CD

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Ojji**

Respondent: **G4S Secure Solutions (UK) Limited**

Heard at: **East London Hearing Centre**

On: **26, 27 November 2020 and 15 March 2021 –**
CVP Judgment given with Reasons on 16 March 2021

Before: **Employment Judge Speker OBE DL**

Representation

Claimant: Mr Francis Akpan-Inwang (Consultant)
Respondent: Mrs Melanie Pimenta (In-house Solicitor)

JUDGMENT

The judgment of the Tribunal is as follows: -

1. The Claimant was fairly dismissed, and his claim of unfair dismissal is unsuccessful.

2. The Claimant was lawfully dismissed and his claim of wrongful dismissal and for notice payment is refused.

REASONS

Background

1. This is the hearing of claims of unfair dismissal and breach of contract brought by the Claimant against his former employer G4S. The hearing has extended over four days with the witnesses being heard on 26 and 27 November 2020 and 15 March 2021 continuing today 16 March 2021 for deliberations and the delivery of judgment and reasons.

2. The hearing has been conducted by CVP because of the Covid19 Pandemic restrictions. The parties, representatives and witnesses have participated remotely by video.

3. Originally, there was also a race discrimination claim within the proceedings when the claim was presented on 1 October 2019. In papers prepared for a Preliminary Hearing on 25 March2020, the Claimant indicated in his agenda that the race discrimination claim was withdrawn. The Claimant stated he would like to withdraw the claim of discrimination. Subsequently, the Claimant sought to amend his claim to include again a claim of race discrimination. That application to amend was heard by Employment Judge Russell in a Telephone Preliminary Hearing on 20 May 2020 when the Claimant was represented by Mr Akpan-Inwang who represented him in this final hearing. The Judge considered the arguments and relevant authorities and decided that the race discrimination claim had effectively been withdrawn, that a further claim was out of time and applying general relevant guidelines, leave to amend to include it was refused. No basis was advanced suggesting that it would be just and equitable to extend time. Therefore, this final hearing is not to deal with a claim of race discrimination but with claims of unfair dismissal and wrongful dismissal. The wrongful dismissal is a claim for breach of contract. The Employment Judge at the Preliminary Hearing ruled that the claim as to wrongful dismissal and alleged breaches of contract with regard to investigation training and right to be accompanied could proceed. A further application made by the Claimant to amend in order to include breaches of contract in respect of the 2018 incident (referred to later) was not allowed.

4. The issues before me were set out in the Case Management Summary from the Preliminary Hearing on 20 May 2020 as follows:

Unfair dismissal

4.1 What was the reason for dismissal? The Respondent relies upon conduct, a potentially fair reason within Section 98(2). The Claimant denies that this was the genuine reason.

4.2 Did the Respondent have a reasonable belief based upon a reasonable investigation? The Claimant will say that the investigation was insufficiently extensive for example it did not take witness statements from those present on 5 July 2019 and/or that the investigation was not fair and impartial.

4.3 Was dismissal fair in all of the circumstances of the case, having regard to Section 98(4) Employment Rights Act 1996 and, in particular, was it within the range of reasonable responses? The Claimant will aver that the sanction was unduly severe and in particular failed to give adequate regard to mitigation of his length of service, lack of training, extreme provocation and a previous complaint in 2018. Further, that the Respondent improperly relied upon his SIA licence, did not permit him a companion of his choice and failed to consider any lesser sanction.

4.4 If unfairly dismissed, the Tribunal will consider whether there should be any adjustment to an award to reflect:

(1) Contributory fault;
(2) The chance that he may have been fairly dismissed in any event, **Polkey**
(3) Unreasonable failure to comply with the ACAS Code; and/or

(4) Unreasonable failure to mitigate loss.

Breach of Contract

4.5 Did the Respondent breach an express term of the Claimant's contract of employment in relation to:

(1) The extent of the disciplinary investigation;
(2) The companion at the disciplinary hearing;
(3) The training provided to the Claimant to enable him to do his job effectively and efficiently; and
(4) Failing to give him notice of dismissal.

