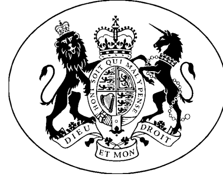

EMPLOYMENT TRIBUNALS

Claimant: Mr A Palmer v **Respondent:** The Flannels Group Limited

Heard at: Nottingham **On:** 17 & 18 October 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: In Person
For the respondent: Ms J Twomey (Counsel)

JUDGMENT

1. The claimant's claim for unlawful deduction from wages is dismissed upon withdrawal.

2. The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. At the hearing, the claimant advanced his claim for unfair dismissal. The respondent relied on the claimant's misconduct as justifying his dismissal, arguing that the claimant had acted in an intimidating manner towards a child whist at work, and then used racially charged language in a debate with members of the public on the shop floor. The claimant denied acting in an intimidating manner towards the child, and said he was provoked into using the language he did during an altercation. He denied that the language was racially charged.

2. I make clear, at this prominent point in these reasons, that I found the claimant to be polite, humble and impressive throughout the proceedings. Although I ultimately

dismissed his claims, the contents and matters described in these reasons are not, in my view, indicative of the claimant's broader character or his ability to work professionally in his field. I merely found that the respondent in this case acted reasonably in coming to the views it did, and that those views allowed it to dismiss the claimant because that sanction fell within the range of reasonable responses.

3. The claimant represented himself and gave evidence himself in support of his claim. The respondent was represented by Ms J Twomey of counsel. The respondent's sworn witnesses were: Mr Harley Guadagni (Assistant Store Manager); and Mr Robert Flower (Area Manager).

4. I also had access to an agreed bundle of documents which ran to some 95 pages. Page references in this document refer to the pages of that bundle. Finally, I had access to CCTV footage of the incidents which formed the misconduct found by the respondent. We watched those incidents, described below, in the hearing together. I also had access to the clips to view separately. Stills from the footage appear in the bundle.

Issues to be decided

5. The issues were:

   5.1. ***Ordinary unfair dismissal –***

   5.1.1. has the respondent shown that the claimant was dismissed for reason of his conduct?

   5.1.2. did the respondent carry out such investigation into the claimant's conduct as was reasonable in the circumstances?

   5.1.3. did the respondent, at the time the decision to dismiss was taken, have a genuine and reasonably held belief that the claimant had committed the misconduct?

   5.1.4. did the respondent act reasonably in treating the misconduct as sufficient reason to dismiss the claimant?

   5.1.5. was the dismissal fair or unfair in accordance with s98(4) ERA 1996 and, in particular, was dismissal within the reasonable range of responses which a reasonable employer might have adopted?

Findings of fact

6. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the bundle of documents I was provided with prior to the hearing starting.

Background

7. The claimant was employed at the Flannels store in Nottingham from 6 April 2011 until his dismissal on 16 December 2020. By the time of his dismissal, the respondent was the legal entity employing him; Flannels is now part of the Frasers Group. The claimant worked as a senior sales person on the shop floor. On the day of the incident, he was working on the ground floor of the stoor. The claimant had no history of disciplinary issues prior to the day in question. It is clear from the

claimant's comments in the hearing that he perceives there to have been a decline in the number of customers in the store whom he enjoys serving over the time he worked there.

13 October 2020

8. The claimant was working with one other person on the shop floor on the day of the incidents. There were Covid restrictions in place at the time. The claimant and his colleague were wearing masks, and it was a practice for customers to wear masks, too, where able. At around 4:10pm, two young customers entered the store. They were boys in school uniform, aged somewhere between 11 and 14. On the CCTV, it appears that one of them has a mobile in his hand. A colleague greeted them on the door to ask if they had face coverings. One of them said that he had asthma, and they walk together to the back of the store on the ground floor.

9. The claimant approaches them at the back of the store. On the CCTV, the claimant is seen walking up to the boys with his hands across his chest. He bends forward as he speaks to them appears to be asking them questions. The smaller boy responds to him. The claimant takes a clear step towards the boy and the boy rocks back on his heels and steps away to maintain his personal space. The claimant then gestures for them to move to the front of the store. Contrary to the respondent's witnesses recollection, it does not appear to me that the claimant herds or pushes the boys out of the store. He is ahead of them and leads them to the door. The boys leave.

10. There is some difference between the parties about what was said to the boys by the claimant at this time. There is no audio on the CCTV. The claimant says that he challenged the smaller boy because he was taking photos of stock and he knew from previous interactions that the boy was not a serious customer and could be disruptive. Other evidence suggests that the claimant challenged the boy about whether he had a job or whether he could pay for the items he was looking at and that the boy was unhappy at being picked on. I do not consider that the precise wording of the conversation at this point is relevant. I accept the respondent witnesses view that the claimant did not have authority to eject the boys and that he should have alerted a manager to the situation but did not do so.

11. I accept that the younger boy was upset by the interaction and went to sit outside. Mr Guadagni confirmed that the boy was upset when he came back into the store shortly after. It is apparent that the boy was seen by a street warden who was also from time to time a customer in the store. She came to the store and confronted the claimant. She did not come alone, and brought another street warden with her. The claimant says that the street warden was abusive towards him in the doorway and referred to him as being black on the outside and white on the inside, or a 'coconut'. I accept that this. The claimant went to the door as they came to the store and could see others outside from the same group. The claimant sought to close the door to stop them all entering, but the boy was in the doorway. The door was opened to allow the boy back in, and then closed. The claimant walked away from the door to get management support.

12. Around a dozen members of the street warden group then filed into the store and stood at its entrance. The claimant says, and I accept, that he found this to be very

intimidating. Mr Guadagni arrived to the incident and spoke to the claimant at the back of the store. Both he and the claimant agree that the claimant relayed what had happened with the boy. The claimant went to serve another customer at the till point whilst Mr Guadagni spoke to the street wardens. At some point, the claimant says he was threatened to be attacked by an uncle of the group. The claimant is then drawn back into the conversation and goes to stand near Mr Guadagni. The claimant then made a comment about the 'race card'. There is some dispute about the precise wording, but I accept the claimant's recollection that he said *"at least you can't use the race card"*. I do not consider the precise formulation of the disputed wording to be relevant. I find as a fact that the claimant used the word 'race card' to highlight that he, the boys and the street wardens are black and so the claimant could not be accused of being racist.

13. The group and the boys then left the store and the incident was reported to the store manager, who decided that the matter should be investigated.

Investigation and dismissal

14. The claimant was alleged to have (1) behaved unprofessionally towards customers who were minors, and (2) used racially inappropriate language on the shop floor. The investigation was conducted by Sophie Liversidge, who was the store manager at the time. She spoke to the other colleague on the shop floor with the claimant, Mr Guadagni, and the claimant. She also viewed the CCTV of the incident of the time (the relevant parts I have also seen). Ms Liversidge thought that the claimant should answer the allegations in a disciplinary hearing and Mr Flower was appointed to chair that process.

15. On 28 October 2020, the claimant was invited to a disciplinary hearing and was told that dismissal could be an outcome. The hearing was scheduled for 3 November 2020 but the claimant did not come. He did not have access to the e-mail account the respondent had used to communicate with, although he confirmed in cross examination that it was an address he had supplied to the respondent and/or that this was an address he knew the respondent held for him. A reconvened disciplinary hearing took place on 10 December 2020. I am satisfied that the claimant was presented with all of the evidence gathered and was given an opportunity to respond to it.

16. In the disciplinary hearing, the claimant conveyed what had happened on 13 October 2020. He opined that the boys in question often caused problems and had no manners and a bad attitude. He admitted that he had felt angry or annoyed at the boys and that he had decided to ask them to leave, and did so. The claimant did raise that he felt threatened and abused by the group of people at the store, but the notes from the hearing do not convey that the claimant made a link between feeling threatened and making the comment about the race card. The claimant confirmed key parts of the allegations made against him. In particular, he confirmed that (1) he had felt angry when dealing with the boys, (2) he had a negative opinion of them, (3) he wanted to get them out of the store quickly, and (4) he had made a comment about an inability of the group to play the 'race card'.

17. Mr Flower then consulted with HR and reflected upon the evidence and decided that the claimant should be dismissed to guard against any further damage to the

Flannels brand. Mr Flower did not consider whether any lesser sanction could have solved the same problem. He did not consider whether the claimant had acted because he was provoked. He did not consider the claimant's training or disciplinary records. He did not consider what policies and procedures were in place in the store itself at the time.

18. The claimant was told of his dismissal for gross misconduct by letter dated 15 December 2020. The claimant was allowed time to appeal against that decision but he did not do so.

Relevant law

19. Under *s98(1) of the Employment Rights Act 1996*, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with *section 98(2)* or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within *section 98(2)*.

20. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, *section 98(4) of the Employment Rights Act 1996* states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with the equity and substantial merits of the case.

21. In *Iceland Frozen Foods v Jones [1982] IRLR 439*, it was held that, when considering s98(4), the tribunal should consider the reasonableness of the employer's conduct and not simply whether the dismissal is fair. In doing so, the tribunal should not substitute its view about what the employer should have done. The case also outlined that there is a range of responses open to a reasonable employer; although different employers could come to different decisions in the same circumstances, all might be reasonable. Consequently, the tribunal must consider whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the reasonable range of responses which a reasonable employer might have adopted. If a dismissal falls outside that band, then it is unfair. The tribunal should consider the whole dismissal process, including any appeal stage, when determining fairness (*Taylor v OCS Group Ltd [2006] ICR 1602*).

22. When considering cases of alleged issues of conduct, it is important to consider the case of *British Home Stores v Burchell [1980] ICR 303*. This case establishes a three stage test for dismissals:

    22.1. the employer must establish that it believed that the misconduct had occurred;

    22.2. the employer had in its mind reasonable grounds upon which to sustain that belief; and

22.3. when the belief in the misconduct was formed, the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

23. The band of reasonable responses test applies as much as much to the respondent's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets v Hitt [2003] IRLR 23*). The tribunal must focus on whether the employer's investigation was reasonable in all the circumstances (*London Ambulance v Small [2009] IRLR 563*).

Discussion and conclusions

24. My role is not to determine what decision I would have made in the same circumstances. In the hearing, I challenged the respondent quite strongly about an apparent failure to consider if a lesser sanction, such as mandatory training, should have been put into place for the claimant instead of dismissal. In my view, the respondent could have handled the situation on 13 October 2020 in a way which did not lead to the escalation of the situation. The claimant was not asked to leave the shop floor, as might be expected where a member of the public is angrily confronting him. It is obvious from the CCTV footage that the claimant was caught in an intimidating situation with several members of the public arranged at the shop front making threats against him.

25. There is no evidence before me to suggest that the claimant's colleagues stood up for him or gave him public support when dealing with that group of people. Nowhere in the bundle or in evidence does it appear that anyone took any steps to check on the claimant's welfare or provide any support following what must have been a scary experience that the claimant encountered in the workplace. Aspects which are plainly capable of interpretation as the claimant trying to protect himself, such as shutting the front door on the group of people trying to enter, were held against him as aggravating conduct. To me, it is clear that the respondent has failed the claimant in these material aspects. These failures also risk damage to the Flannels brand, which appears to be the respondent's primary concern.

26. Instead, the respondent opted to conduct an investigation and then carry out disciplinary action against the claimant. The legal test that I have to apply is outlined above, and the reasonable range of responses test means that a dismissal will be fair if any reasonable employer could have opted to dismiss an employee in all the same circumstances. Just because a dismissal is within a reasonable range of responses does not mean that it is the most appropriate decision in the circumstances. It does not mean that other reasonable employers would always dismiss the employee in the circumstances.

27. Instead of putting immediate support in place for the claimant, the respondent opted to investigate the cause of the incident. The investigation involved talking to members of staff who witnessed the incident and a review of the CCTV. In my judgment, the respondent conducted a reasonable investigation in the circumstances. It reviewed the material available. It considered that the claimant had a case to answer – he was seen to be acting aggressively towards the boy who was upset, and his words to the effect that the complaining warden could not 'play the race card' was considered to be inappropriate from a member of staff.

28. At the disciplinary stage, the claimant did not particularly fight his case. In his submissions, he said that he did not think that he needed to. He says it did not cross his mind that he might be dismissed for what happened, although he acknowledged that he was told that dismissal might be an outcome of the process. This meant that he missed an opportunity to raise matters about his feelings on the day which may have explained his behaviour and given some insight which might have changed the sanction imposed. In other words, when considering all of the evidence available upon which to base a decision, Mr Flowers was not given any further information which might have diverted his mind away from dismissing the claimant.

29. The claimant points to some issues with communication as evidence that the process he was subjected to was unfair. In cross examination, he confirmed that the e-mail address used was one that he had given to or authorised for use at the respondent, although he said that everyone knew he did not have access to it. I do not consider that the respondent can be criticised for using an e-mail address it had been given to correspond with the claimant. In any event, I note that the respondent did make accommodations for miscommunications and that the claimant was still able to engage with the disciplinary process. I can detect no significant unfairness with the process that the claimant was subjected to, keeping in mind that the process need only be reasonable in all the circumstances. In my judgment, the process adopted by the respondent was fair.

30. I am satisfied that the claimant was dismissed for a reason relating to his conduct. I am satisfied that the respondent held a genuine belief that the misconduct occurred. It had seen the CCTV footage and a comment including the phrase ‘race card’ was heard by colleagues. These points also meant that, in my view, that belief was formed on reasonable grounds. I have already found that the respondent conducted a reasonable investigation in all the circumstances. These points satisfy what has become known as the ***Burchill*** test. The final question, which caused me the greatest difficulty in deliberations, is whether the decision to dismiss fell within the reasonable range of responses.

31. In the hearing, the claimant explained that his actions on CCTV may have been informed by his cultural background. When the sound is removed, the claimant accepted that his actions may have appeared to be intimidating or aggressive. However, he submitted that this was not his intention, and said that his cultural background meant that he had a propensity to express himself with his hands and gestures. This tendency was apparent in the hearing, where the claimant was physically expressive despite conducting himself in a calm and professional way. He was unhappy that this was not taken into account. He was also unhappy that no allowances had been made to account for the stress and pressure he felt under on that day after the street wardens had entered the store. In his view, the respondent failed to take into account all of the circumstances of his case which meant that the decision to dismiss was too severe. I have sympathy with these points. Only in the hearing did Mr Flowers accept that the claimant had himself been racially abused. It is surprising to me that this point had not been considered before I asked directly about it – if for no other reason than to ensure that colleagues are properly looked after.

32. However, despite these arguments, the respondent was still faced with the following reasonably drawn conclusions:

    32.1. The claimant had opted to eject a child from the store without the authority to do so and without concern for his wellbeing;

    32.2. The claimant had stepped towards the child when speaking to him, leading the child to visibly step away as if afraid;

    32.3. The claimant upset the child, a member of the public who is or could be a customer;

    32.4. The claimant did not do all he could to diffuse the ensuing tensions and did engage in conversations with the members of the public who he says provoked him; and

    32.5. The claimant did make a reference to the ‘race card’ to a member of the public who is or could be a customer.

33. In my judgment, it would be perverse of me to accept these reasonably drawn conclusions, particularly relating to the initial interactions with the child which caused upset, and then find that the decision to dismiss fell outside of the reasonable range of responses. Viewed through that lens, despite all my hesitations about how the respondent has treated the claimant’s case, the decision to dismiss was plainly open to a reasonable employer.

34. Consequently, I find that the claimant was not unfairly dismissed.

22 December 2022

Written Reasons sent to the parties on:

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For the Tribunal Office:

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