



EMPLOYMENT TRIBUNALS

Claimant: Mr R Sutcliffe

Respondent: Freight Systems Express (Wales) Ltd

Heard at: Cardiff Employment Tribunal **On:** 20/12/2023 & 12/01/2024

Before: Employment Judge Lloyd-Lawrie

Representation

Claimant: In person

Respondent: Mr. O'Callaghan (Counsel)

JUDGMENT having been sent to the parties 16th January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant brought a claim ordinary unfair dismissal under s98 of the same Act against the Respondent.

Evidence

2. I was provided with a hearing bundle of 182 pages and 3 Respondent witness statements and a Claimant witness statement. The Respondent's representatives had provided the up-to-date hearing bundle of 182 pages shortly before the hearing. It became apparent that not all of the documents that were in the original bundle had been put into the new bundle, thus the first bundle of 67 pages was also considered.

3. I heard oral evidence from Mr. Gethin Worgan and Mr. Geoff Tomlinson for the Respondent. The Respondent were intending to call the appeal chair Helen Philips, however, the Claimant confirmed that

he did not seek to challenge her statement. The Claimant gave evidence for himself.

The Claims and Issues

4. The issues in this case as set out below.

5. The Claimant claims unfair dismissal under section 98 Employment Rights Act 1996. The issues in relation to this are:-
 - i. What was the reason or principal reason for the dismissal?
 - ii. Was a reasonable investigation carried out in all of the circumstances, including the size and administrative resources of the Respondent?
 - iii. Was dismissal within the range of reasonable responses?

6. If the Claimant is found to have been unfairly dismissed, the issues in relation to Polkey are:-
 - i. Was a fair procedure followed by the Respondent?
 - ii. If not, would the Claimant have been dismissed in any event, or is there a chance that she would have been dismissed in any event.

7. If the Claimant is found to have been unfairly dismissed, the issues in relation to contributory fault are:-
 - i. Was any conduct of the Claimant before the dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, by how much (per s122 (2) Employment Rights Act 1996)?
 - ii. Was the dismissal, to any extent, caused or contributed to by any action of the complainant and, if so, by what proportion is it just and equitable to reduce the amount of the compensatory award (per s123(6) Employment Rights Act 1996)

The Facts

8. I make the following findings of fact in this case.

9. The Claimant was employed by the Respondent from 5/4/2011-31/05/2023.

10. The Respondent is a freight company and the Claimant had been employed by them in various roles, most latterly that of Operations Manager.

11. The Respondent had a procedure in place for staff to track if a driver was going to deliver in time and if not, to notify the customer in good time in order to maintain good client relationships.

12. The Claimant had responsibility for running the team that was in charge of ensuring that deliveries were made on time.

13. The Claimant had been told in an email to himself and his colleague Chris Gibbs, on 11.38 on 24/1/2023, by Mr. Warner, that they were to follow specific instructions for how to run the business and in relation to driver discipline they were told “more than ever now you must be seen as being in charge, they need to look at you two and know they can’t fuck about- do so and there will be consequences”.

14. An incident occurred on 28/3/2023 with a new customer for the Respondent. The delivery that day was to be the second delivery to the new customer. The driver had overslept due to ill health the night before and it had been missed by the Claimant’s team due to them concentrating on other duties. The Claimant became aware of the matter when the driver rang him at 7.39 in the morning. The Claimant then emailed the customer at 7.48, copying in Mr. Worgan, advising that the delivery would be late.

15. The Claimant then was emailed by Mr. Worgan whilst he was on the school run asking if the reason he told the customer was true. The Claimant, again on the school run, confirmed that that was the case.

16. The parties disagree about the time that the Claimant arrived for work. I find that the evidence given by the Claimant which has not changed and is in line with the others working in his department, is correct and that the Claimant arrived in the office around 8.20. The Claimant saw an email from Mr. Worgan to attend his office and immediately did so.

17. I further prefer the Claimant’s evidence as I can see an email from Mr. Tomlinson at 8.55 asking for the Claimant’s out of office to be put on. Unless the Claimant had already left by this point, that email would make no sense.

18. The Claimant, Mr. Warner and Mr. Tomlinson were the only people in that meeting.

19. Mr. Warner opened the meeting by referring to what had been happening that morning as a “shit show” which set the tone of the meeting. It is usual practice in the Respondent’s business for employees to swear in normal conversations with each other and to engage in heated conversations with each other, including their managers. The Respondent’s employees do not face disciplinary sanctions generally for such behavior.

20. The meeting between the 3 people in the room was heated and raised voices, though not content of the conversation, was heard by other employees of the Respondent.

21. The Claimant sought to explain that he could not have done more than he did as he was doing the school run for his daughter. The Claimant was allowed to do school runs and it was known about in the business. Others did this also.

22. Mr. Tomlinson said words to the effect of “I don’t give a shit about your kids, you’re the manager, it’s your responsibility”.

23. Following Mr. Tomlinson, the director with overall responsibility for the Respondent saying this, the Claimant became distressed and decided to terminate the meeting. He stated words to the effect of “I’m sick of giving up my life for you, I wish I didn’t work for you fuckers anymore” and left the room.