5. I heard from the following witnesses on behalf of the Respondent:

Mr Soni Shemar – The Claimant's Line Manager who carried out the investigation;

Mr Jack Islam – Contract Manager who held the disciplinary hearing and was the dismisser;

Mr Russell Gregoriades – Regional Manager who heard the Claimant's appeal;

For the Claimant, evidence was given by Mr Ojji in person and by Mr Simeon Doherty an accredited GMB Trade Union Representative, who represented the Claimant at his appeal and the reconvened appeal.

6. Statements were also referred to from a number of employees at the DWP namely Joanne Cherry, Prasanna Vijayakumar and Samantha Bessex who had witnessed the relevant incident on 5 July 2019 and also from Dharmendra Patel the other G4S Security Officer on duty with the Claimant at Brentwood DWP that day. Those four persons did not give evidence. There was also a bundle of documents containing over 220 pages.

7. I found the following facts:

7.1 The Respondent G4S Secure Solutions UK Limited is a company which is inter alia in the business of providing officers for security and surveillance services at premises of clients on a nationwide and global basis. One of those Clients is the Department of Work and Pensions (DWP). This case involves the DWP Jobcentre Plus Office in Brentwood, Essex where the Claimant worked as a Customer Care Officer (Security Officer). This was a site at which the contract required two security officers the Respondent to be engaged.

7.2 The Claimant commenced his employment with the Respondent as from 19 April 2011 and the employment continued until it was terminated on 26 July 2019.

7.3 The Claimant obtained and held throughout his employment a Security Industry Authority (SIA) Licence. This licence was essential for him to undertake his role. It required him to have undergone relevant training, and in addition modules were available to him. On 5 March 2012, he

completed modules on conflict resolution and managing aggression.

7.4 The Claimant had no disciplinary record during his employment until the final event. He appears to have been efficient in his job and was liked by DWP colleagues at Brentwood. An incident had occurred in 2018 involving the same customer (member of the public) who was involved in the incident in July 2019. The 2018 incident did not result in any proceedings or disciplinary action. There was no suggestion that the Claimant had dealt with that earlier incident in an incorrect manner.

7.5 On 5 July 2019, the Claimant was on duty at Brentwood DWP as normal. The usual second security guard was not at work. Instead, Mr D Patel, a relief officer was working with the Claimant. Mr Patel had worked at the site before and of course also held an SIA Licence.

7.6 On Friday 5 July 2019, shortly after 1pm, a member of the public entered the DWP office and was not wearing a shirt. In accordance with DWP's dress code, the Claimant informed the customer that he must put on his shirt if he wished to enter and be served. The member of the public put on his shirt but then began to swear at and be abusive to the Claimant and address him with derogatory, abusive and racist insults. This member of the public was the same person who had been involved in the 2018 incident. The swear words and abuse towards the Claimant were extremely unpleasant. The man sat down in the customer waiting area within the DWP office and whilst seated continued to shout abuse and racist remarks at the Claimant which included insulting the Claimant's wife and suggesting that the Claimant and people like him and his wife should be killed. As the abuse continued, the Claimant walked over to the man, who was still seated, and hit him in the face. The blow caused the man's nose to bleed. DWP staff then intervened and order was restored. The Claimant was accompanied away from the immediate area and from the floor at around 1:15pm. The member of the public was asked if he wished to have medical attention for his injury or if he requested the police to be involved but he said he did not, although he said he wished to make a complaint.

7.7 The Claimant reported the matter to his manager Soni Shemar at the office and stated that there had been an incident on site. Mr Shemar called the Claimant who gave details that a member of the public had been told to put on his shirt and had then been racially abusive and insulting. The Claimant was told to send in a report. At that stage he had not mentioned that there had been an assault.

