



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Glyn Price

**Respondent:** Fleet Express and Logistics Ltd

**Heard at:** West Midlands Employment Tribunal (by CVP)

**On:** 19 and 20 September 2023

**Before:** Employment Judge Routley

## Representation

Claimant: Mr A MacMillan (Counsel)

Respondent: Mr J Price (Lay representative and Claimant's son)

# RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimant was unfairly dismissed.
2. The Claimant did act in an aggressive manner towards Mr Pugh. The compensation awarded to the Claimant should therefore be reduced by 75% by way of the Claimant's contributory conduct.
3. The Claimant is therefore awarded **£2743.19**

# REASONS

## The hearing

1. For the purposes of this judgment, I shall refer to Mr Glyn Price as "the Claimant" and his son as "Mr Price".
2. The hearing took place by CVP. All parties attended. There were no significant connection issues.

3. The parties confirmed that there were no preliminary issues for me to deal with. It was clarified by the Claimant that the claim was one of unfair dismissal only.
4. The Claimant gave evidence on his own behalf. The Respondent provided witness statements for Michael Pugh, Mark Shaw, Jenny Nunn and Steven Williamson. However, Ms Nunn was unable to attend the Tribunal hearing as she was on holiday in Mexico. I informed the parties that I would read the statement of Ms Nunn but could place only limited weight upon it.

### **Findings of fact**

I make the following findings of fact:

1. The Claimant was employed by the Respondent as a trailer loader from 3 January 2018 until 16 December 2022, when the Claimant was dismissed with immediate effect.
2. The Claimant had a clean disciplinary record at the time of his dismissal.
3. On 8 December 2022, an incident took place between the Claimant and his supervisor, Michael Pugh. The Claimant and Mr Pugh gave very different accounts of this event.
4. Mr Pugh and the Claimant agree that the Claimant clocked out shortly after 8pm. Mr Pugh states that he followed the Claimant out to the yard and asked him to return to help with some work which still needed to be finished. The Claimant however states that Mr Pugh followed him and his colleagues out to the car and shouted "get out the fucking car you three, none of you are going fucking home." Mr Pugh admits to raising his voice, but denies swearing.
5. None of the witnesses to this incident provided a witness statement either to this Tribunal or at the time of the disciplinary investigation. There was CCTV footage of part of the incident but this has not been retained. I therefore have to make a finding as to what happened based only on the statements of Mr Pugh and the Claimant.
6. I find that the incident on 8 December 2022 happened in the manner described by the Claimant. I have chosen to accept the evidence of the Claimant over Mr Pugh. This is because of the inconsistencies in Mr Pugh's

evidence in respect of this incident. Mr Pugh's evidence in front of the Tribunal differed from that contained in his witness statement in a number of key respects.

7. In his witness statement, Mr Pugh described an incident which took place outside. However, in his evidence to the Tribunal Mr Pugh stated that the incident had taken place whilst the Claimant was in a car. Mr Pugh's witness statement also stated that he had gone back and resolved the issues with unfinished work by himself, but in verbal evidence stated that his colleagues had already dealt with the problem by the time he returned from speaking to the Claimant.
8. Whilst I appreciate the events in question happened some nine months ago, and that the memory of the event may have been eroded by time, Mr Pugh's witness statement was signed relatively recently.
9. I have also taken into account the fact that Mr Pugh stated during his evidence that he had intended to apologise to the Claimant on 9 December 2022. I find that Mr Pugh would not have felt the need to apologise if he had acted in the way set out in his witness statement. The fact he felt that an apology was necessary suggests that he knew that his behaviour was inappropriate.
10. On 9 December 2022, a further incident occurred between Mr Pugh and the Claimant. Again, there are significant differences in the accounts given of this incident.
11. Mr Pugh alleges that shortly after the Claimant arrived at work that afternoon, he came over to him and threatened either to "knock him out" or "knock his teeth down his throat".
12. The Claimant claims that he had told Mr Pugh that he did not like his actions the night before, and that he wanted Mr Pugh to show him and his colleagues some respect. The Claimant states that Mr Pugh apologised and asked that they draw a line under the incident.
13. I am required to make a finding of fact as to which version of events is accurate, as this will be relevant to the question of whether any award

should be reduced by way of contributory conduct, and/or on the basis of the principles set down in the case of *Polkey v AE Dayton Services Ltd*.

14. I have found this a very difficult exercise in circumstances where the only evidence in front of the Tribunal is the conflicting evidence of two witnesses. There are no contemporaneous documents, CCTV footage or additional witness statements that would assist me.
15. On 12 December 2022, Mr Pugh approached Mr Shaw. Mr Pugh had with him a letter of resignation and explained to Mr Shaw that he wished to resign as a result of the incident which took place on 9 December 2022.
16. On the balance of probabilities, I find that the incident on 9 December 2022 occurred in the way described by Mr Pugh.
17. In reaching this decision, I have considered the credibility of each witness. I found each witness to be credible on this point. Both answered the questions put to them consistently and in a straightforward manner.
18. Mr Price did challenge the reliability of Mr Pugh's evidence, on the basis of inconsistencies between his witness statement and the evidence given in front of the Tribunal during this hearing. Primarily, this was the question of whether the Claimant had threatened to "knock him out" or "knock his teeth down his throat". However, I find that this was a relatively minor discrepancy which does not call into question the overall reliability of Mr Pugh's evidence.
19. I have therefore reached my decision on the basis of the likelihood of the incident in question having occurred. If the events of 9 December 2022 had taken place in the way described by the Claimant, Mr Pugh would have to have told Mr Shaw an extensive and brazen lie of a nature that he knew could lead to the dismissal of the Claimant.
20. This seems to me to be an extremely unlikely course of events, particularly in circumstances where the Claimant claims that he and Mr Pugh had resolved their differences and agreed to draw a line under the incident. Additionally, it was the unchallenged evidence of Mr Pugh that he had a good working relationship with the Claimant.
21. Further, Mr Shaw gave unchallenged evidence that Mr Pugh had been extremely shaken when he came to see him and that he was in obvious

distress. This is evidence in favour of a finding that the Claimant had acted in an aggressive manner towards Mr Pugh.

22. The Claimant was invited to a disciplinary hearing by way of a letter dated 12 December 2022. The letter contained little detail in respect of the disciplinary charges against the Claimant. It simply stated that the meeting would discuss the claimant's "aggressive and threatening behavior towards a senior member of staff." It did not detail this behaviour or name the member of staff.
23. The disciplinary hearing took place on 14 December 2022. It was conducted by Mr Shaw, the Respondent's Operations Manager. No notes were taken of this meeting. A summary of the meeting is contained within the witness statements of both Mr Shaw and the Claimant.
24. At the meeting, Mr Shaw referred to having watched the CCTV footage of the 8 December incident. Mr Shaw did not show this footage to the Claimant.
25. Mr Shaw claims that he offered to show the footage to the Claimant but that the Claimant declined this offer. The Claimant denies that he was offered an opportunity to watch the CCTV footage.
26. I find that the Claimant was not offered an opportunity to watch the CCTV footage. Mr Shaw made no mention of this offer in his witness statement. In evidence, Mr Shaw stated that this was because the Claimant had expressed that the CCTV was irrelevant.
27. I did not find this explanation believable. In evidence, Mr Shaw made clear that the CCTV footage of 8 December incident was a significant factor in his decision to believe the account of Mr Pugh over the Claimant. I find that if Mr Shaw had offered the Claimant an opportunity to view this evidence, he would have expressed this in his witness statement. The witness statement sets out the investigation and disciplinary process in some detail, and I find that unrealistic that such a key step would have been missed.
28. Following the disciplinary hearing, Mr Shaw made further attempts to obtain witness statements from other members of staff. One individual, named as "Frank" in Mr Shaw's statement, refused to give a statement but did express an opinion that "Glyn does what he wants". Mr Shaw explained in evidence

that he took this into account when deciding that the Claimant should be dismissed. Mr Shaw did not inform the Claimant that Frank had expressed this opinion, or give him an opportunity to comment on it before reaching a decision to dismiss.

29. The Claimant was dismissed with effect from 16 December 2022. The Claimant was dismissed with immediate effect and did not receive any notice or pay in lieu of notice.
30. The Claimant appealed against his dismissal by way of a letter dated 19 December 2022. No appeal hearing was held until 30 January 2023. By this time, the CCTV of the incidents of 8 and 9 December had been deleted.
31. The depot at which the Claimant worked was closed with effect from 7 September 2023. Mr Williamson's witness statement stated that all staff had been made redundant. However, Mr Shaw's evidence was that some members of staff had been deployed into alternative roles, including sales roles. Mr Shaw further stated that there was no reason why the Claimant could not have been redeployed into a sales role, as full training was provided. As Operations Manager, Mr Shaw would have first-hand knowledge of the situation at the depot. I therefore prefer the evidence of Mr Shaw, and find on the balance of probabilities that the Claimant would have remained employed after 7 September 2023.

### **Relevant Law and Judgment**

1. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed.
2. The burden is on the Claimant to demonstrate that they were dismissed by the Respondent. However, there is no dispute as to whether the Claimant was dismissed in this case.
3. In order to demonstrate that the Claimant was fairly dismissed, the Respondent must show that it had a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996.
4. I find that the Claimant was dismissed for a reason which related to his conduct. This is a potentially fair reason under section 98(2)(b) of the Employment Rights Act 1996.

5. Section 98(4) of the Employment Rights Act 1996 deals with fairness in general. It provides that the determination of the question as to whether a dismissal was fair or unfair 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.
6. I find that the Respondent acted unreasonably in all the circumstances in treating the Claimant's conduct as a reason for dismissal. I have taken into account the fact that the Respondent is a relatively small employer with limited resources. However, I have found that some of the Respondent's failings relate to the fundamental rules of fairness. An employer of the Respondent's size should have been capable of complying with these rules, even without the assistance of a specialist HR department.
7. I make this finding on the following basis, taking into account the guidance for Tribunals on fairness in the decision in *BHS v Burchell 1978 IRLR 379*:
  - a. I find that the Respondent believed that the Claimant had carried out an act of misconduct. Mr Shaw stated in evidence that this was his belief, and set out the evidence on which he had based this conclusion.
  - b. The Respondent also has to demonstrate reasonable grounds on which to base this belief. Mr Shaw stated that his belief was based on the following factors:
    - i. Mr Pugh's demeanor during their conversation about the incident and the fact that he was clearly shaken;
    - ii. The unwillingness of other members of staff to give evidence; and
    - iii. The CCTV footage of the incident which took place on 8 September.

I therefore find that the Respondent had reasonable grounds on which to base its belief in the Claimant's misconduct.

- c. However, at the time the belief was formed, I find that the Respondent had not carried out a reasonable investigation.

- d.** Mr Shaw did not show the Claimant the CCTV footage on which he had based his decision to dismiss. The Claimant was given no opportunity to comment on this footage. Further, Mr Shaw did not discuss with the Claimant the fact that potential witnesses had refused to give evidence or the inference that he had taken from this.
- e.** Mr Shaw explained that the CCTV and the attitude of the Claimant's colleagues were two of the three factors which influenced his decision to believe Mr Pugh over the Claimant. It would therefore have formed part of a reasonable investigation to give the Claimant an opportunity to properly consider and comment on this evidence. I understand that I should not substitute my own judgment for that of the employer when determining what amounts to a reasonable investigation. However, discussing the relevant evidence with the Claimant is a basic step that would have been taken by any reasonable employer.
- f.** In her witness statement, Ms Nunn described the appeal process as a "full review". Ms Nunn did not attend the Tribunal to give evidence as to what she meant by this. However, Ms Nunn would have been unable to entirely remedy the errors set out above. She did not have access to the CCTV footage due to the passage of time.
- g.** Mr MacMillan on behalf of the Respondent has referred to the case of *Sunshine Hotel Ltd t/a Palm Court Hotel v Goddard EAT 0154/1* as authority for the proposition that it was not necessarily fundamental to a fair process that a separate investigation meeting be held. I accept that the Claimant could have been fairly dismissed despite the lack of an investigation meeting. However, the *Goddard* case goes on to make clear that the Respondent should carry out as much investigation as was reasonable in the circumstances of the case. It is difficult to imagine a case where it would not be a reasonable investigatory step for an employer to present an employee with the evidence against him and to give him an opportunity to comment on it.



- h.** Mr MacMillan's submissions appear to imply that the *Goddard* case found that two managers watching CCTV footage and the proceeding straight to a disciplinary hearing was found to be an adequate investigation. I do not accept this submission. Firstly, I do not accept that this was the finding in the *Goddard* case. Secondly, the question of reasonableness has to be determined on the basis of the circumstances of the individual case. In this case, it would have been reasonable to share the footage with the Claimant.
- i.** Further, I find that the Respondent did not act in a procedurally fair manner. Having reviewed the documents and the witness statements, I can see that the basics of an appropriate process was followed, in that the Claimant was invited to a disciplinary hearing with the right to be accompanied, and later given an opportunity to appeal. However, there were two key procedural flaws.
- j.** Firstly, the letter inviting the Claimant to the disciplinary hearing gave very little information about the allegations against the Claimant. It did not name the person in respect of whom the Claimant had acted aggressively, and did not give any detail as to the nature of this alleged aggressive behaviour.
- k.** Secondly, there was a substantial delay between the Claimant's decision to appeal against his dismissal and the date of the appeal hearing. The Claimant appealed against his dismissal on 19 December 2022, and the appeal hearing did not take place until 30 January 2023. The Tribunal accepts that the Christmas holidays took place in this period, and that Ms Nunn was on leave for 10 days from 6 January 2023. However, this left a significant number of working days prior to 30 January 2023 when the hearing could have taken place. I appreciate that this was a busy time for the Respondent, but an appeal against a dismissal for gross misconduct should have been treated as a priority. This was therefore a breach of the ACAS Code on Disciplinary and Grievance which states that meetings should not be unreasonably delayed. The delay was a particular issue in this case because it led to the loss of key CCTV evidence.

## Remedy

### Basic award

8. The Claimant had four complete years of service with the Respondent. The Claimant is currently 63 years of age. He is therefore entitled to 1.5 weeks' gross pay for each year of service.
9. The Claimant's pay slips are at pages 38-40 of the bundle. These demonstrate that the Claimant was paid a gross salary of £12,348 per year. This gives a weekly wage of £237.46.
10. The Claimant did work some overtime. However, this overtime was not obligatory or guaranteed, and so I have not included this in the calculation of a week's pay for the purposes of the Claimant's basic award (in accordance with section 234 of the Employment Rights Act 1996).
11. The Claimant is therefore entitled to a basic award of **£1424.76**.

### Compensatory award

12. The Claimant gave evidence that he had applied for two roles at the start of this year, and left his CV with around 40 employers in his local area. The Claimant also gave evidence that he had been unwell and taking medication for depression since March 2023. In light of this, I find that the Claimant has taken reasonable steps to mitigate his losses.
13. The Respondent has submitted that the depot closed on 7 September 2023, and so the Claimant's losses should cease with effect from this date. However, I have made a finding of fact that the Claimant's employment would have continued after this date.
14. I therefore award the Claimant immediate losses from the effective date of termination until the date of the hearing. I have calculated this on the basis of an average net weekly wage of £217 per week.
15. I find that the Claimant is likely to find work in the near future. The Claimant has indicated that his health will improve once the Tribunal is behind him. Additionally, the Claimant has expressed an interest in working in warehouses and shops. The Christmas season is approaching which is a busy time for both of these industries, and employment is likely to be available.

16. I find that the Claimant should therefore be awarded compensation for a period of four further weeks. This gives a total of 40 weeks' loss of earnings, amounting to **£8680**.

### **Deductions**

17. I find that whilst the Respondent broadly followed a fair process, there were elements of its procedure which amounted to a breach of the ACAS Code of Practice on Disciplinary and Grievance. These are:
- a. The failure to provide full details of the disciplinary allegation in the letter inviting the Claimant to a disciplinary hearing; and
  - b. The failure to hold an appeal hearing in a timely fashion.
18. I find that these are relatively minor breaches, and that the key elements of the Code were followed. I therefore award an uplift of 10%. This puts the compensatory award at **£9548**.
19. I have made a finding of fact that the Claimant did carry out an act of serious and blameworthy misconduct. The Claimant's conduct clearly contributed to his dismissal. In light of this, I am entitled to make such deduction as I consider just and equitable. I have determined that a deduction of 75% would be just and equitable. I have not made a 100% deduction on the basis that I have found that the Claimant was also the recipient of an act of serious misconduct on the part of Mr Pugh, a more senior member of staff. This provocation by Mr Pugh goes some way to mitigating the Claimant's poor behaviour.
20. I have not made a deduction respect of *Polkey*. I do not feel that it would be just and equitable in this case, as it would essentially mean that the Claimant was penalised twice for his contributory conduct.
21. A deduction for contributory conduct is applied to both the basic and compensatory award.
22. The Claimant's basic award is therefore reduced to **£356.19**. The Claimant's compensatory award is reduced to **£2387**. The total award payable to the Claimant is therefore **£2743.19**.
23. The Claimant has not claimed any benefits and therefore the recoupment provisions do not apply.

Employment Judge **Routley**  
20/09/2023