



EMPLOYMENT TRIBUNALS

Claimant

Mr A Mohamed

v

Respondent

Sainsbury's Supermarkets Limited

Heard at: Central London Employment Tribunal (by CVP)

On: 22-23 November 2022

Before: Employment Judge Norris, sitting alone

Appearances

For the Claimant: In Person

For the Respondent: Ms J Shepherd, Counsel

JUDGMENT

The Claimant's claim is not well-founded and is dismissed.

REASONS

1 Background

The Claimant worked as a Customer Service Assistant at the Respondent's Acton Churchfield Road store from 10 May 2017 until his dismissal in October 2021. The Respondent is the well-known retailer and supermarket chain. The Claimant began ACAS conciliation on 8 February and concluded it on 16 February 2022. He submitted his claim to the Tribunal on 23 February 2022. The Respondent defended the claim by ET3 lodged on 19 April 2022.

2 Hearing

- 2.1 The Hearing was listed for 22-23 November 2022, having been postponed from 6-7 July and 22-23 September 2022.
- 2.2 We had a bundle of 142 pages prepared by the Respondent. I emphasised that the Respondent should ensure for future hearings that handwritten evidence before the Tribunal is typed up for the bundle as it was not always entirely legible but we made the best of it that we could. The Tribunal heard

evidence from the Respondent's witnesses: Mr M Bayless, now an Operations Manager, Mr C Byrne, Store Manager and Ms V Hindley, Area Manager. Mr Bayless was the store manager at the Acton store on the date of the incident that led to the Claimant's dismissal, Mr Byrne was the dismissing officer and Ms Hindley heard the appeal against dismissal. The Claimant then gave evidence and after that, following brief submissions from the parties, the decision was reserved overnight and the parties told not to attend until midday.

- 2.3 I record that the Claimant had not produced a witness statement and so I went through the bundle with him to ensure that I had read all the accounts of events on which he wished to rely. He had had the bundle and the witness statements for the Respondent but had not prepared any questions for the witnesses.
- 2.4 The Claimant also noted during the course of the first morning that he had originally rung the Tribunal and asked for an interpreter as English is not his first language. I did not consider it necessary to adjourn to obtain the services of an interpreter. The Hearing had been put back twice already. We were not discussing complex issues of fact or law and the Claimant, who had worked in a potentially public-facing role as a Customer Service Assistant, clearly understood what was being said and could be readily understood by the Tribunal. I said to him however that if he did not understand any of the questions put to him, he should say so and they could be asked a different way. Also, I asked each of the Respondent's witnesses to read their witness statements aloud and then I asked them some questions before adjourning for a short period so that the Claimant could think about any questions that he wanted to ask them by way of cross-examination.
- 2.5 I did not permit either party to add additional evidence to what was before me. This was particularly because the Claimant was not represented and because the Respondent, although represented, would not have the chance to verify any of the evidence that the Claimant might have sent in. I return to the evidence below. I do not set out in full the submissions, but I did have careful regard to what each party said to me.
- 2.6 The Hearing reconvened at 12.00 on day two. The Claimant did not return at that time or thereafter. I waited until 12.30 while the clerk made a number of unsuccessful efforts to call him. I had asked the parties to ensure they had their phones on so they could be contacted if necessary. In his absence at 12.30 I began to read the decision with reasons. The Claimant had not attended by the time I finished. I decided to provide these written reasons so that the Claimant understands why his case was unsuccessful.

3 Issues and the Law

- 3.1 The claim comprised a single issue, of unfair dismissal. The Respondent relied on the Claimant's conduct (specifically, assault or attempted assault on other colleagues or customers at work), which is a potentially fair reason for dismissal pursuant to section 94(1) Employment Rights Act 1996. The Claimant was not convinced that that was the reason, suggesting during the course of giving

evidence that his dismissal had been a plot by a new manager, Mr Kalkhoran, and others to have him fired. I therefore have to determine the reason for dismissal, and the burden of proof is on the Respondent in that regard.

