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EMPLOYMENT TRIBUNALS

Claimant: Mr J Childs
Respondent: Bunzl UK Limited
Heard at: East London Hearing Centre
On: 2 February 2023
Before: Employment Judge Feeny

Representation

Claimant: Did not attend
Respondent: Ms G Nicholls (Counsel)

JUDGMENT having been sent to the parties on 7 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. This was a claim for unfair dismissal only. The Claimant was dismissed for gross misconduct following a fight in work on 21 March 2022. The fight ended with him knocking out a colleague with a roll of pallet wrap. The Claimant was summarily dismissed in a letter dated 14 April 2022.
2. The Claimant presented his ET1 on 19 May 2022. The ET1 initially complained of race discrimination as well as unfair dismissal but the claim for discrimination was subsequently withdrawn by the Claimant.
3. There was a telephone preliminary hearing in front of EJ Norris on 31 October 2022 which the Claimant attended. Following this hearing, a case management order was sent out. The final hearing was listed as an in-person final hearing for 2 and 3 February 2023. The parties were told to attend for 9.30am on the first day of the hearing. A separate notice of hearing was sent with the Employment Tribunal's address clearly stated on it.
4. On the day of the hearing at 9.30am, the Claimant called the Tribunal office to say that he was running late due to bad traffic. At 10.30am, my clerk attempted to call the Claimant for an update on the mobile number provided in the Claimant's ET1. The number, however, was not recognised and my clerk could not get through to the Claimant.

At 10.40am, the Claimant called the office again to say that he was lost and that he could not find the Employment Tribunal on his Sat-Nav. The Claimant hung up before my clerk could ask for his telephone number or to give directions to the Tribunal. At around 11am, the Claimant called again, he said that he was at the Tribunal but the car park was full. At this point my clerk took his number but before he could pass the Claimant to another member of staff to give directions to an alternative car park, the Claimant again hung up. At around 11.30am, the Claimant had still not arrived. My clerk called the Claimant and suggested a couple of local car parks where he should be able to find space. The Claimant told him that he had tried all of the car parks nearby and they were full, that he and his witness were going home and that he would not attend the Tribunal in person today.

5. I called the case on at 11.45am. I decided to proceed in the absence of the Claimant pursuant to Rule 47. I was satisfied that the Claimant did not have a good reason for his non-attendance. I do not accept that there were no available parking spaces in the general area, which includes Canary Wharf, which has a large car park. The Claimant could have also driven further out of London, parked, and got a train back in. This was not a day of train strikes. As a last resort, the Claimant could have got his witness to drop him off at the Tribunal and wait in the car for him to come back.

6. Furthermore, if the Claimant had been willing to engage with my clerk on the phone, a solution could have been found. I had already delayed the commencement of the hearing and I would have been willing to delay the start further if the Claimant had agreed on a solution and been able to attend. Instead, I consider the Claimant acted discourteously in not attending and he has also wasted the Tribunal's resources, with other cases waiting to be heard instead of this one. For that reason, I decided to not adjourn the hearing, as this may have affected the listing of other cases.

7. I decided to proceed in the absence of the Claimant, rather than dismiss the claim, because the Respondent has the burden of proof in a complaint of unfair dismissal. I heard evidence and decided the claim in the Claimant's absence.

8. Mr Trevor Howlett and Mr Martin Allen were called by the Respondent as witnesses. They both confirmed their witness statements were true under oath. They were both asked a couple of questions by myself and also by Ms Nicholls, Counsel for the Respondent. I spent most of the hearing watching the CCTV footage which was helpfully played by the Respondent's solicitor on a TV screen in the Tribunal room. At various points, I asked Mr Howlett to clarify aspects of the footage whilst he was still under oath.

9. I read the Claimant's witness statement, but I have attached little weight to it for two reasons. Firstly, the Claimant is not here to be asked questions about it, and, secondly, I agree with Ms Nicholls that there are inconsistencies between that statement and the documentary evidence in the bundle. At the conclusion of the evidence, I heard brief oral submissions from Ms Nicholls on behalf of the Respondent. She also provided a written skeleton argument which I had read in advance of commencing the hearing.

Findings of Fact

10. The Claimant was employed by the Respondent as a warehouse operative at its

Harlow warehouse. His employment commenced on 8 January 2020. On 21 March 2022, an incident occurred involving the Claimant, his brother Jamie Salter, and a colleague, Dudek Przemyslaw ("Dudek"). A friction had developed that day between the three individuals with Dudek apparently refusing to provide a cigarette lighter to the Claimant's brother. This initial exchange was not caught on a CCTV camera within the Respondent's premises. However, all relevant incidents thereafter were captured on the Respondent's CCTV cameras and, as I have indicated earlier in this judgment, I was able to watch the relevant footage during the hearing. There were four different CCTV cameras that captured the relevant incidents and I will briefly summarise what they show.

11. Firstly, there was CCTV in the car park. This shows Dudek and the Claimant entering the car park broadly together. Dudek is aggressive towards the Claimant. He moves towards him and grabs the Claimant by his hoodie. The Claimant throws a punch towards Dudek but apparently in self-defence. During this altercation, Dudek pulls off the Claimant's hoodie, leaving the Claimant topless. Dudek attempted to strike the Claimant again but the Claimant walks back to avoid the punch. At this point Dudek walks off and the Claimant is left still topless, he punches his fists together a few times then collects his scooter and heads to the canteen.

12. The second CCTV footage is in the canteen. It shows the Claimant's brother present but he leaves before the incident occurs. As the incident occurs in the car park, the footage shows the other employees within the canteen standing up and watching what was going on through the window. Dudek then walks straight into the warehouse (you can see his hi-vis vest go past the canteen door) but without him going into the canteen. The Claimant comes into the canteen still topless, he is holding his black t-shirt and grey hoodie. He puts his scooter in the corner, prowls around in an agitated state, puts his t-shirt on whilst still holding his hoodie, and then goes into the warehouse.

13. The third video is within the warehouse. This shows the Claimant walking in. He puts his hoodie on. He walks past his brother, who is in the middle of the warehouse. He says something to his brother but only in passing and then goes straight to Dudek who is in the top corner of the warehouse as viewed from the CCTV camera angle. It is difficult to see who speaks first but there is then a lunge from Dudek towards the Claimant. The Claimant's brother comes over and gets in between the two, presumably to try and stop the fight. However, the conflict then spills into the main aisle in the warehouse. Dudek then attacks the Claimant's brother. This prompts a kick from the Claimant towards Dudek's legs. Dudek then throws something towards both of them. In evidence Mr Howlett told me that he thought this was a small bundle of plastic. The CCTV footage then shows both brothers back away from Dudek. Dudek goes to the aisle towards the top of the screen to pick something up. At this point, the Claimant turns and picks up a roll of pallet wrap. He turns back around to try and find Dudek. By this point Dudek has gone towards the bottom of the screen, to an aisle where (I am told) cases may contain knives. However, rather than a knife, Dudek picks up a mop handle and then moves into the main aisle, swinging the mop head at the Claimant's brother. By this point the Claimant had run behind Dudek and, as Dudek advanced on his brother, he struck him on the back of the head with the roll, knocking Dudek to the floor where he then lies unconscious.

14. The final CCTV footage is of a different angle in the warehouse. This does not show much more than what the previous footage shows. It really only captures the final blow to the back of Dudek's head which sends him to the floor. This footage shows that

both brothers walked back into the canteen, with the Claimant's brother then coming immediately back out with the transport manager to check on Dudek.

15. Returning then to the general chronology, the Claimant was suspended the same day, as was his brother. Dudek was taken to hospital in an ambulance and was later suspended. On 23 March 2022, an investigation was commenced by Mr Howlett, Operations Manager. Mr Howlett interviewed the workers who were in the area at the time, many of whom who can be seen on the CCTV footage. Two statements are of note in particular. Firstly, one from Jed Oliver, page 241 of the bundle. He said that the Claimant "put his scooter to one side and was shouting 'I am going to snap him'. He put his top on and then went out into the Warehouse." The other statement is that of Moses Adesina, page 247 of the bundle. He told Mr Howlett "[the Claimant] was really agitated and hot tempered saying he wanted to fight Dudek." Mr Howlett completed his investigation with a report, see page 250 of the bundle and on 4 April 2022, the Claimant was invited to a disciplinary hearing, see page 253.

16. The disciplinary hearing took place on 8 April 2022, see page 256. The hearing was chaired by Mr Allen, Network Development Manager. Richard Gray, Senior HR Manager, was also in attendance. The Claimant attended and confirmed that he was happy to proceed without a representative. During the hearing, the Claimant was shown the CCTV footage and was given the chance to comment on it. There are two comments of his that are of particular significance. Firstly, the Claimant said, "I was calming down when I walked into the warehouse, just wanted to let my brother know what had happened." However, the CCTV footage shows that the Claimant only spoke to his brother in passing as he approached Dudek, who was beyond his brother in the warehouse. Secondly, the Claimant told Mr Allen that he only picked up the roll of pallet wrap because he thought Dudek was going for a knife. However, the footage shows that the Claimant had already picked up the roll before Dudek went to the aisle where the knives were contained.

17. Mr Allen, after considering all of the evidence, decided that the Claimant should be summarily dismissed for gross misconduct. This was confirmed in a letter sent to the Claimant dated 14 April 2022, see page 256. The Claimant was given a right of appeal but he did not avail himself of that right. Dudek was dismissed himself for the same incident on 19 April 2022, see page 297. The Claimant's brother was not dismissed, and no disciplinary sanction was applied as the Respondent considered that he was an innocent bystander, essentially caught up in the other two individuals' aggression.

The Law

18. The right not to be unfairly dismissed is contained in section 94 of the Employment Rights Act 1996 ("ERA") and the test the Tribunal must apply is in section 98 ERA. It is for the Respondent to prove that it had a fair reason for the dismissal; conduct is a potentially fair reason (s 98(2)(a) ERA).

19. As this is a conduct dismissal the well-established principles of **British Home Stores Limited v Burchell** [1978] IRLR 379 apply. They are:

- a. Did the Respondent genuinely believe that the Claimant was guilty of

misconduct?

- b. Did it have reasonable grounds for this belief?
- c. At the time that it formed the belief had it carried out as much investigation as was reasonable in the circumstances?
- d. Was dismissal within the range of reasonable responses?
- e. Was the procedure carried out fair?

20. The Tribunal must not substitute its view for that of the employer: the test is whether the Respondent's conduct in dismissing the Claimant was within the range of reasonable responses open to it (**Iceland Frozen Foods v Jones** [1982] IRLR 439, **London Ambulance Services NHS Trust v Small** [2009] IRLR 563).

21. However, the range of reasonable responses test is not infinitely wide and the Tribunal's consideration of the claim should not be reduced to procedural box-ticking (**Newbound v Thames Water Utilities Limited** [2015] IRLR 734). I must assess the substance of the decision.

22. I take into account the provisions of the ACAS Code of Practice for disciplinary and grievance procedures albeit compliance or non-compliance with the Code is not necessarily determinative of the claim.

23. In assessing whether to make a **Polkey** reduction I take into account in particular the guidance in paragraph 54 of **Software 2000 Ltd v Andrews** [2007] ICR 825.

24. For contributory fault, I can make a reduction in the Claimant's basic award due to any blameworthy or culpable conduct before his dismissal pursuant to section 122(2) ERA if it is just and equitable to do so. If I find that blameworthy or culpable conduct by the Claimant caused or contributed to his dismissal, I can make a reduction to the compensatory award pursuant to section 123(6) ERA providing it is just and equitable to do so. I take into account the guidance given by the EAT at paragraphs 8 to 12 in **Jinadu v Docklands Buses Ltd** UKEAT/1066/16/BA (unreported).

Conclusions

25. The first question that I have to consider is what is the reason for the dismissal, was it a potentially fair reason? I am satisfied that the reason for dismissal was conduct. This is, of course, a potentially fair reason pursuant to section 98(2)(b) ERA. I am also satisfied that the Respondent had a genuine belief in the misconduct.

26. The next question is did the Respondent have reasonable grounds to believe the Claimant guilty of misconduct? In my judgment, the answer is yes. The mainstay of the evidence is the CCTV footage. This shows everything that occurred relatively clearly, the only thing missing is sound. However, the Respondent had two separate accounts of what the Claimant said in the canteen, from the two witnesses quoted above, and they both

referred to the Claimant saying that he was going to – in essence - attack Dudek. It is clear from the footage in the canteen the Claimant was agitated, although of course this is unsurprising given the incident which had just occurred in the car park. The footage in the warehouse shows that the Claimant went straight to Dudek to reinitiate conflict. The Claimant could have taken the opportunity to have calmed himself down and to have informed management of what had happened in the car park but he did not.

27. The footage in the warehouse also shows that the Claimant picked up the roll of plastic wrap before Dudek had gone to the aisle where the knives were contained and was wielding this roll as a weapon. Whilst I accept that the Claimant struck Dudek over the head with the roll of pallet wrap at a time when Dudek was advancing on the Claimant's brother and attacking him with a mop handle, and therefore that the Claimant was attempting to protect his brother (who had been unfairly dragged into the fight) at that exact moment, his conduct up until that point shows that he was at least, in my judgment, an equal aggressor in the incident. He had the chance to simply report Dudek's aggression towards him in the car park but had failed to do so and had instead sought Dudek out in the warehouse to, as I have said, reignite the conflict.

28. The next question under the **Burchell** test is whether there was a reasonable investigation. Again, in my judgment, the answer is clearly yes. The CCTV footage was obtained and watched, and Mr Howlett took statements from all of the relevant individuals. There were no obvious additional steps that Mr Howlett could have taken.

29. I move then to the question of sanction. Was dismissal a fair sanction in these circumstances? I take into account - as Mr Allen did - that the Claimant was remorseful after the incident and to a degree he was attempting to protect his brother at the moment at which he struck Dudek, his brother being an innocent participant who had been dragged into a violent situation. However, Mr Allen was correct to say that the Claimant had had a number of opportunities to diffuse this situation. Instead, the Claimant went into the warehouse to seek Dudek out for further confrontation when he could - and should - have reported the car park incident to management instead. The legal test that I have to apply is was the dismissal within the range of reasonable responses open to the Respondent? In my judgment it clearly was.

30. Finally, in terms of liability, I consider the issue of procedure. Was the procedure followed by the Respondent fair and reasonable? I have read the ET1 and the Claimant's witness statement. In neither document does he make any criticisms of the procedure as carried out by the Respondent. Further and in any event, I have not been able to identify anything which I consider unfairness in the way the process was carried out and concluded.

31. It follows from those conclusions that the unfair dismissal claim is not well founded and is dismissed.

32. If I am wrong on that, I have considered whether I would have made a reduction to the Claimant's basic and compensatory award by way of contributory fault. I would have reduced both awards by 100%. The conduct of the Claimant in reigniting the fight with Dudek in the warehouse was blameworthy and culpable conduct which caused his dismissal. I accept that Dudek was also guilty of the same or similar conduct, but he was also, in my judgment, correctly dismissed. The Claimant was therefore 100% responsible

for his own dismissal.

33. Finally, I have considered the issue of **Polkey** but given that there is no counter-factual situation for me to address, it seems to me that I am not in a position to form any alternative judgment on whether I would have made **Polkey** reduction in the event that I found that the dismissal was unfair.

Employment Judge Feeny

21 February 2023