



EMPLOYMENT TRIBUNALS

Claimant: Mr J Bennett
Respondent: Mark Hughes t/a Barleywood Joinery
On: 1 October 2021
1 November 2021 (in Chambers)
Before: Employment Judge McAvoy Newns

Appearances:

For the Claimant: In person

For the Respondent: Mr F Husain, Solicitor

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well-founded and is dismissed.
2. The Claimant's claim for automatically unfair dismissal is not well-founded and is dismissed.
3. No award is made under section 38 of the Employment Act 2002.

REASONS

Background and issues

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
2. With the parties agreement, the name of the Respondent was confirmed as Mark Hughes t/a Barleywood Joinery.

3. It was agreed that the purpose of this hearing would be to determine liability alone; a separate remedy hearing would follow if necessary.
4. The agreed issues, in respect to the Claimant's ordinary unfair dismissal claim, were set at a case management preliminary hearing before Employment Judge David Hughes on 30 April 2021 and were as follows:
 1. What was the reason or principal reason for the Claimant's dismissal?
 2. Was the reason for dismissal a potentially fair reason within the meaning of s.98(2) of the Employment Rights Act 1996 ("ERA"). The Respondent relies upon conduct and states that the Claimant violently attacked him. In this regard did the Respondent have genuine belief that the Claimant had committed that act of misconduct?
 3. Did the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant in accordance with s.98(4) of the ERA? In this regard:
 - i. Were there reasonable grounds for the above mentioned belief?
 - ii. At the time that the belief was formed, had the Respondent carried out a reasonable investigation?
 - iii. Was the dismissal procedurally fair?
 - iv. Was dismissal within the range of reasonable responses?
 4. If the Claimant's dismissal was unfair under s.98(4), what compensation is he entitled to, taking into account in particular the following questions:
 - i. Would the Claimant nonetheless have been dismissed anyway but for any unfairness which the Tribunal has found (and, if relevant, what is the percentage chance of this occurring)?
 - ii. Did the Claimant contribute to his dismissal through his own blameworthy conduct?
 - iii. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply and, if so, did the Respondent or Claimant unreasonably fail to comply with such Code? If so, is it just and equitable to increase or decrease any award payable to the Claimant? If so, by what proportion up to 25%?
5. Although it does not appear to have been discussed during the above mentioned case management hearing, it was also acknowledged by the parties at the start of the hearing that the Claimant had a claim for automatically unfair dismissal. The agreed issue in this claim was: was the reason or principal reason for the Claimant's dismissal of a prescribed kind under section 99(3)(c) of the ERA, namely that the Claimant took parental leave?

6. The Claimant confirmed that he was not pursuing a claim for wrongful dismissal/breach of contract in respect to his unpaid notice pay. The Claimant confirmed that he was however pursuing a claim under section 38 of the Employment Act 2002 in relation to the Respondent's failure to provide him with a written statement of terms and conditions / employment particulars. The Respondent accepted that this formed part of the Claimant's claim.

Preliminary issues

7. It was agreed between the parties that the CCTV footage did not need to be shown during this hearing. To do so would have necessitated a postponement and a relisting in person as such footage could not be shown over the CVP platform. Both parties had watched the footage recently and witnesses were given time during the hearing to watch it on their laptops before answering questions.
8. The Claimant raised that the Respondent had provided its witness statement three days prior to the hearing which it considered to be intentional. The Respondent's representative explained that he was new to the case and his organisation (Croner) was dealing with an unusually high caseload. The Claimant said that he did not wish for the hearing to be postponed and that he had had sufficient time to read the Respondent's statement before the hearing commenced. It was therefore agreed that the hearing would proceed notwithstanding such delay.

Evidence

9. The Claimant served a witness statement and was cross examined on that statement. The Respondent also served a witness statement and was cross examined on that statement.
10. I also had sight of a bundle of documents containing 82 pages together with a small amount of documents provided immediately before and during the course of the hearing.
11. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

12. The Respondent is a sole trader specialising in the making and repairing of sash and casement windows, doors and traditional carpentry. At the time of the Claimant's dismissal, it employed three individuals and had no dedicated HR support.
13. The Claimant commenced employment with the Respondent on 1 May 2016. He was employed as a Joiner.

14. This case largely centres around the events of 12 September 2019. These can be separated into two main events. The first, a conversation between the parties in the workshop and the second, an incident between the parties in the Respondent's office. In respect of the second incident, CCTV footage was available although this did not emit any sound.

Conversation in the workshop

15. At around 11.30am on 12 September 2019, the Claimant approached the Respondent to let him know that he would need to leave work two hours early that day in order to attend a meeting at the Claimant's daughter's school. The parties agreed that the Claimant's request to leave was granted but that, in future, if the Claimant had pre-booked appointments (e.g. the leave was not requested to deal with an emergency), he would need to take either annual leave or unpaid leave.
16. The reason for the Respondent's decision was that he suspected that the Claimant had been taking work off the Respondent and he requested time off to do quotes rather than attend appointments concerning his daughter.
17. The Claimant believed that the Respondent had changed a verbal agreement between them and that the Respondent was saying if he left work early that day, he would not be paid at all for that day. The Claimant said that this had upset him. This resulted in the Claimant's demeanour becoming more aggressive to the Respondent during the conversation. The Respondent told the Claimant he would no longer be having the conversation with the Claimant and returned to his office where he sat down next to his desk. As the Respondent walked to his office he heard the Claimant shout followed by a loud bang.
18. Although he did not give evidence at this hearing, a colleague of the Claimant's provided a statement setting out what he says he saw in the workshop. He recorded that he "*could tell that [the Claimant] was not happy*", "*[he] threw down the tools and promptly followed [the Respondent]*", "*[he] looked visibly annoyed as he left the workshop*" and "*[he] looked very angry... storming around the workshop slamming tools about and saying that he was done*" [49]. Another colleague, who also did not give evidence at this hearing, provided a statement in which he said that, during this incident, both parties' tone became more serious and both voices were getting slightly raised. After the Respondent started walking back to the office this colleague recorded that the Claimant "*proceeded to shout something quite loud, throwing the tools he had in his hand down on the work bench very hard, making a loud bang*" [50].

Altercation in the office

19. This leads to the second event which was recorded on CCTV. Based on the recording, I find the following facts:

1. The Claimant was stood up inside the Respondent's office. The Respondent was sat down. A conversation between the parties took place during which the Claimant was using some hand gestures;
 2. The Claimant began tapping his hand on the partition between himself and the Respondent, causing the Respondent to make a hand gesture, stand up and walk towards him. The Respondent does not raise his hands as he walks towards the Claimant. The CCTV footage does not suggest that the Respondent was walking towards the Claimant with the intention of harming him;
 3. At the same time, the Claimant himself walks towards the Respondent. He pushes the Respondent backwards in an aggressive manner and the Respondent lands in his seat; and
 4. The Respondent immediately stands up and points towards the door, signalling for the Claimant to leave the office. The shoulders of the parties touch as the Claimant leaves the office, although it is unclear from the CCTV who initiated that shoulder contact. The Claimant leaves the office with his back to the Respondent.
20. The Respondent considered the Claimant's behaviour to amount to an act of aggression and violence which it considered to be gross misconduct. It therefore immediately dismissed the Claimant, verbally. The parties' evidence varied as to the words used however no determination into the precise language needs to be made; both parties acknowledged that the words used signalled the immediate end of the Claimant's employment. The Claimant's dismissal was not confirmed in writing. Prior to being dismissed, the Claimant was not invited to an investigation and/or disciplinary meeting. The Claimant was not offered a right of appeal.
21. The Respondent's evidence was that as a small business it did not know the procedures which ought to be followed and its priority was to remove the Claimant from the premises to safeguard himself (the Respondent) and his other members of staff.
22. The CCTV footage is 28 seconds long. The conversation was much longer, in the region of 10-20 minutes. The footage of the remainder of the conversation was unavailable. There was a dispute on the facts as to what was discussed during this conversation. The Claimant says the discussion centred solely around his daughter. The Respondent agrees this was discussed but also says the parties discussed the Claimant's intention to set up his own business. It is irrelevant to this case what was discussed during this time because:
1. The Respondent dismissed the Claimant for what was visible in those 28 seconds. Primarily, because the Claimant pushed the Respondent backwards in an aggressive manner causing the Respondent to land in his seat; and

