EMPLOYMENT TRIBUNALS

Claimant: Mr. Oniovosa Iruagha

Respondent: Bestway Wholesale Limited

Heard at: **Cardiff ET** **On:** **17th March 2022**

Before: Employment Judge J Bromige

Representation
Claimant: In Person
Respondent: C McDevitt (Counsel)

RESERVED JUDGMENT

1. Upon the Respondent conceding the Claimant's claim of compensation related to entitlement to leave under Regulation 14 of the Working Time Regulations 1998, the Respondent is ordered to pay the Claimant the sum of £410.86.

2. The sum awarded is calculated gross of income tax and employee national insurance contributions, and the Claimant is responsible for any income tax or employee national insurance contributions which may become due.

3. The recoupment provisions do not apply.

4. The Claimant's claim of unfair dismissal is not well-founded.

5. The remedy hearing listed for 20th May 2022 is vacated.

REASONS

1. This is the judgment in case number 1600930/2021, Mr. Oniovosa Iruagha v Bestway Wholesale Limited at the Wales ET sitting at Cardiff on 17th March 2022. The Claimant brings claims for unfair dismissal under s.94 and s.98 Employment Rights Act 1996 ("ERA 1996") and unpaid compensation related to entitlement to leave under Regulation 14 of the Working Time Regulations 1998 ("WTR 1998").

Procedure

2. The ET1 was issued by the Claimant on 11th July 2021 after a period spent in ACAS Early Conciliation that concluded after a period spent in ACAS Early Conciliation that concluded on 5th July 2021. The ET3 was received on 9th September 2021.

3. I was provided with an agreed bundle, totaling 174 pages, as well as a witness statement from the Claimant and three witness statements for the Respondent. The Respondent's witnesses were Shafqat Randhawa, Operations Manager for the Respondent's Cardiff Branch, Kevin Hope, Operations Manager at the Swansea Branch, and Fida Hussein, General Manager of the Swindon Branch.

4. The Claimant did not have pgs. 173-174 in his bundle, however the Tribunal had a spare copy of the full bundle and he was able to insert these pages into his own bundle.

5. The Claimant's unfair dismissal claim arises from his dismissal without notice on 6th May 2021. He has ticked the box at §8.1 of the ET1 indicating he was bringing a claim for unfair dismissal, and has provided a narrative to his Tribunal Claim where he sets out what he believes was unfair about his dismissal. He is seeking an order for reinstatement under s.114 ERA 1996.

6. The Claimant also ticked the box at §8.1 to indicate he was owed holiday pay. There was no clarification or quantification of the claim in the narrative document, however around the same time as filing the ET1, the Claimant also provided a schedule of loss **[bundle 34-36]**. In the schedule of loss, he identifies that he had accrued 9 days of annual leave at the point of his dismissal, he had taken 5 of those days, and so accordingly was owed 4 days of holiday. He valued this at £232.00.

7. On 7th March 2022, the Respondent wrote to the Claimant **[173]** indicating there was a total underpayment, including accrued holiday pay of £342.38, as well as a further £136.96 which was deduced from the Claimant's final pay which was an error. The Respondent said it would pay the Claimant the total of £410.86 in the next pay run. The Claimant stated he had not received the payment as of 17th March 2022.

8. Mr. McDermitt stated that the Respondent conceded the holiday pay claim in light of the payment it was going to make. I queried with the Claimant if he accepted this payment satisfied his claim. He told me it did not, as his holiday pay was not limited to £232.00 but rather that he had not been paid for any bank or public holidays throughout his employment, which dated back to 25th March 2009. He referred me to his contract of employment **[50]** which stated that he was entitled to 22 days annual leave plus 8 bank and public holidays. The Claimant did not work on Mondays, and so sought compensation for 8 days of unpaid holiday for each year of his employment. The Claimant made reference to his *"right to bank holidays was denied"* at §22 of his witness statement.

9. The Respondent objected to what it said was the Claimant seeking to amend his holiday pay claim at a very late stage. The Claimant had the benefit of a Solicitor in drafting the Schedule of Loss, and at no stage had

this basis of claim been raised, and no application had been made to amend. The Respondent stated that it was unsure of the value of the claim, how the Claimant said that he was able to claim alleged unpaid holiday from as far back as 2009, and that if an amendment was allowed, it would need an adjournment because it did not have either the evidence or witnesses present to deal with this new claim.

