that it follows that the claimant is not guilty of the allegations. I have given some consideration to that argument but it is something I can't accept, Mr Kim and Mrs Taylor considered whether the claimant had committed acts of physical violence, assault and fighting. The claimant admitted that he had punched Mr Cresswell and his actions resulted in injuries to him. Mr Kim and Mrs Taylor did not accept that Mr Cresswell hit the claimant first, though it was accepted that Mr Cresswell acted in an aggressive and violent manner towards the claimant by grabbing him by the throat and causing the claimant to fear that he was about to be punched. They concluded that although self-defence may be a mitigating factor, the acts of violence by the claimant and fighting with Mr Cresswell when he next saw him was completely unacceptable, regardless of whether he was acting in self-defence or not or whether Mr Cresswell was the aggressor.
31. There is no issue taken with the investigation or process followed and there is no evidence that the decision to dismiss had already been made prior to the disciplinary hearing.
32. I find that both Mr Kim and Mrs Taylor had a genuine belief that the claimant was guilty of the allegations against him and that this were based upon reasonable grounds following a reasonable investigation.
33. I must go on to consider whether the decision to dismiss for those reasons falls within a band of reasonable responses open to a reasonable employer. The arguments put forward by Mr Halson that the claimant acted in self-defence (including his reference to section 76 of the Criminal Justice and Immigration Act 2008) and that it was Mr Cresswell who was the aggressor are relevant in considering this question. I accept that the respondent considered both of these factors together with others, including the environment in which the claimant and his colleagues worked and the fact that the claimant was a Deputy Team Leader when making their decision.
34. Mr Kim accepted in evidence before the Tribunal that the claimant was acting in self-defence when he punched Mr Cresswell; all of the evidence indeed supports that view. It is also difficult to predict how anyone would react faced with that situation and often any response is instinctive. Mr Kim's view, however, was that it was not just that incident upon which he made his decision. His decision was also based upon the second incident where the claimant was involved in a further altercation with Mr Cresswell. Mr Kim's view was that as a Deputy Team Leader the claimant should have walked away from the situation and not got involved again. He followed Mr Cresswell and a fight occurred. Mrs Taylor considered that the claimant could have used alternative responses to the threat which he faced from Mr Cresswell rather than punching him. That may have been the case, it is difficult to say when

you are not actually the person there present. However, in both cases, Mrs Taylor and Mrs Kim were of the view that in the manufacturing environment in which the claimant worked, and with its consequent health and safety risks, violent conduct or fighting of any type and for any reason could not be accepted, particularly from someone in a supervisory position such as the claimant. The company's disciplinary policy confirms that dismissal is the likely outcome in such a situation.

35. It is not for me to substitute my own view as to whether this dismissal was fair and rather I have to consider whether any decision falls within the band of reasonable responses open to a reasonable employer taking into account all of the circumstances as set out in Section 98(4) of the Employment Rights Act 1996. In this case I cannot say that the decision to dismiss fell outside that band of reasonable responses and for that reason I find that the dismissal was fair.

Wrongful Dismissal – Notice Pay

36. The question I must consider is whether the respondent breached the claimant's contract of employment by dismissing him without providing the notice he was entitled to under his contract. The respondent says it was entitled to dismiss without notice as the claimant's actions amounted to gross misconduct.
37. It is for me to decide what happened based upon the evidence and consider whether the respondent has shown that the claimant's conduct was so serious as to amount to gross misconduct.
38. I consider that in the first incident, the claimant was attacked by Mr Cresswell who was agitated and threatening and grabbed him by the throat. I do not accept that Mr Cresswell hit the claimant first, the evidence does not support that, but I find that he was about to. I also find that the claimant had little or no time to react and instinctively hit out at him. There may well have been more appropriate ways of reacting but I accept that the claimant had little time to consider them. The claimant however did strike Mr Cresswell.
39. I have again considered Section 76 of the Criminal Justice and Immigration Act 2008. Clearly self-defence is a defence to a criminal charge but these incidents took place in a working environment. The actions of the claimant impacted not only him but also the health and safety of colleagues and others who worked in the manufacturing environment in which the respondent operates. That in my view is why disciplinary policies and procedures contain such stringent rules in respect of physical violence, fighting and assault and why there are such serious sanctions for breach of those rules, even though self-defence may be an absolute defence to any criminal charge. The respondent has an obligation not only to keep an individual safe but also to keep colleagues and other staff safe too. The respondent was therefore entitled to have these types of behaviour as examples of gross misconduct in their procedures. Further, in this case the second incident was part of the decision to dismiss for gross misconduct. I consider that the claimant did approach Mr Cresswell with the intention of seeing if he was ok but, by getting

involved in a further fight, where Mr Tung's evidence was that it was not just one of them who was responsible, the claimant compounded his actions.

40. I consider that the claimant's actions in hitting Mr Cresswell even in circumstances which might amount to self-defence, together with his fighting with Mr Cresswell shortly afterwards was behaviour which was so serious that it amounted to gross misconduct such that the respondent was entitled to dismiss without notice.
41. All claims therefore fail and are dismissed.

Employment Judge Benson
17 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 May 2021

FOR THE TRIBUNAL OFFICE

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[JE]