- 3.2 If I find that the reason was the Claimant's conduct, I must not substitute my own view for whether the dismissal was fair or not, but I must consider whether in all the circumstances, the Respondent acted reasonably or unreasonably in treating conduct as sufficient reason to dismiss, taking into account the Respondent's size and administrative resources. The *Burchell* test¹ is applicable: in other words, I need to be satisfied on balance of probabilities that the Respondent's belief in the Claimant's misconduct was both genuine and reasonable, and based on as much investigation as was reasonable in all the circumstances.
- 3.3 I must then consider whether the Respondent's dismissal of the Claimant was within the range of reasonable responses. The burden of proof here is neutral.
- 3.4 I explained to the Claimant that I am not, in assessing the evidence and reaching my conclusions, acting as a point of appeal and that if I did substitute my own opinion, that would be an error of law. I am considering the evidence that was in front of the managers making the decisions, at the time they made them. I also explained to the Claimant that it does not matter that he does not have a lawyer. There is no weight placed on whether a party to the claim is represented or not.

4 Evidence

- 4.1 The way in which the claim arose is as follows. On 22 September 2021, the Claimant was involved in an incident with Mr Kalkhoran. It appears to be common ground that although it was not Mr Kalkhoran's first day, it was the first time the two men had worked together. Also on duty were three other members of staff, including Mr Bayless and another Customer Service Assistant, Mr Rodrigues. As a result of that incident, the Claimant was suspended and called to an investigation meeting with another Store Manager, Mr Bamania, which took place over more than one day.
- 4.2 The matter was forwarded for a disciplinary hearing, which the Claimant did not attend. He was dismissed in his absence. He appealed and a hearing took place remotely, chaired by Ms Hindley. The Claimant had a union representative at that appeal hearing, which was unsuccessful.
- 4.3 The Claimant says that the incident happened after Mr Kalkhoran had been instructing him to do lots of different tasks. He says he had asked Mr Kalkhoran to let him finish one task before making him start another. At one point, the Claimant says, he was making his way to remove a "roll cage"² from the shop floor when Mr Kalkhoran appeared and was shouting at him that he would call the store manager. The Claimant was unsure what he had done. Mr Bayless

¹ *British Home Stores v Burchell* [1978] IRLR 379

² One of the large metal cages used to move produce around the supermarket

came to the Claimant, shouting and “treating him like he was nothing”. He asked the Claimant why he was being rude and aggressive to Mr Kalkhoran.

- 4.4 The Claimant says that he spoke normally throughout and had asked Mr Kalkhoran to move out of the way of the cage and had not hit him with it. The Claimant saw Mr Kalkhoran talking to a security guard, Mr Akbary, after the incident, saying he wanted to get the Claimant fired. Mr Akbary works for Mitie and not for the Respondent.
- 4.5 The Claimant says he did not attend the disciplinary hearing because he had not been aware it was taking place. He says that he did not receive invitations to attend on 19 or 26 October. He only received one single missed call from the store, which was on 26 October 2021, and he rang back a minute later. He says he told Mr Byrne he was eating his lunch but could be at the hearing in 30 minutes. Mr Byrne just said words along the lines of, “sorry mate” and hung up on him.
- 4.6 The Claimant did attend the appeal hearing. He confirms that he and Ms Patel, his USDAW union representative, were able to make appropriate representations.
- 4.7 The Respondent’s evidence suggests a different version of events on 22 September and thereafter. Mr Kalkhoran told Mr Bamanian at the investigation that the Claimant was around 45 minutes late for work and behaved in an aggressive manner from the start after Mr Kalkhoran raised this with him. He was intermittently absent during the day and then was on his phone. He said it was to his GP so Mr Kalkhoran said nothing more. Then the Claimant came up with the roll cage and told Mr Kalkhoran that this was his “routine” and he knew what he was doing.
- 4.8 A delivery arrived and Mr Kalkhoran asked the Claimant to give him the roll cage and to go to work in the produce section. The Claimant became aggressive and animated and shouted at Mr Kalkhoran that he knew what he was doing and Mr Kalkhoran could not have the cage. He pushed the roll cage towards Mr Kalkhoran who had to move out of the way and felt threatened for his safety.
- 4.9 Mr Rodrigues was standing nearby. He told Mr Bayless that he had heard the Claimant shouting at Mr Kalkhoran and refusing to give him the roll cage, asking “How much work do you want me to do”? Mr Rodrigues said he could hear clearly what had happened.
- 4.10 It is the Respondent’s case that an invitation was sent by Special Delivery for the disciplinary hearing that was initially fixed for 19 October. The Claimant did not attend and Mr Byrne checked the Royal Mail tracking, from which he could see that someone had signed for it. Nonetheless he adjourned the hearing to 26 October and sent out another Special Delivery letter. He says that according to the Royal Mail website this also was signed for, although only a copy of the first tracking signature was in the bundle.