10. I treated the Claimant's attempt to clarify his claim and §22 of his witness statement as an application to amend. I had regard to the principles in *Selkent Bus Co Limited v Moore* [1996] IRLR 661, namely:

    a. The nature of the amendment;
    b. Time limits for any new claims that are being brought; and
    c. The timing and manner of the application to amend the claim.

11. The nature of the amendment can cover a variety of matters, such as:

    a. the correction of clerical and typing errors;
    b. the additions of factual details to existing allegations;
    c. the addition or substitution of other labels for facts already pleaded;
    d. the making of entirely new factual allegations which change the basis of the existing claim.

12. In my judgment, the principle factor was the timing and manner of the application to amend the claim. It was being made on the morning of the final hearing, without notice, and after the Claimant had already clarified his holiday pay claim in his schedule of loss. The Claimant was unable to tell me how much he believed he was owed, or how many days of holiday he was claiming. He had always been aware of this claim, certainly at the point he submitted his ET1.

13. A further important factor was that the nature of the amendment was effectively making an entirely new factual allegation which changed the basis of the existing claim. The combination of the two factors meant that if the application was granted, the hearing would have to be adjourned. Balancing the question of hardship, whilst the Claimant would be prevented from pursuing a potential additional claim for holiday pay, of which he was unaware of the value, the balance of hardship fell with the Respondent, who would be put to the cost of an adjournment and additional costs, which would not be recoverable given the Claimant's financial position.

14. Therefore the application to amend the claim was refused. With consent of the Respondent, judgment was entered for the Regulation 14 WTR 1998 for the sum of £410.86.

15. I also clarified with the Claimant as to whether he was bringing a wrongful dismissal claim. He had not ticked the box at §8.1 on the ET1 for a claim for notice pay, however there was reference to wrongful dismissal in his schedule of loss. Having discussed the difference between unfair and wrongful dismissal, the Claimant confirmed he was not bringing a wrongful dismissal claim.

16. The Claimant had prepared questions to ask each of the Respondent's witnesses, although on occasion, I interjected to clarify the question or ensure that the Claimant asked only one question at a time. After the Claimant had finished cross-examining the second witness (Mr. Hope), it was apparent to me that he was struggling to articulate himself as well as he had done earlier in the morning, so I adjourned for an early lunch to allow him to prepare before cross-examining the final witness, Mr. Hussein.

17. I also altered the order of final submissions, inviting the Respondent to go first, and then offering a break for the Claimant to gather his thoughts and respond to any points that Mr. McDevitt had raised in his closing.

Findings of Fact

18. The Respondent is the UK's largest independent cash and carry wholesaler. It employs around 4205 people in and around the UK. Of relevance to this judgment, it has shops in Cardiff, Swansea and Swindon.

19. The Claimant was employed as a Floor Assistant at the Respondent's Cardiff Branch from 25th March 2009. He received a copy of the Staff Handbook on 13th August 2009 **[55]**. This included the Respondent's Disciplinary Procedure **[52]**.

20. The Respondent updated their Disciplinary Policy in April 2021. I have not seen the original disciplinary policy which was in force in 2009, but the Claimant did not indicate there was any particular differences to his knowledge and I am satisfied there was no material difference between the policies.

21. As is common in internal disciplinary policies, there were various stages of sanctions available to the Respondent in cases of misconduct and gross misconduct **[62]**. Of relevance to this case is:

    Stage 1: Verbal Warning. If conduct or performance does not meet acceptable standards, the employee will be issued with a formal Verbal Warning. This will be confirmed in writing setting out the nature of the misconduct, the necessary improvements required, the timescale within which improvement is necessary and the consequences of failing to achieve the acceptable standards. This sanction will remain on file for a period of 6 months.

    Stage 4: Dismissal with or without notice, or demotion. An employee will not normally be dismissed without notice under this procedure for a single instance of misconduct, unless a final written warning is already in place, and where… if the act was one of gross misconduct. However, where gross misconduct is found to have occurred then dismissal without notice or payment in lieu will be the usual outcome.

22. On 11th March 2020, a customer, WB, made a written complaint that the Claimant had told him to "fuck off" and threatened to run WB over with a fork-lift truck **[73]**. The Claimant was interviewed by Kevin Hope, the Respondent's Operation Manager at the Swansea Branch, on the same day, with a follow-up meeting on 12th March 2020. Statements were also taken from two other employees of the Respondent.

23. Mr. Hope concluded his investigation and passed it Gemma Hill, Operations Manager at the Cardiff Branch where the Claimant worked. She requested that HR send an invitation to a disciplinary hearing to the Claimant on 16th March 2020. I have not seen this invitation or heard any evidence as to whether a disciplinary process occurred.

24. On 23rd March 2020, the Respondent received another complaint about the Claimant, this time from a customer AO. AO had made a comment to the Claimant about there being no stock on the shelf, and he reported that the Claimant responded *"with a string of verbal abuse"* **[82]**. AO's statement has a handwritten note from Shafqat Randhawa, another Operations Manager of the Respondent stating: *"Verbally Reprimanded"*.

25. Mr. Randhawa suggested that a verbal reprimand was not the same as a verbal warning under Stage 1 of the disciplinary process. I reject this explanation, since given there are four stages of the disciplinary process, which extends to a verbal warning, it would be irrational for a Manager to seek to impose a lesser sanction outside of the policy. The Claimant had also been involved in an investigation under the policy only a week previously for a similar allegation. I therefore find that this 'reprimand' was in fact a verbal warning. In any event, the Claimant was aware of this warning, and chose not to appeal it.

26. On 30th October 2020, the Respondent received a complaint about the Claimant from customer DP. The allegation was that he had spat on the floor near DP, and when challenged, had told DP to *"fuck off"*. The Claimant provided a written statement the same day **[84]**, where he stated that the customer had been coughing and he asked him *"could you please stop coughing"*. There was no mention of any swearing, or a denial that he had sworn. It does not appear that the Respondent investigated the matter further or determined which account was correct.

27. On 4th December 2020, the Claimant was involved in another incident near the checkout desk. Another employee of the Respondent, KJ, provided a statement saying that the Claimant had shouted at SF (another employee), saying *"fuck off, fuck you, don't call me to checkouts"*. On KJ's account, the Claimant continued to swear and be aggressive **[85]**.

28. The Respondent gathered other statements, including that of SF, who corroborated KJ's account, and MB **[89]**, who said he heard both swearing and shouting from the Claimant. Mr. Randhawa gave evidence that he spoke to the Claimant about this accusation, which the Claimant denied, but it appears the matter was taken no further as the Claimant went on holiday before an investigation meeting.

29. Another complaint was received about the Claimant on 22nd March 2021 **[93]**. Customer LF stated that the Claimant had been extremely violent towards him, swearing at him on several occasions, and spitting and coughing towards him, which the complaint described as an assault.

30. The Claimant provided his account on 25th March 2021 **[95]**. He claimed that LF had coughed behind him and placed his hand on the Claimant's

bottom. He said that LF (who was unknown to him) had breached social distancing requirements.

31. Mr. Randhawa was appointed as the investigation officer. He invited the Claimant to an investigation meeting at 1330hrs on 29th March 2021. He emailed the Respondent's HR Partner at 1300hrs the same day, stating *"please can you help with this, I have attached incident reports and just need some direction, ideally we would like to dismiss"*. The incident reports attached were the 23rd March 2020 complaint from AO, the 30th October 2020 incident with DP, and the alleged confrontation on 4th December 2020 with colleagues. There is no evidence of any response from HR to the email.

32. The Claimant attended the investigation meeting along with a colleague. Mr. Randhawa had the benefit of a notetaker as well, although in fact the meeting was particularly short. The Claimant denied LF's account, and said *"it has been taken way out of context…"* **[97]**.

33. Mr. Randhawa asked the Claimant if there were any problems and asked what the Respondent could do to help since there was a pattern of incidents developing. The Claimant stated he had done nothing wrong and his *"conscience is clear"*. The Claimant did not raise any questions at this stage about other potential witnesses who could have seen or heard the incident, or whether there was CCTV footage available.

34. The Claimant was invited to a disciplinary meeting on 27th April 2021 via a letter dated 13th April 2021. The allegation set out in the letter was:

    - *That on Friday 19th March 2021 you displayed aggressive and violent behaviour towards a customer in the Depot*
    - *You used foul language and were verbally abusive towards the customer*
    - *That you deliberately spat and coughed in the face of the customer several times*

35. The letter also enclosed the disciplinary policy and documents from the investigation. In addition, it included copies of notes from previous incidents, although did not say what they were. I am satisfied, both from the evidence of Mr. Hope and the email from Mr. Randhawa to HR, that these notes were those from 23rd March, 30th October and 4th December 2020.

36. On 14th April 2021 (received by the Respondent on 19th April 2021), the Claimant requested CCTV footage relating to the incident. Mr. Randhawa investigated this, and informed the Claimant the same day that there was no CCTV footage available. Whilst the Claimant told me that there was a camera in the vicinity of the aisle, I accept the evidence of Mr. Randhawa that he checked for CCTV footage and there was none because the cameras had been disconnected since he began his employment in August 2019.

37. At the disciplinary hearing, the Claimant reiterated his account about the customer. He was asked about the previous complaints by Mr. Hope **[109]**

and was unable to explain why several customers who he had never met before would make up very similar allegations.

38. Mr. Hope adjourned the disciplinary meeting to reach his decision, and communicated it in writing on 6th May 2021. He concluded that he preferred the evidence of the customer over the Claimant, and the actions that the customer had described amounted to gross misconduct, especially in the context of the Covid-19 pandemic. He also relied on the previous allegations, in particular the 23rd March and 30th October 2020 complaints as support for preferring the evidence of the customer.

39. The outcome of Mr. Hope's findings was that the Claimant was dismissed without notice, effective from 6th May 2021. The Claimant was informed of his write to appeal, which he availed himself of in an undated letter **[127]**.

40. In his appeal, the Claimant raised 7 points, including the lack of CCTV, that he hadn't received a verbal warning for the AO complaint in March 2020, and that Kevin Hope had prior knowledge of the matter because he had initially received the verbal complaint from LF.

41. The appeal meeting was chaired by Mr. Hussein on 24th May 2021. The appeal outcome was sent to the Claimant on 7th June 2021, responding to each of the 7 points raised. The appeal was not upheld.

The Law

42. The burden of establishing the reason for dismissal is upon the Respondent – section 98(1) and (2) ERA 1996. The Respondent has pleaded that the reason for dismissal was the Claimant's conduct, which is a potentially fair reason for dismissal under s.98(2)(b) ERA 1996.

43. If a potentially fair reason is established, I then need to consider whether dismissal for that reason was fair in all of the circumstances – s.98(4) ERA 1996.

44. In a conduct case, that consideration is assessed in accordance with the test in the case of *British Home Stores v Burchell* [1978] ICR 303 which established that the Tribunal must assess:

    a. that the respondent had a genuine belief of the claimant's guilt of the disciplinary offence;
    b. that that belief was based on reasonable grounds;
    c. that those grounds were formed after conducting a reasonable investigation.

45. If the *Burchell* test is answered in favour of the Respondent, then I must consider whether dismissal was a reasonable sanction within the range of reasonable responses open to a reasonable employer, as set out in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17.

46. In considering all matters under s.98(4) ERA 1996, including the tests in both *Burchell* and *Iceland Frozen Foods*, the Tribunal must make the assessment as what is broadly reasonable, and not substitute their own view as to the appropriateness of the actions taken.

47. Because the Claimant is seeking an order for reinstatement under s.114 ERA 1996, if I conclude that the dismissal was unfair, I do not need to consider whether a fair dismissal might have occurred in any event, applying the principles set out by the House of Lords in *Polkey v A E Dayton Services Limited* [1987] ICR 142. This is because *Polkey* is only relevant for an assessment for a compensatory award under s.123(1) ERA 1996, and is not part of the assessment under s.116(1). However, contributory fault, that is contributory conduct on behalf of the Claimant, is relevant, both under s.116(1)(c) and s.122(2) ERA 1996.

48. When assessing contributory fault, the definition of such fault is set out in *Nelson v BBC (No2)* 1980 ICR 110. The conduct of the Claimant must have the *"characteristic of culpability or blameworthiness… it could also include conduct that was perverse or foolish, bloody-minded or merely unreasonable in all the circumstances"*.

Conclusions

49. The Tribunal is particularly concerned with the email from Mr. Randhawa to HR on 29th March 2021. It is not appropriate for a Manager, acting as an Investigating Officer, to express before the employee has attended an investigation meeting that *"ideally we would like to dismiss"*. It is also not appropriate for HR to simply ignore this – it is beholden on a Human Resources Department to reinforce that each stage of a disciplinary process is fair and impartial.

50. However, whilst Mr. Randhawa was aiming for dismissal as an outcome, in my judgment his investigation was reasonable in all of the circumstances. He took a written statement from the Claimant upon receipt of the customer complaint, the Claimant was given the opportunity to explain his side of the story in the investigation meeting, and he investigated whether any CCTV evidence existed when the Claimant raised this as an issue. Whilst the Claimant criticises the investigation for not seeking additional witnesses, neither the Claimant nor LF suggested that anyone else had either heard or seen the altercation.

51. Therefore, despite the unprofessionalism of Mr. Randhawa in his email to HR, in my judgment a reasonable employer would have conducted the investigation in a very similar way.

52. Furthermore, having heard the oral evidence of Mr. Hope, in addition to his witness statement, I am satisfied that he had not pre-judged matters, and approached the disciplinary hearing with an open mind.

53. Mr. Hope concluded that the Claimant had been violent towards Customer LF, that he had sworn at him and had spat and coughed in his direction. I am satisfied that his conclusion was based on a genuine belief of the Claimant's guilt.

54. Mr. Hope reached his conclusion based on two particular points. Firstly, he considered the evidence of Customer LF (see paragraph 10 of his witness statement), in particular that there was no motive for LF to fabricate his account. Secondly, he took into account the previous complaints of a similar

nature against the Claimant. In doing so, he used these as evidence of a propensity for this sort of behaviour by the Claimant, rather than relying on the previous sanction and approaching the previous allegations and warning as cumulative matters building towards gross misconduct.

55. I conclude that Mr. Hope's belief was therefore based on reasonable grounds, and that those grounds were formed after conducting a reasonable investigation. In particular, in my judgment, it would be open to a reasonable employer to use recent previous, independent complaints, even if these had not been fully investigated at the time, as evidence of propensity to reach a conclusion on balance of probabilities.

56. In light of Mr. Hope's finding that gross misconduct was made out, was dismissal within the range of reasonable responses? Mr. Hope took into account the Claimant's length of service, but also his lack of remorse, and also in particular that spitting in the context of the Covid-19 pandemic was particularly serious before reaching his decision. In my judgment, taking into account all of those factors, dismissal was within the range of reasonable responses open to the reasonable employer.

57. I have also considered the appeal, which re-examined the CCTV footage issue, the involvement that Mr. Hope had with dealing with Customer LF on the 19th March 2021, and the Claimant's belief in a lack of evidence of his guilt. I am satisfied that Mr. Hussein conducted a fair appeal process, took his time to clarify with Mr. Hope and Mr. Randhawa what actions they had taken (for example, about the CCTV footage), and acted reasonably in reaching his conclusions.

58. Therefore the judgment of the Tribunal is that the complaint of unfair dismissal is not well-founded. This means that the Respondent fairly dismissed the Claimant.

59. If I am wrong as to the judgment that the dismissal of the Claimant was fair, I go on to consider the issue of contributory fault under s.116(2)(c) and s.122(2) ERA 1996. I conclude on balance of probabilities that the Claimant did act in the way that Customer LF says he did on 19th March 2021, and in reaching that conclusion I have taken into account the several complaints about the Claimant in 2020 and discounted the possibility of collusion or coincidence.

60. The act of spitting at anyone in the workplace, let alone a customer during the Pandemic, amounts to culpable and blameworthy conduct, even before the foul and abusive language used. In the circumstances it would be appropriate to make a reduction of 100% to reflect the seriousness of the Claimant's actions towards LF.

61. The Respondent having conceded the holiday pay claim in full, judgment will be entered in favour of the Claimant for the sum of £410.86.

62. The remedy hearing on 20th May 2022 is vacated.

Case No: 1600930/2021

Employment Judge **J Bromige**

Date **24th March 2022**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 25 March 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche