



EMPLOYMENT TRIBUNALS

Claimant Mr Chivers
Respondent: CPJ Field & Co Ltd

HELD AT: London South **ON:** 14 July 2022
BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Mr Greenlaugh, CAB representative
Respondent: Mr Collyer, consultant

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. Mr Chivers, the claimant, was dismissed on the 5 August 2020, following an altercation at work.
2. The claimant's claim form was presented to the Tribunal on the 26 October 2020. The respondent's response form was submitted to the Tribunal on the 15 December 2020.

The hearing

3. The parties and their witnesses and representatives attended in person, with the exception of Mr Scott, a respondent witness, who attended by CVP. The representatives are thanked for their assistance and representation during the hearing.
4. The Tribunal was provided with a joint hearing bundle of 124 pages, the references to page numbers in this judgment are to the pages in this bundle. In addition, the claimant provided an updated schedule of loss.
5. The claimant provided a witness statement and gave evidence on his own behalf. The respondent provided witness statements for Mr Coote, Principal Funeral Director, and Mr Scott, General Manager, who both gave evidence on behalf of the respondent.
6. The claimant requested, and was granted, the following reasonable adjustments due to a health condition:
 - 6.1. That when giving evidence the Tribunal takes into account that the claimant's memory was not as strong as it used to be.
 - 6.2. That the claimant may need frequent breaks. The Tribunal informed the claimant that regular breaks would be scheduled every hour, but he could ask

for a break at any time. In addition, the claimant's carer, who was in attendance, was asked to assist the Tribunal and indicate if a break was required. At one point during the claimant's evidence the carer did request an additional break and this was granted.

7. On completion of the evidence both representatives made oral submissions.
8. Judgment on liability was reserved and a provisional date for a remedy hearing was arranged for 5 December 2022 at 2pm (in person).

Claims and issues

9. Both parties confirmed at the outset that the claim was for unfair dismissal only. The claimant confirmed that misconduct was accepted as the reason for his dismissal. Therefore the issues for the Tribunal to determine at the liability stage were:

9.1 Whether the dismissal was fair in all the circumstances?

9.2 Whether there was a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so should his compensation be reduced and by how much?

9.3 Whether the claimant caused or contributed to his dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensation and by how much?

10. In closing submissions the respondent confirmed that it was not pursuing its pleaded case that if there were any procedural errors, then these were not sufficient to have made the dismissal unfair, relying on the case of **Buzolli v Food Partners Limited** [2013] 2 WLUK 202.

Factual findings

11. The respondent is a long-established funeral care provider with several locations principally in the Home Countries and South of England. It employs approximately

189 employees. There were 20 employees at the claimant's place of work in Rampion House, Burgess Hill, West Sussex.

12. On 10 July 2017 the claimant commenced employment with the respondent as a chauffeur bearer. He was provided with a contract of employment [p. 32-42]. The respondent's disciplinary procedure and rules contained a non-exhaustive list of conduct considered to be gross misconduct including 'fighting or assaulting another person' and 'using threatening or offensive language towards customers or other employees' [p. 40-41].
13. On 19 June 2020 the claimant was involved in a difference of opinion with Mr Connolly, another bearer, over whether a coffin that was due to go on a hearse should be covered with a cloth. The claimant had more experience and thought that Mr Connolly should defer to him. The claimant had gone to see Ms Norman, the Funeral Services Manager, who was in her office and told him it was 'fine and all sorted'. He had then returned to help carry the coffin onto the hearse with Mr Connolly on the other side and Mr Wheeler, the hearse driver, standing at the head of the coffin.
14. The claimant's account of what happened next significantly differed from the accounts provided to the respondent by Mr Connolly, Mr Wheeler and Ms Norman (p. 62-65).
15. The claimant stated that as he approached the coffin Mr Connolly was shouting and swearing at him including saying several times 'fuck off cunt'. Neither Mr Connolly nor Mr Wheeler refer to Mr Connolly shouting or swearing at the claimant and instead state it was the claimant who was shouting and both refer to him saying, 'do what the fuck you want, you always do'. The claimant admitted that he had shouted this at the appeal hearing (p. 97). Ms Norman, who was in her office at the time, stated that she heard the claimant shouting and then heard aggressive shouting prompting her to leave the office, she did not hear what was said.
16. The claimant went to stand opposite Mr Connolly to lift the coffin onto the hearse. The claimant stated that as he leaned forward to lift the coffin, Mr Connolly pushed

his head into the claimant's saying, 'fuck off you cunt'. Neither Mr Connolly nor Mr Wheeler refer to Mr Connolly swearing or leaning over the coffin to make contact with the claimant. Mr Wheeler states that the claimant was shouting 'experience, experience, experience'. Ms Norman stated that by now she had left her office and was walking down the garage towards the coffin, she saw the claimant and Mr Connolly either side of the coffin and heard the claimant shouting about his experience. She said the claimant's 'body language was aggressive and Steve [Mr Connolly] clearly wasn't going to back down'. She shouted for them to 'back away'. The Tribunal notes that Mr Connolly and Mr Wheeler did not see Ms Norman at this point and only refer to seeing her at the end of the altercation, at which point Mr Connolly stated she was 'coming out of the office' and Mr Wheeler stated she was 'half way down the garage'.

17. The claimant does not dispute that he then went around the head of coffin, past Mr Wheeler, and approached Mr Connolly. The claimant claims that he did this to de-escalate the situation. The accounts again differ:

17.1. The claimant stated that Mr Connolly said, 'get out of my face', the claimant responded, 'I'm not in your face' and Mr Connolly 'was rubbing his forehead across the claimant's face saying, "I'm in your fucking face now".'

17.2. Mr Connolly stated that the claimant 'flew' round the coffin 'squaring up into my face'. Mr Connolly responded 'get out of my face or this will be the last thing you do'. He stated that the claimant 'then put his head onto my forehead, shouting experience, experience at this point where his head was in my head'. He heard Ms Norman shouting. He stated that the claimant then 'reared his head back for a headbutt' but at that point Mr Connolly 'put my head forward to brace it'. The Tribunal notes that the claimant accepted in his disciplinary hearing that he may have moved his head back not because he intended to headbutt Mr Connolly but because he heard Ms Norman shout [p. 74].

17.3. Mr Wheeler stated that the claimant was 'literally chest to chest' with Mr Connolly, who was saying 'don't get in my face, don't get in my face' the claimant then said, 'come on then, come on then'. He then saw the claimant

move his head into Mr Connolly's head and 'shove' him with his forehead on Mr Connolly's forehead.

- 17.4. Ms Norman stated the claimant walking straight up to Mr Connolly's face shouting 'come on then son, come on. Experience', Mr Connolly said something about 'get out of my face; and then the claimant put his forehead onto Steve and pushed his head away'. Ms Norman, who had continued to shout 'back away' intervened and things calmed down.
18. Following the incident the claimant was signed off work sick for two weeks, returning to work on 6 July 2020.
19. On 22 June 2020 Ms Norman took statements from Mr Connolly and Mr Wheeler and provided her own statement [p. 63-65]. The statements recorded that they were taken by Ms Norman.
20. On 6 July 2020 the claimant returned to work. He was asked to provide his account in a statement and was then suspended on full pay whilst investigations were conducted [p.62].
21. On the 7 July 2020 the claimant was invited by letter to a disciplinary hearing on the 9 July 2020 [p.61]. He was informed that the allegations were (1) that he had 'used threatening and offensive language' towards Mr Connolly, and (2) that 'you pressed your forehead against Steve Connolly's forehead and pushed his head back'. He was informed that the allegations could constitute potential gross misconduct and that a possible outcome was summary dismissal. He was also informed of the right to be accompanied by a fellow employee. He was provided with his own statement and the statements of Mr Connolly, Mr Wheeler and Ms Norman. The Tribunal notes that it was not alleged that the claimant had, or was intending to, headbutt Mr Connolly.
22. On 8 July 2020 the respondent agreed to postpone the disciplinary hearing following representations from the claimant that he had been provided with insufficient notice to enable him to arrange representation [p. 66].
23. On 9 July 2020 the claimant raise a formal grievance [p. 92-93].

24. The disciplinary hearing took place on 30 July 2020 at 12:12pm, chaired by Mr Coote. The claimant was accompanied by Mr Taylor, a colleague; Ms Chick, HR Manager took notes. The Tribunal has been provided with the notes of this meeting [p. 68-81]. When the claimant was asked why his account differed from that of the other witnesses, he suggested that they had colluded to provide false statements, pointing out that Ms Norman had helped Mr Connolly and Mr Wheeler with their statements. He also suggested that Ms Norman's account was fabricated because Mr Connolly and Mr Wheeler only saw her at the end of the altercation, and therefore she could not have seen him move round the coffin and push his forehead into Mr Connolly's.
25. The disciplinary hearing was adjourned at 2:20pm in order for Mr Coote to speak to Ms Norman. The notes of this discussion have been provided to the Tribunal [p. 82-85]. Ms Norman accepted that she had amended the statements that she had taken as she was typing them up, but that the changes were grammatical only. She had taken the statements sequentially, printing the statements off after she had typed them and that both Mr Connolly and Mr Wheeler had read and signed their statements. Ms Norman was then asked to give an account of what she saw. She confirmed her account and specifically that she had seen the claimant go round the coffin and go up to Mr Connolly and 'got right into SC [Mr Connolly's], toe to toe, not just his head it was his whole body', and that she had witnessed the claimant putting his head against Mr Connolly's head and push his head away [p. 83-84]. She also stated that Mr Connolly was not backing down. On being asked whether she had heard Mr Connolly swearing at the claimant she stated that she 'may have heard a few F's but I didn't hear any CUNT' [p. 84]. She suggested that use of the 'F' word was not unusual but that she would not tolerate 'CUNT'.
26. Immediately after the meeting with Ms Nelson, a meeting was held with Mr Wheeler during which he confirmed that his statement was an accurate and true reflection of what had happened on that day and that no-one has changed it [p.86].
27. At 16:28, Mr Coote reconvened the disciplinary hearing and informed the claimant that he had spoken to both Ms Nelson and Mr Wheeler but not Mr Connolly

because he was on annual leave. The claimant was given the opportunity to add anything and the hearing adjourned for Mr Coote to consider his decision.

28. A meeting was subsequently held with Mr Connolly, who also confirmed that his statement was an accurate and true reflection of what had happened on that day and that no-one had changed it [p. 87].
29. On 5 August 2020 the claimant received a letter informing him that he was to be summarily dismissed for gross misconduct [p. 88-90]. Mr Coote stated that he was faced with two versions of events and that he could find no reason why the claimant's manager or colleagues would fabricate their evidence. He concluded that the claimant had used threatening and offensive language and pushed his forehead against Mr Connolly's forehead. Having regard to the seriousness of the claimant's conduct, Mr Coote concluded that the claimant actions had seriously damaged the trust and confidence held in him by the company. The claimant was informed of his right to appeal.
30. On 7 August 2020 the claimant submitted an appeal. On 14 August 2020 the claimant attended the appeal hearing chaired by Mr Scott. The notes of this meeting have been provided to the Tribunal [p.94-108]. The claimant was accompanied by Mr Taylor; Ms Wiseman took notes. Mr Scott confirmed with the claimant at the outset that the information in his grievance would form part of his appeal. The claimant raised the following issues:
 - (1) Falsification of evidence by Ms Norman.
 - (2) That Ms Norman, Mr Wheeler and Mr Connolly had colluded to provide false evidence.
 - (3) Discrepancies between the statement of Mr Connolly, Mr Wheeler and Ms Norman, in particular regarding the location of Ms Norman, casting doubt of the truth of the statements.The Tribunal notes that the claimant also raised the lack of evidence that the claimant had headbutted Mr Connolly, but this has never been part of the allegations against him, and has not been pursued as a matter before the Tribunal.

31. On 20 August 2020 the claimant was informed that his appeal was dismissed [p. 109-110]. Mr Scott stated that the claimant had not provided any new substantive evidence that Ms Norman had falsified the statements or had colluded with Mr Connolly and Mr Wheeler to undermine the claimant position. In terms of discrepancies, the exact location of Ms Norman had no bearing on the reliability of the evidence and the claimant had adduced no new evidence to challenge the conclusion that he was the aggressor in the incident. Mr Scott upheld the decision to dismiss the claimant for gross misconduct.

The law

32. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111. In this case there is no dispute that the claimant was dismissed by the respondent.
33. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages. First, the respondent must show they had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it has a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
34. In this case it is not in dispute that the reason for the claimant's dismissal was because the respondent believed he was guilty of misconduct. Since misconduct is a potentially fair reason the respondent has satisfied the requirements of section 98(2).
35. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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. The tribunal is required to determine this issue in accordance with equity and the substantial merits of the case.

36. The correct approach that tribunals should adopt is that set out in the well-established guidance in **BHS v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. In particular, the question under section 98(4) is whether the employer had reasonable grounds for believing that the claimant was guilty of misconduct, and whether those reasonable grounds were based on a reasonable investigation. When considering whether the respondent acted reasonably or not, the tribunal must decide whether it acted within the range of reasonable responses open to an employer in all 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 views or its values for that of the reasonable employer. The range of reasonable responses test applies to investigations as well as decisions, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**.

Conclusions

Did the respondent have reasonable grounds for believing that the claimant was guilty of misconduct?

37. The Tribunal finds that the answer to this question is yes. The respondent, having obtained statements from all those present, and faced with two different accounts as to what had taken place, was entitled to choose which set of facts it believed.
38. The Tribunal does not accept the claimant's argument that there was no evidence in support of the first allegation because none of the witnesses found the claimant's language to be threatening and offensive. The wording of the first allegation was that the claimant had 'used threatening and offensive language', this is an objective question, not dependent on whether the particular witnesses considered it to be threatening and offensive. That the claimant had used offensive language was not disputed. The Tribunal accepts that there was evidence that Mr Connolly may have also used the 'F' word, that language is contextual and the use of the 'F' word in a workplace where such language was the norm may not be considered offensive. However, context is also relevant to

whether the language used was threatening. The evidence before the respondent was that that the claimant had approached Mr Connolly by going round the coffin, making physical contact with Mr Connolly by pressing his forehead against Mr Connolly's, shouting at him about his experience and saying, 'come on then'. Given the claimant's actions, it was reasonable for the respondent to conclude that the claimant's language was threatening.

39. The Tribunal does not accept the claimant's argument that the second allegation should have been dismissed because Mr Connolly did not refer to the claimant pushing his forehead back, but instead refers to the claimant moving his head back for a headbutt. The claimant's case ignores the first part of the allegation that the claimant pressed his forehead against Mr Connolly's (not the other way round as the Claimant suggests); further both Mr Wheeler and Ms Norman saw the claimant push Mr Connolly's head back. Ms Norman and Mr Wheeler were not personally involved in the incident and therefore had no reason to exaggerate or minimise the conduct of Mr Connolly and the claimant. Mr Wheeler was standing at the head of the coffin and would have had a good view. The Tribunal accepts that Ms Norman's view may have been more partial, since she was moving from the office towards the coffin during the incident. However she was very clear when questioned at the disciplinary meeting as to what she saw, and confirmed that she had seen the claimant putting his head against Mr Connolly's and push his head away (p.84). Her evidence was all the more powerful because she also accepted that Mr Connolly was not de-escalating matters, and did not support Mr Connolly's account that the claimant had moved his head back to headbutt him.

40. In relation to both allegations, singularly or cumulatively, it was reasonable for the respondent to conclude that the claimant was guilty of misconduct on the basis of the evidence before it.

At the time the belief was formed had the respondent carried out a reasonable investigation?

41. What amounts to a fair investigation will depend on the particular facts of the case. The Tribunal reminds itself that an employer is not required to conduct a criminal

level investigation. The test is whether the respondent acted within a range of reasonable responses taking into account all the circumstances. The Tribunal took into account that the claimant was facing a serious allegation which required the respondent to take some care in its decision-making.

42. The respondent obtained statements from all those present. The claimant's case is that the respondent should have explored discrepancies in the accounts provided. In particular, the different accounts as to whether the claimant pushed Mr Connolly's forehead (as claimed by Mr Wheeler and Ms Norman) or moved his head back for a headbutt (as claimed by Mr Connolly), undermined the respondent's case that there was an act of aggression by the claimant. The Tribunal does not consider this to be an obvious discrepancy. At its highest it is an omission, since Mr Connolly in his statement, does not comment on whether after the claimant had put his head onto Mr Connolly's forehead he had then pushed it back. Mr Connolly's focus was on a later point in time and his recollection that after hearing Ms Norman shouting, the claimant moved his head back (which the claimant accepted), which Mr Connolly interpreted was in order to headbutt him. The Tribunal notes that Mr Connolly was not specifically asked during the investigation whether the claimant had pushed Mr Connolly's head back, but also notes that this discrepancy was not raised by the claimant at any point during the disciplinary or appeal hearings.
43. In any event, Mr Coote confirmed in his evidence that this discrepancy, did not materially change his conclusion that the claimant was the aggressor. The claimant does not dispute that he went round the coffin and approached Mr Connolly. It was reasonable for the respondent to view this as an act of escalation rather than de-escalation as claimed by the claimant. Further there was no discrepancy in the accounts before the respondent that the claimant then pressed his forehead against Mr Connolly's. All the accounts described the claimant as being the aggressor, 'squaring up into my face' and shouting (Mr Connolly), standing 'chest to chest' and shouting 'come on then, come on then' (Mr Wheeler), got 'right into SC [Mr Connolly's] face, toe to toe, not just his head but it was his whole body' and shouting 'come on then son' (Ms Norman). On the basis of the

evidence before it, it was reasonable for the respondent to uphold the allegations and conclude that the claimant was the aggressor not Mr Connolly.

44. The other main discrepancy relied upon by the claimant, was the differences in the accounts as to the location of Ms Norman; it being suggested that Ms Norman's account was fabricated since she had only witnessed the end of the altercation. It was also suggested that Ms Norman had fabricated the statements of Mr Connolly and Mr Wheeler. This defence was raised during the disciplinary hearing and considered and rejected by Mr Coote on the basis that he could see no reason as to why the claimant's manager or colleagues would fabricate their evidence. In the absence of any evidence that Mr Connolly, Mr Wheeler and Ms Norman had colluded to provide false evidence it was reasonable for the respondent to accept their accounts over that of the claimant. The claimant himself accepted before this Tribunal that whilst Ms Nelson had changed the grammar when she took the statements from Mr Connolly and Mr Wheeler, he was not alleging that she had changed the sense of the accounts provided by them. It was not part of the claimant's case before this Tribunal that Ms Norman's own statement was fabricated. The Tribunal notes that Ms Norman was asked to provide an account of what she had seen during the disciplinary meeting and that she gave a full account, specifically confirming that when she left the office the claimant was still on the opposite side of the coffin to Mr Connolly. The mere fact that she was not noticed by Mr Connolly or Mr Wheeler until the end of the altercation can be explained by where they were standing and their attention being directed at the actions of the claimant.

45. The Tribunal concludes that the respondent conducted a reasonable investigation. It is not required to explore every avenue, but did explore with the claimant at the disciplinary hearing why the claimant's account was different from that of Mr Connolly, Mr Wheeler and Ms Norman and did investigate the claimant's claim of fabrication and collusion. Having found that there was no reason as to why the witnesses would fabricate the evidence it was reasonable for the respondent to accept their accounts over that of the claimant.

Did the respondent otherwise act in a procedurally fair manner

46. Other than in relation to the investigation the claimant has not suggested that the disciplinary procedure was otherwise unfair.

Whether the dismissal was within the range of reasonable responses.

47. The Tribunal finds that the dismissal was within the range of reasonable responses. The Tribunal reminds itself that a decision which appears to be harsh may nevertheless fall within the range of reasonable responses. The respondent's disciplinary policy stated that gross misconduct will result in summary dismissal. It goes on to provide a non-exhaustive list of offences that are normally regarded as gross misconduct, including 'using threatening or offensive language... towards other employees' and 'fighting and assaulting' another person. The claimant was found to be guilty of using threatening and offensive language, and could have been dismissed for this reason alone. He was also found to be guilty of pressing his forehead against Mr Connolly's and pushing it back. Although not fighting, this is serious aggressive behaviour by the claimant towards a colleague including physical contact. In all the circumstances it was within the range of reasonable responses for the respondent to conclude that this seriously damaged the trust and confidence that it had in the claimant and to summarily dismiss him. The fact that Mr Connolly may also have used offensive language does not give rise to inconsistent treatment, given the respondent's conclusions that the claimant, not Mr Connolly, was the aggressor.

48. Having found that there were no unfair dismissal it is not necessary for the Tribunal to consider whether the claimant would have been dismissed in any event had the dismissal been unfair and / or whether the claimant objectively contributed towards his dismissal. The remedy hearing listed for 5 December 2022 is to be vacated.

Employment Judge Hart

Date: 31 August 2022

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