24. Mr. Tomlinson chose to follow the Claimant out of the office and onto the staff floor. The Claimant attempted to get his things and was not seeking to continue the conversation. Mr. Tomlinson shouted at the Claimant words to the effect of “Don’t you think you can get away with speaking to us like that, if you speak to us like that again, you won’t be welcome in these offices”. The Claimant then proceeded to leave the building and Mr. Tomlinson followed him and continued shouting at the Claimant, causing the Claimant to respond with words to the effect of “after the last time I let you speak to me like that I won’t do it again”. The Claimant then left the building.

25. Mr. Tomlinson had previously shouted and sworn, including using the word “fuck” at the Claimant and Mr. Gibbs in another meeting.

26. Immediately after the Claimant left the building, his internal computer access was removed at the direction of Mr. Tomlinson.

27. No one contacted the Claimant that day to say that he had been suspended. The Claimant received text messages from colleagues to say that he had been suspended, so he texted Mr. Warner to ask. He did not put smiling or laughing face emojis as claimed by Mr. Warner. Mr. Warner failed to respond to the Claimant.

28. The Claimant received a letter of suspension the next day. The letter of suspension was not in either version of the bundle but was read out during the hearing. In any event, it is agreed that it stated that the reason for suspension was that the Claimant had walked out of a meeting. The letter talked of holding a meeting to discuss actions and look for solutions and that there were options for a positive outcome or exploring the disciplinary procedure.

29. Andrew Smith was asked to conduct an investigation. No investigation report is provided nor was one provided to the Claimant at any time. The Claimant was not invited to attend an investigatory meeting and was only asked for a statement after the disciplinary hearing was arranged.

30. The Claimant was told that the disciplinary hearing was to be held by an external person, Jackie Lewis. He was told that the allegations were as follows, “using inappropriate behaviour and language with the directors, threatened to quit and a continuation of such behaviour in our open offices”.

31. The Claimant was not provided with any further details until the meeting. The Claimant was however given a right to be accompanied.

32. The Claimant attempted to serve a grievance during the disciplinary hearing. Ms. Lewis refused to accept the same and said that he must serve it on the company.

33. The Claimant was not sent a copy of the disciplinary meeting minutes and the accuracy of them is disputed by the Claimant.

34. The Respondent appointed Mr. Phillip Morgan, Director for The Scarlets, to chair the grievance. The main thrust of the grievance was the Claimant considered that Mr. Tomlinson had acted inappropriately during the meeting on 28th March 2023 and that he had said "I don't give a shit about your kids".

35. A grievance hearing was held and Mr. Morgan subsequently spoke to Mr. Tomlinson, who stated in relation to the alleged quote, "The comment about his kids is absolutely wrong and taken out of context. I did not say that and referred to the point that the issue with the late delivery was his responsibility and whether he is taking his kids to school or not he should have managed this. His statement differed from his undated statement but listed in the bundle index of 28/3/23. On that statement there is no reference to a conversation about the Claimant taking his daughter to school at all. On the follow up questions, notes taken by Jackie Lewis, undated but said to be 17/4/23 in the index, Mr. Tomlinson was asked "during the alleged incident on the 28/03, did you refer at any point in the conversation to RS child? Mr. Tomlinson is reported to have said "no, I didn't, we didn't discuss it". When asked again, "you have no recollection of a conversation about RS daughter? He is said to have replied "No we were talking about the late delivery as it says in my statement". The statements of Mr. Tomlinson are inconsistent.

36. The grievance outcome was sent on 17/05/2023. It was found that during the meeting on 12/3/23 emotions were high and voices were raised but that that was an isolated incident. It was also found that there was no evidence to support the assertion that Mr. Tomlinson had made the alleged comment about the Claimant's children.

37. On 23/05/2023 the dismissal letter was drafted and signed, not by Jackie Lewis who chaired the meeting, but by Gethin Worgan. It was Mr. Worgan who made the decision to dismiss the Claimant. Mr. Worgan stated he dismissed the Claimant for "refusal to obey a legitimate management instruction and negligence of performance of duties relating to the incident and for serious insubordination to your line manager and the managing director". Mr. Worgan confirmed in oral evidence that he did write the dismissal letter and that he had meant to only put in the issues regarding the late delivery as background, not as a reason for dismissal. I find that Mr. Worgan added an extra charge, post disciplinary hearing, that had never been raised with the Claimant as a potential disciplinary matter.

38. The Claimant appealed the dismissal. The Respondent appointed an independent third party to undertake the appeal. She did this competently. The appeal process was tainted by the guiding minds of the company, Mr. Tomlinson and Mr. Worgan's who had provided evidence that was not correct, namely that the Claimant had entered

into a heated meeting, that was made heated immediately by Mr. Worgan. Mr. Tomlinson then continued the tone of the meeting and told the Claimant that he did not give a shit about his children which caused the Claimant to feel the need to leave the room. As the context was not given to the appeal officer and she was given an incorrect version of events from the guiding minds of the business, it was not possible for her to conclude whether or not dismissal was a necessary outcome or whether the actions of the Claimant indeed constituted gross misconduct or misconduct.

The Law

39. For ordinary unfair dismissal under section 98 Employment Rights Act 1996, the law is well-settled.

40. First, the Respondent has the burden of proving that there was a potentially fair reason for dismissal.

41. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of the dismissal. It is not permitted to substitute its views as to whether it personally thinks that the Claimant's actions constituted gross misconduct or what it personally would have done in the circumstances if had been the employer.

42. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within s98 (4) Employment Rights Act, in the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**:

- i. Did the Respondent genuinely believe in the misconduct of the Claimant?
- ii. Was that belief based on reasonable grounds?
- iii. Was a reasonable investigation carried out in the circumstances?
- iv. Was summary dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

43. The Tribunal, when considering whether there was a reasonable investigation carried out, must consider whether procedure was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent. If it finds the Burchell test has been answered in the Claimant's favour or there is an issue with the procedure, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway in accordance with the principles in **Polkey v AE Dayton Services Ltd [1978] UKHL 8**.

44. Whereas in considering whether or not the Claimant has been unfairly dismissed, it is the genuine belief of the Respondent that is important, if the claimant is found to have been unfairly dismissed, in

assessing contributing action, the test is not the same. The leading case is **Nelson v BBC (No. 2) [1980] ICR 110 (CA)** which states that there are 3 factors that must be present to give a reduction to the compensatory award for contributory action:

- i. The Claimant's conduct must be culpable or blameworthy (but need not be the sole or even the main cause of the dismissal)
- ii. It must have actually caused or contributed to the dismissal;
- iii. The reduction must be just and equitable.

Findings

45. I find that the reason for the Claimant's dismissal was conduct, a potentially fair reason. The Claimant does not seek to suggest that there was an underlying other reason for his dismissal.

46. However, what is not clear is what conduct the Claimant was dismissed for. The suspension letter, disciplinary invite letter and disciplinary outcome letter differ in allegations. Mr. Worgan was clear that he had inserted the issues with the delivery as background but that he had dismissed the Claimant for his behaviour in the meeting. It is worth noting at this point that Mr. Worgan was not the person chairing the disciplinary hearing and was a witness.

47. I find that the Respondent's witnesses, most importantly, the managing director, have been somewhat disingenuous in their evidence, both in the internal process and to the Tribunal. I find that they have sought to minimize and at times utterly deny the conversation about the Claimant's children. I find the fact that their evidence has changed over time has dramatically undermined the Respondent's case. In the case of Mr. Tomlinson this is as he changes from making no mention of the Claimant's child in his initial statement, to actively telling a hearing officer that no conversation was had, to stating in his witness statement that a conversation was had about the child but was not as reported by the Claimant, to stating in his oral evidence that he cannot recall the conversation. In the case of Mr. Worgan, he went from overhearing the Mr. Tomlinson telling the Claimant in the main office that he would not be welcome in the office again if he behaved like that, to having not heard this. I find that the Respondent's witnesses have done this as they are aware that their behaviour was inappropriate and justifies the actions of the Claimant.

48. I find that the Respondent did not genuinely believe in the misconduct of the Claimant. I find that the Respondent is a company where staff routinely swear at each other and in conversation and I remind myself of the wealth of case law regarding swearing and I consider the context of the company being a freight company when making my findings.

49. I find that the Respondent allows for and its senior managers actively encourage managers to take a robust and somewhat confrontational style of management. This is demonstrated by Mr. Worgan in his email of 24/1/2023 when referring to driver discipline. Further, I accept the evidence of the Claimant, as supported by the written evidence of Mr. Gibbs as correct, which was that in a meeting in

October 2021, Mr. Tomlinson was highly aggressive and swore at the Claimant and Mr. Gibbs numerous times. Mr. Tomlinson, when challenged on this in cross examination, sought to avoid the question and when asked to answer claimed that he cannot remember what occurred in 2021. I find that should an allegation be outrageous and not in line with normal business practices or indeed Mr. Tomlinson's own business practices, he would have been able to categorically state that this did not occur.

50. I find that the Respondent's guiding minds knew that the Claimant had reacted to the behaviour that he was subjected to in the meeting and was not taking offence at the heated nature of the exchange, until Mr. Tomlinson made a comment about the Claimant's children. I find that the Claimant's outburst, in response to such provocation was not misconduct. Further I find that the Respondent's staff did not believe it was misconduct and that the appeal chair would not have believed it, if given the true facts. I find that as the guiding minds of the business were fixed with knowledge of what occurred and had provided incorrect evidence to the appeal officer, that the appeal was not a true appeal process. Further, I find that the use of swearing is such common place that the bad language used does not cause what was said to amount to misconduct.

51. I find that the Claimant expressing that he is not prepared to be subjected to improper treatment cannot be said to be misconduct.

52. As I find that the Respondent cannot satisfy the first limb of **Burchall**, it follows that the Claimant claim for ordinary unfair dismissal under s98 (4) Employment Rights Act succeeds.

Employment Judge Lloyd-Lawrie

Date - 19/02/2024

REASONS SENT TO THE PARTIES ON 20 February 2024

FOR THE TRIBUNAL OFFICE Mr N Roche