- 4.11 On 26 October 2021, the Claimant again did not attend. Mr Byrne says he used the store phone and tried to ring the Claimant but he did not pick up. Mr Byrne dealt with the matter in his absence. He noted that the store CCTV showed the Claimant using “aggressive mannerisms” both towards Mr Kalkhoran in the initial incident and also in the stairwell, where Mr Bayless took him before he was suspended. I did not have the CCTV or any stills before me. The Claimant, who confirmed that he has seen the CCTV, did not suggest that the footage showed anything other than what it was said by the Respondent to show.
- 4.12 Mr Byrne concluded that the Claimant should be dismissed. He spoke by phone with Mr Khan, HR Adviser, who agreed that it had been appropriate to deal with the matter in the Claimant’s absence on the second occasion. After the hearing was over, the Claimant rang Mr Byrne and said he could be there in two hours. Mr Byrne told the Claimant that the hearing was over and that the outcome was that he had been dismissed.
- 4.13 There was a potential issue around the timing of the confirmation letter of dismissal. Although the decision was taken on 26 October, the letter confirming it was not sent out until 8 November. The Claimant thus did not receive it until 9 November 2021. I have to determine whether I accept the Respondent’s evidence that Mr Byrne told the Claimant by phone on 26 October 2021 that he was dismissed, which would mean his claim would be out of time, or whether the first the Claimant knew of his dismissal was on receiving the letter on 9 November as he says, in which case it would be in time.

5 Findings and Conclusions

I make the following findings and reach the following conclusions based on the evidence before me:

- 5.1 I am satisfied that the Respondent has shown the reason for dismissal was misconduct, namely aggressive behaviour. The Claimant has not shown any evidence for why Mr Kalkhoran, whom he had met for the first time only that morning, might want to remove him from the store or get him dismissed, prior to the incident. The Claimant did not suggest that Mr Bayless had that agenda, or question Mr Bayless about it in cross-examination, although he said in his brief submissions that there had been such a plan.
- 5.2 The Claimant confirmed that he did not hear what Mr Kalkhoran said to the security guard Mr Alakbary, who was asked about this subsequently by Ms Hindley and made a statement. Mr Alakbary said Mr Kalkhoran told him only that the Claimant was a troublemaker and was going through a disciplinary procedure. He did not report Mr Kalkhoran saying he wanted the Claimant fired. I also note that although the Claimant said he had not met and discussed this with Mr Alakbary (and that they were in touch only by social media), Mr Alakbary’s own statement says they did. Mr Akbary does not, as I have said, work for the Respondent and I can see no reason for him to mislead Ms Hindley. Accordingly, I do not accept that there was any other reason than the Claimant’s misconduct for the decision to dismiss.

- 5.3 I am also satisfied that the Respondent had a genuine and reasonable belief in that misconduct. Mr Bamania took statements from all those present on the day. Mr Byrne had watched the CCTV and concluded that it more closely matched the accounts of the others present than that of the Claimant. The evidence before Mr Byrne was therefore on balance of probabilities that the Claimant had behaved in the manner alleged.
- 5.4 I appreciate that the Claimant has since spoken to Mr Rodrigues, taking a covert recording of what he said. Mr Rodrigues apparently told the Claimant that he is not a witness for anyone. He has certainly not given a statement for or appeared as a witness in this hearing. However, he did give a statement at the time, and it was not supportive of the Claimant's version of events. Mr Byrne had that statement in front of him when he took the decision.
- 5.5 The Claimant did not attend the disciplinary hearing to put forward his side of the story. He said at this Hearing that he rang straight back when he realised he had had a missed call from the store and said that he could be there in 30 minutes. He held up his phone to the camera during his evidence and showed that on 26 October 2021, he had a missed call from the store at 13.05 and an outgoing call to the store at 13.06 which lasted six minutes. He said that returned call was to Mr Byrne. However, the screen does not show to whom he spoke to when he returned the call. He also did not make his full call log available to the Respondent at the time, despite telling Ms Hindley he would do so, nor has he made it available to the Tribunal by way of inclusion in the bundle.
- 5.6 I accept the Respondent's submission that the notes taken of the disciplinary hearing do not reflect the Claimant ringing back at 13.06 and speaking to Mr Byrne. I note that if the Claimant had genuinely not received the invitations to the hearings, he would not have known who to ask for in any event.
- 5.7 I further note that in the appeal hearing conducted by Ms Hindley, the Claimant said that he told Mr Byrne he could be there in an hour because he wanted to eat something with his friend. That was inconsistent both with what Mr Byrne says and with what the Claimant told the Tribunal. The Claimant has not suggested that the appeal hearing notes are inaccurate, and anyway he had a union representative with him who could have corrected the notes subsequently if she considered they were wrong. Therefore on balance of probabilities I prefer the Respondent's case that in fact the Claimant did not ring Mr Byrne until after the hearing had concluded and that he said he could be there in two hours but he was told it was too late.
- 5.8 I also find on balance of probabilities that the Claimant did receive the letters inviting him to the disciplinary hearing. He said repeatedly to the Tribunal that he is the only person living in his home. The details of his address (number and postcode) are correct and the delivery was signed for. The signature does not match the Claimant's signature in his passport which he also held up to the camera, but I consider that that is not unusual when someone signs for a special delivery letter using a stylus on a handheld Royal Mail device. The postal