2. The Claimant was upset immediately before and during this incident. The Claimant accepted this himself and is also supported by the statements mentioned above and the Respondent's own evidence.
23. The crux of the Claimant's argument was that when he pushed the Respondent he did so in self-defence and because he was intimidated. This is not supported by the CCTV footage. Nor is this assertion credible. The Claimant approached the office voluntarily. He was upset. His demeanour (the tapping of his hand) suggested agitation. Had the Claimant been intimidated, it is reasonable to expect him to have not walked towards the Respondent and instead leave the Respondent. The Claimant said he did not do this because it was "human nature, to fight or flight" as the Respondent approached him aggressively. However, the CCTV footage does not suggest that the Respondent approached him aggressively. The Claimant also said he believed that the Respondent would attack him from behind. However, after the Claimant pushed the Respondent, the Claimant turned around and walked away with his back to the office. If it was the case that the Respondent initiated the shoulder contact mentioned above, this has limited relevance given that this took place after the Claimant pushed the Respondent backwards. It could not be said therefore that the Claimant pushed the Respondent in self-defence because of the shoulder contact.
24. Shortly afterwards, the Respondent asked the Claimant to return his keys. After some correspondence, the Claimant agreed to do so.

Post-dismissal investigation process

25. On 15 September 2019, the Respondent wrote to the Claimant to confirm that he had been suspended on full pay from 12 September 2019 in order for an investigation to be carried out. The allegation was that the Claimant had acted in a violent manner towards a member of the management team.
26. On 16 September 2019, a Director from Buds Gardens Ltd wrote to the Claimant to invite him to an investigation meeting proposed for 18 September 2019. The Claimant replied to say that he had already been dismissed and he considered his grounds for dismissal as being "*unknown*" [69].
27. Buds Gardens Ltd replied stating: "*I would like to stress that you have not had your contract terminated with the company. Perhaps anything said/actions done between Mr Hughes and yourself was purely in the heat of the moment*" [67]. The Claimant was then urged to attend an investigatory meeting so that he could "*put across to [him] [the Claimant's] account of exactly what happened*". The Claimant refused to attend and no investigation meeting took place.
28. The Claimant's evidence was that, had he attended an investigation meeting, or a meeting at which the allegation that he had acted aggressively to the Respondent was put to him, he would not have had much to say, save that he believed he was acting in self-defence. The Respondent's evidence was that

had it investigated the incident and conducted a disciplinary meeting beforehand, the outcome would have been the same.

Submissions

29. Both parties provided oral submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them. In summary, the Claimant submitted his dismissal was unfair as no procedure was followed. The Respondent submitted that the Claimant had acted aggressively towards the Respondent and following any investigatory or disciplinary procedure would have been futile. The Respondent submitted that I should find the dismissal fair on this basis or, in the alternative, I should make a maximum reduction to any compensation because of either **Polkey** and/or contribution.

The Law

30. The relevant parts of s.98 ERA state:

- (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 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.*
- (2) *A reason falls within this subsection if it—*
 - b. *relates to the conduct of the employee;*
- (3) ...
- (4) *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.*

31. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the

employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

32. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the ERA.

33. Section 122(2) of the ERA provides as follows:

“Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”

34. Section 123(6) of the ERA then provides that:

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

35. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL***, the House of Lords ruled that employers could not argue that a procedurally improper dismissal was nevertheless fair because it would have made no difference if the employer had followed a fair procedure. Their Lordships held that an employer's actions in dispensing with a fair procedure were highly relevant to the question of whether an employer acted reasonably in dismissing, and that tribunals were not entitled to take into account, when determining the fairness or otherwise of a dismissal, whether a proper procedure would have made any difference to the employer's decision to dismiss. However, the HL stated: *‘It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied’*. Therefore, only in wholly exceptional cases, where it could be shown that carrying out a proper procedure would have been ‘utterly useless’ or ‘futile’, would procedural failures be overlooked when considering reasonableness for the purposes of S.98(4) ERA.

36. Section 38 of the Employment Act 2002 states:

- (1) *This section applies to proceedings before an employment tribunal relating to a claim by [a worker] under any of the jurisdictions listed in Schedule 5.*
- (2) *If in the case of proceedings to which this section applies—*
 - a. *the employment tribunal finds in favour of the [worker], but makes no award to him in respect of the claim to which the proceedings relate, and*
 - b. *when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change)...*

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the [worker] and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
- (3) *If in the case of proceedings to which this section applies—*
 - a. *the employment tribunal makes an award to the [worker] in respect of the claim to which the proceedings relate, and*
 - b. *when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996...*

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead
- (5) *The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*

Conclusions

What was the reason or principal reason for the Claimant's dismissal?

37. The Claimant was dismissed on 12 September 2019. This was the evidence of both parties, notwithstanding the events that followed.
38. The Claimant was dismissed because the Respondent believed that he behaved aggressively towards him. The particular act of aggression which led to the Claimant's dismissal was the Claimant's conduct in pushing the Respondent backwards such that the Respondent fell back into his chair. The Claimant did not deny so and the same is visible from the CCTV. No other reason for his dismissal was advanced by the Claimant save as for the point addressed in paragraph 39 below.
39. The Claimant was not dismissed for reasons relating to the taking or requesting of parental leave. There is no evidence to support this assertion and, on the contrary, there is clear undisputed evidence of the Claimant acting in an aggressive manner towards the Respondent. Furthermore, it was agreed between the parties that when the Claimant requested time off to attend an appointment with his daughter on 12 September 2019, this request was granted. It was also agreed that subsequent requests would be granted, subject to an alternative arrangement being in place between the parties,

different to what had been in place prior to 12 September 2019. This alternative arrangement was that, when an appointment had been pre-made (e.g. it was not an emergency), the Claimant ought to use annual leave or take unpaid leave.

Was the reason for dismissal a potentially fair reason within the meaning of s.98(2) of the ERA?

40. Yes. The Claimant was dismissed for conduct (as explained above) which is a potentially fair reason pursuant to section 98(2)(b) of the ERA.

Did the Respondent have genuine belief that the Claimant had committed misconduct?

41. Yes. This is not a case involving an incident between the Claimant and another colleague, where the Respondent has to decide whether it believes that the incident occurred based on the evidence gathered. The Respondent himself was the victim of the incident in this case. The Respondent had a genuine belief that the Claimant had pushed him backwards such that he fell back into his chair. This incident was visible from the CCTV footage, was recollected by the Respondent and was not disputed by the Claimant.

Were there reasonable grounds for that belief?

42. Yes, for the reasons given at paragraph 41 above.

At the time that the belief was formed, had the Respondent carried out a reasonable investigation?

43. Had the incident involved the Claimant and one of his colleagues who was not the Respondent himself, a reasonable investigation would have likely involved at least taking witness statements/conducting interviews with relevant witnesses before deciding upon any disciplinary action. However, as concluded above, the incident involved the Respondent himself. The Respondent himself recalled being pushed backwards by the Claimant such that he fell back into his chair. Although there was no investigation, in the circumstances, this was not outside of the range of reasonable responses, for the reasons given at paragraph 41 above.

Did the Respondent otherwise act reasonably in treating the reason as a sufficient reason for dismissing the Claimant?

44. No procedure was followed prior to the Claimant's dismissal. A reasonable employer could have suspended the Claimant on 12 September 2019 and allowed an independent investigator to carry out an investigation and disciplinary process.

45. Section 98(4) requires me to consider the size and administrative resources of the Respondent's undertaking when deciding whether the Respondent acted reasonably in treating the Claimant's conduct as a sufficient reason for

dismissing him. I am also reminded that this determination must be made in accordance with equity and the substantial merits of the case.

46. The then House of Lords in *Polkey* held that, subject to the below, Tribunals are not entitled to take into account, when determining the fairness or otherwise of a dismissal, whether a proper procedure would have made any difference to the employer's decision to dismiss. The exceptions to this however are where, based on the conclusions drawn by the Tribunal, in the exceptional circumstances of a particular case, the employer reasonably took the view that taking the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with.
47. There are exceptional circumstances to this case. Firstly, the Claimant's aggressive behaviour was directed to the owner of the business, the Respondent himself. Secondly, the Respondent sought to engage the Claimant in an investigation process after he was dismissed. However, the Claimant did not engage. There is no guarantee the Claimant would have engaged in such a process had it taken place prior to the Claimant's dismissal. Thirdly, the evidence of both parties was largely that an investigation and subsequent disciplinary process would not have made a difference to the overall outcome. This was the clear evidence of the Respondent.
48. On the "no difference" point, the Claimant's evidence was slightly different; he said that all he would have only said was that he was acting in self-defence. He said he would not have given any other representations. Therefore, I have considered what the position could have been had the Claimant attended a disciplinary hearing and raised the fact that he was acting in self-defence. A reasonable employer could have listened to and considered these representations, before making the decision to terminate the Claimant's employment. However, based on the findings I have outlined in paragraph 23 above, a reasonable employer would not have accepted these representations and the outcome would have therefore been the same. I find therefore that it was reasonable for the Respondent to take the view that taking these steps would have been futile, utterly useless and could not have altered the decision to dismiss.
49. Finally, I conclude that summary dismissal was within the range of reasonable responses. It is reasonable for the Respondent to have concluded that the aggressive behaviour demonstrated by the Claimant was serious enough to undermine the relationship of trust and confidence between the parties.
50. Accordingly, I have found that the Claimant was not unfairly dismissed and his claims are therefore not well-founded.

Polkey and contributory fault

51. Had I not found that the Claimant's dismissal was not unfair on the basis that it would have been utterly useless and futile for the Respondent to follow a proper procedure prior to dismissing him, I would have found that following a

proper procedure would have made no difference to the outcome and consequently any compensatory award should be reduced by 100%.

52. I have concluded above that the Claimant behaved in an aggressive manner towards the Respondent in the workplace prior to his dismissal. Consequently, had I found that the Claimant had been unfairly dismissed, I would have concluded that it was just and equitable for me to reduce any basic award to nil. As I have found that such behaviour was the sole cause of his dismissal, I would have also concluded that it would be just and equitable to reduce any compensatory award by 100% because of the unacceptable nature of the Claimant's behaviour.

ACAS Code of Practice on Disciplinary and Grievance Procedures

53. The Respondent did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures prior to dismissing the Claimant. However, for the reasons explained in this decision, the Respondent did not act unreasonably in omitting to do so and it would not be just and equitable for me to increase any compensation payable to the Claimant arising from such failure.

Contract of employment

54. Section 38 of the Employment Act 2002 states that if I find in favour of the Claimant in respect to his claims (whether this resulted in me awarding the Claimant compensation or not), I should consider whether the Respondent has failed to comply with section 1(1) of the ERA and if so, decide whether additional compensation should be paid to the Claimant. As I have not found in the Claimant's favour in this regard, I have not gone on to determine this.

Employment Judge McAvoy News

10 November 2021

Sent to the parties on:

26/11/2021

For the Tribunal:

N Gotecha