7.8 Shortly afterwards Mr Stuart Chapman, the DWP Site Manager called Mr Shemar to inform him that there had been an incident and also told him that the Claimant had hit the member of the public in the face, causing his nose to bleed and that the Claimant would need to leave the site.

7.9 Mr Shemar called his Line Manager, Mr Jack Islam, who advised that the Claimant be suspended with immediate effect. Mr Shemar called the Claimant and informed him that he was suspended from work. The incident

was tagged with the National Control Centre. The suspension was confirmed to the Claimant by letter the same day, telling him that he was suspended on full pay pending investigation into the allegation that he had physically attacked a member of the public. It was also stated that the suspension was not disciplinary action and did not imply any assumption of guilt of the misconduct. A further letter to the Claimant requested him to attend an investigation meeting on 10 July 2019.

7.10 A fast-track form was completed by the DWP about the assault stating that it was recorded on CCTV and that statements were being taken from DWP staff members who were present. Mr Shemar did view the CTV coverage and prepared a time-line from it. The DWP investigation recorded that there had been a failure on the part of the Respondent company.

7.11 On 10 July the Claimant attended an investigatory meeting and was represented by Nigel Brewster. The meeting was held by Mr Shemar. The Claimant gave the names of the persons at the DWP who had witnessed the incident. He admitted that he had hit the member of public and that what he did was wrong but that he had been very upset at the things which were said to him and he had been shocked but was not proud of his actions. He was asked why he had not informed Mr Shemar of the assault when he first reported the incident. He said he was shocked and confused. Mr Shemar subsequently interviewed Mr Patel who confirmed that he had seen the assault but had not heard the details of the abuse. Mr Patel had stayed with the member of the public whilst he was being advised by the DWP staff.

7.12 Mr Shemar prepared an investigation report which suggested that the Claimant had not behaved professionally or correctly, that he could have walked away and was not in physical danger at the time, that the assault constituted gross misconduct and that the client (DWP) had requested that the Claimant be removed from the site.

7.13 The Claimant was invited to a disciplinary meeting by Jack Islam who informed the Tribunal of his considerable experience in dealing with disciplinary and grievance matters. The disciplinary hearing was on 24 July 2019. The Claimant maintained that he was not allowed to be represented by his chosen Union Representative, Gordon Brunning. The Respondent's case was that it was for the Union to decide who could attend with the Claimant and apparently they had given instructions to Gordon Brunning that he was not to do so. In the event, the Claimant was represented at the disciplinary hearing by Nigel Brewster who had represented him at the investigation hearing. The Claimant suggested that he was not provided with any statements or documents for the disciplinary hearing. Mr Islam thought that he had been. Mr Islam was of the view that the Claimant was not particularly remorseful about the incident and had explained that he acted as he did because of the actions of the member of the public. Jack Islam's decision was dismiss the Claimant and this was communicated in an outcome letter of 29 July 2020 stating that the Claimant had physically attacked a member of the public in the DWP Public Waiting Area and that this was so serious a breach of his contractual

obligations as to warrant dismissal without notice and without warnings. The Claimant was informed of his right to appeal.

7.14 The Claimant submitted a letter of appeal dated 30 July in which he stated that the dismissal was unfair, that he had not been given training in handling racist abuse and that the SIA training did not cover this, that he was not allowed his chosen representative, that mitigation and disciplinary record were not taken into account, that the persons who dealt with the investigation and disciplinary hearings were friends and had a personal issue with him. He also felt that his clean record was not taken into account at all.

7.15 The appeal was heard by Mr Russell Gregoriades, Regional Manager, who also professed significant experience of handling discipline and grievance hearings. The Claimant was invited to attend the appeal hearing on 21 August. In advance of this, the Claimant had attempted to secure representation by Gordon Brunning and emailed the Union about this and copied in Mr Gregoriades. In the event, the Claimant was told by Gordon Brunning that he could not represent the Claimant but that he recommended Mr Simeon Doherty, another GMB accredited representative to attend with him and the Claimant accepted this.

7.16 On 21 August at the commencement of the appeal hearing, the Claimant stated he had not had any of the relevant papers although he had not communicated this in advance. Mr Gregoriades adjourned the hearing and arranged for the Claimant to have the necessary papers, including three statements from Joanne Cherry, Prasanna Vijayakumar and Samantha Bessex. The appeal hearing was reconvened on 6 September 2019. The Claimant was again represented by Simeon Doherty. Representations were made by the Claimant and Mr Doherty on the appeal points and for the first time as to the suggested relevance of what occurred during the 2018 incident. The Claimant confirmed to Mr Gregoriades that in similar circumstances in the future he would walk away. He further submitted that he felt his wellbeing was not recognised by the company and that he had been under considerable stress. He provided a copy of a GP letter.

7.17 Mr Gregoriades spoke to Jack Islam to clarify whether the Claimant had been prevented by the Respondent from having his chosen representative; whether this related to the question of who was available; whether Jack Islam had been influenced by Soni Shemar in deciding to dismiss.

7.18 Mr Gregoriades communicated the appeal outcome in a letter to the Claimant dated 20 September 2019. He referred to the Claimant's training as a professional security officer including conflict resolution and managing aggression. It suggested that the question of representation was between Mr Ojji and his Union but that he had been represented at each hearing. Mr Gregoriades' conclusion was that the Claimant's behaviour on the day had been completely unacceptable, that he should have removed himself, called on DWP staff to deal with the situation and called the police. He had not been in physical danger at the time. Accordingly, the appeal was dismissed, and the dismissal was upheld. The Claimant was told of his

right to a second appeal, but he did not take this up.

Submissions

8. Both representatives provided detailed written submissions which were very helpful. They were supplemented by oral submissions and comments on what they regarded as the main issues.

9. On behalf of the Claimant Mr Akpan-Inwang pointed out a number of procedural aspects which he considered were unfair or breaches of contract or both. He explained the seriousness of the racial abuse and the wording used and the effect of this upon the Claimant. He argued that this should have been more taken into account by the Respondent as well as the Claimant's clean disciplinary record and his assurances as to future conduct. The Respondent should have had greater regard for the Claimant's wellbeing and should have recognised its duty to protect its employees and safeguard their interests.

10. He submitted that insufficient regard was had to the aggravating factors and the seriousness of the abuse and the possibility of other sanctions such as a final written warning.

11. He submitted that the procedure applied was unfair, that the method of suspension signified pre-determination, that the investigation was incomplete and flawed, that statements and CCTV coverage should have been released to the Claimant, that the disciplinary hearing was flawed because he did not have his chosen representative and that the dismissal letter did not properly explain the reasons for dismissal or show that alternative penalties had been considered.

12. On behalf of the Respondent, Mrs Pimenta referred to the well-known case of *British Home Stores v Burchell* and argued that the Claimant's actions were properly regarded as gross misconduct and were the result of a reasonable investigation. She also referred to the test of the band of reasonable responses in the case of *Iceland Frozen Food v Jones* and to the wording in Section 98(4).

13. She submitted that dismissal was within the band of reasonable responses.

14. Reference was also made to the case of *Polkey v Dayton* and it was argued that irrespective of any procedural defects, a fair dismissal would still have taken place. It was argued that the Respondent followed its own policies and ACAS guidelines and Code of Practice and that if there were any procedural faults, these were corrected by the appeal which had been very thorough and was followed by further fact finding. She said that it should be noted that the Claimant did not exercise the second right of appeal which was available to him.

The Law

15. Section 98(1) Employment Rights Act 1996

"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 subsection (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.

Section 98(4) Employment Rights Act 1996

Where the employer has fulfilled the requirements of subsection (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."

16. I take into account that the background to this case is that the Claimant was subjected to racial abuse which as described was appalling and unacceptable. However, this is not a race discrimination case. Whilst the racial abuse is part of the narrative and within Section 98(4) is part of the circumstances, I must focus on the issues identified for the resolution of this unfair dismissal and wrongful dismissal case.

Unfair Dismissal

17. In any unfair dismissal claim, the first question under Section 98(1) of the Employment Rights Act 1996 is to require the employer to show the reason or if more than one the principal reason for the dismissal and that it is a reason falling within Section 98(2) as a potentially fair reason. In this case the Respondent maintains that the reason was one related to conduct, namely attacking a member of the public, a client at the DWP for whom the Respondent was providing security services through the placement of Claimant and his colleague. The Respondent maintains that the actions of the Claimant amounted to gross misconduct. The Claimant accepts that this is the reason for dismissal but he challenges the severity of the penalty and the process. No other reason for dismissal is advanced. Accordingly, I find that the reason for the dismissal of the Claimant was his conduct, namely striking or assaulting a member of the public.

18. When considering the investigation of misconduct dismissals, guidance is given by the test in the well-known case of *British Home Stores v Burchell*. In a case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief, and third the employer, at the stage at which the employer formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the

case.

19. Applying these tests to the present case, I find as follows:

19.1 I find that the Respondent through Mr Islam did have a genuine belief in the Claimant's guilt of the misconduct as set out in his albeit brief dismissal letter and from the notes of the disciplinary hearing. I find that he believed that the Claimant was guilty of the assault upon the member of the public.

19.2 Furthermore, I found there were reasonable grounds for that belief in that the Claimant admitted having struck the member of the public and causing him to bleed. This submission was consistent following the first notification to Mr Shemar. It was clear that the Claimant admitted that what he did was wrong and that it was within the definition of gross misconduct in the Claimant's contract and the Respondent's policies.

19.3 As to investigation, regard should be had to the fact Mr Islam had heard from the Claimant by his own admission of the misconduct as well as having seen some statements from the DWP employees and heard that the matter was recorded on CCTV. The investigation must be as much as reasonable in the circumstances as well as giving the employee the opportunity to explain himself. I find that this is what occurred in the present case. There was clear evidence of the misconduct and the Claimant was given the opportunity to explain himself before he was dismissed.

20. As to the fairness of the dismissal, this is considered under Section 98(4) of the Employment Rights Act 1996, the statutory test of fairness. The correct approach is set out in the case of *Iceland Frozen Foods Limited v Jones*. The authorities establish that within the law the correct approach for the Employment Tribunal to adopt in answering the question posed by Section 98(4) is as follows:

(i) The starting point should always be the words of Section 98 themselves;

(ii) In applying the Section, a Tribunal must consider the reasonableness of the employee's conduct, not simply whether the Employment Tribunal considers the dismissal to be fair.

(iii) In judging the reasonableness of the employer's conduct, an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(iv) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably takes another.

(v) The function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, it is unfair.

21. The question therefore is whether the decision to dismiss in this case was within the band of reasonable responses which a reasonable employer might have adopted (as referred to in the case of *HSBC v Madden*). These are objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably' or 'unreasonably" in Section 98(4). This means the test is not by reference to the Tribunal's own subjective views of what it would have done as employer in the same circumstances.

22. The decision taken by the Respondent in this case was that the Claimant's actions in striking a member of the public at the DWP amounted to gross misconduct. Although the Claimant argued that he was subjected to appalling racist abuse and had a clear disciplinary record and promised not to act in such a way again, the Respondent still considered that it was reasonable to dismiss the Claimant for the attack. I take into account that the very nature of the employment and the service contracted between the Respondent and the DWP were to deliver a professional security service for the protection of DWP staff and the customers in the Centre. It should be recognised that there should be no violence meted out by the security staff other than where this is deemed necessary in law and practice such as where a security officer or other person is under physical threat or being attacked or in immediate danger of attack or where self defence is needed. The Claimant admitted that he was not in such a situation or under such threat in that the member of the public was seated and it was the Claimant who walked over to him and struck him.

23. It is also clear that DWP management and some of their staff were surprised or shocked at the attack which took place and would not want any repetition.

24. In all these circumstances and applying the test of the band of reasonable responses and the statutory test in Section 98(4), I find that the decision to dismiss the Claimant in this case for the reason given, in all the circumstances, including the size and administrative resources of the employer's undertaking (and in accordance with equity and the substantial merits of the case) was a fair decision as it fell within the band of reasonable responses open to a reasonable employer.

25. The Claimant's action was unacceptable. It posed a threat of serious injury as well as the risk of escalation, injury to others, damage to the Respondent's reputation and commercial relationship and risks that the Claimant despite his assurances may behave in the same way in the future.

26. Taking all of these matters into account, I find that the decision to dismiss fell within the band of reasonable responses and accordingly this was a fair dismissal.

27. Dismissal can be rendered unfair because of procedural factors. In relation to this, I have very carefully considered all of the points advanced by Mr Akpan-Inwang on behalf of the Claimant and my findings are as follows:

Investigation

I find that there was a reasonable and fair investigation conducted by Mr Shemar. The Claimant was given the opportunity of explaining his actions and he admitted that he had committed the assault. I see no other basis for the suggestion that the investigation was unfair. The investigation report drew clear consequences and it was part of the process

that the report should be passed on as it was. The failure to obtain all of the witness statements from the DWP and CCTV and disclose them to Mr Ojji was understandable, bearing in mind that from the outset Mr Ojji had admitted the assault. When the statements were seen, they included comments about the Claimant which were adverse to him. I directly asked the Claimant what he considered would have been a benefit to him if he had had this material at an earlier stage and he was not able to indicate that there was anything which would have improved what he could have advanced to the company.

Disciplinary Hearing

28. Whilst it is unfortunate that the Claimant did not receive the documents at an earlier stage, again there was nothing to suggest that this had any impact upon the outcome; also, it was understandable bearing in mind that from the beginning the Claimant had admitted the act which was the reason for the disciplinary process.

Representation

29. The Claimant was given the right to be represented at each stage and was so. It was noted that he wished Gordon Brunning to be his chosen representative. The evidence produced was to the effect that this appeared to be a decision and an action by the Union and there was no convincing evidence or any evidence that it was the Respondent who interfered with the Claimant's choice of representative.

Appeal

30. I find that procedural matters were corrected at the appeal stage, bearing in mind that Mr Gregoriades postponed the hearing in order to provide the Claimant with all documents and gave him the chance to consider them. The Claimant had agreed his representative Simeon Doherty for the appeal hearing.

Training

31. Whilst training materials did not specifically refer to racist abuse, they did cover situations with regard to abuse generally and the steps which should be taken in order to de-escalate. The training material also made it clear that using violence was the last resort and only justified in cases of self-defence or similar.

Wrongful Dismissal

32. I find from the evidence that the Claimant's actions amounted to gross misconduct. I do this on the basis of the evidence presented within the hearing and this is not judged by the standard of the band of reasonable responses. The contract clearly establishes that violence is within the definition of gross misconduct and the actions of the Claimant therefore did amount to gross misconduct and were appropriately considered by the Respondent to be such in these circumstances. As mentioned several times, the Claimant admitted the assault and that it was wrong. This entitled the Respondent to terminate the Claimant's contract of employment summarily without notice and notwithstanding that he had no previous warnings. Accordingly, the termination of the Claimant's contract was not a breach of contract but was in compliance with it. He was not wrongfully dismissed and accordingly his claim for notice fails.

33. Accordingly, for the above reasons, I find that the Claimant was fairly dismissed, and his unfair dismissal claim is unsuccessful. Also, he was not wrongfully dismissed and his claim for notice payment fails.

Employment Judge Speker OBE DL
Date: 6 April 2021