worker has also typed that the name of the person receiving the delivery was "Absulaoni". This is not dissimilar to the Claimant's first name, Abdulqani.

- 5.9 It would have reinforced the Respondent's case if Mr Byrne had made a contemporaneous note of the conversation with the Claimant after the hearing, and also if he had retained the special delivery tracking or screenshots of both the second invitation and outcome letters. It would also have been helpful to the Tribunal in understanding the evidence if Mr Byrne had explained fully in his statement how it happened that he did not send out the letter of dismissal for an extended period after having made the decision. However, there is sufficient evidence in the bundle to corroborate the evidence he gave. I conclude that he was entitled to proceed on the basis of what he had in front of him.
- 5.10 I also accept the Respondent's evidence that Mr Byrne told the Claimant on 26 October after the hearing had concluded that he had been dismissed. On that basis I conclude that the Claimant had until 25 January 2022 to enter EC but did not do so until 8 February 2022. On that basis, the Tribunal does not have jurisdiction to hear the claim.
- 5.11 However, in case I am wrong on that, I have gone on to consider the claim on its merits. I have asked myself whether no reasonable employer would have dismissed the Claimant in these circumstances. I consider that although it is accepted the Claimant did not make contact with Mr Kalkhoran when he pushed the cage towards him (despite Mr Kalkhoran claiming in his initial statement that he had done so), and therefore the misconduct may have been at the lower end of the scale initially at least, the evidence nonetheless proved on balance of probabilities that he had behaved in an aggressive manner towards a supervisor or manager. Furthermore, such behaviour was repeated in the stairwell afterwards, causing the Claimant's colleagues to fear for their own safety and the safety of others.
- 5.12 I consider that there is a visible difference between someone using their hands in a calm manner when they speak and someone, who is behaving aggressively, using them to underline their anger and frustration. The Respondent's witnesses Mr Byrne Ms Hindley gave evidence that the CCTV supported in this case it was the latter.
- 5.13 Accordingly, while not every employer might have dismissed the Claimant, I consider in the circumstances that dismissal was in the band of reasonable responses open to a reasonable employer.
- 5.14 Had there been any procedural discrepancies in the conduct of the investigation and/or disciplinary hearing, I consider that they were addressed by Ms Hindley's very thorough appeal. She re-interviewed the witnesses, including Mr Rodrigues, who confirmed his original statement and told her that he was afraid of the Claimant (although also maintaining that the Claimant had not threatened him). Again, while Mr Rodrigues may have given a different version of events to the Claimant, I am concerned with what was in front of the Respondent at

the relevant time, not what Mr Rodrigues has said subsequently to somebody else. There is no basis from what I can see to suggest that Mr Kalkhoran, Mr Bayless and/or Mr Bamanian put pressure on Mr Rodrigues to change his story, nor as I have found was there any reason for them to do so. The Claimant says it was because Mr Rodrigues would have to support management, otherwise he would be in fear of his own job. However, that was not what Mr Rodrigues told Ms Hindley. He confirmed what he had previously said. This meant that there was no good reason for Ms Hindley to overturn Mr Byrne's original decision.

- 5.15 Accordingly, I conclude that dismissal was within the band of reasonable responses; if the Tribunal has jurisdiction to hear it, the claim is not well-founded and is therefore dismissed.

Employment Judge Norris
23 November 2022

Judgment and Reasons sent
to the parties on:

24/11/2022

For the Tribunal: