EMPLOYMENT TRIBUNALS

Claimant: Mr N Moore

Respondent: Baco-Compak (Norfolk) Limited

HEARD AT: Cambridge: 22 March 2019

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr Shah (solicitor)

JUDGMENT

1. The Claimant's unfair dismissal claim is not well founded, and is dismissed.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent as a lorry driver from October 2013 until 11 December 2017, when he was dismissed for alleged gross misconduct following an incident on 15 November 2017. By claim form presented to the tribunal on 17 February 2018, the claimant asserted that his dismissal was unfair.

EVIDENCE

2. I heard oral evidence from the claimant. The claimant had not complied with the tribunal's 8 March 2018 order concerning the exchange of witness statements. However, I gave him permission to use his pleadings and (at his request) the statement he had given to the respondent during the investigatory process by way of evidence. He also gave me some further detail concerning the events in question.

3. The claimant was courteous and to-the-point in his evidence. I was grateful for his constructive and sensible approach.

4. For the respondent, I heard from Stephen Bacon. He is a director of the respondent. Albeit he did not make the decision to dismiss, nor hear the

appeal, he was familiar with the background and had spoken to the decision makers. He presented as a thoroughly fair and credible witness.

5. Mr Bacon's sister, Ms Leslie Bacon, was the dismissal decision maker. She is unfortunately on long-term sickness and she was therefore unable to attend. I read her witness statement, and gave it due limited weight. I also read the statement of Peter Burgess, the appeal officer, whom the claimant described as "a lovely bloke". Because of regrettable personal circumstances (for which the tribunal has great sympathy), he was also unable to attend today. I gave his witness statement due limited weight. Usefully, however, Stephen Bacon had spoken to both his sister and Mr Burgess about the content of their statement and was able to give me evidence in that respect, albeit on a hearsay basis.

   Both Ms Bacon and Mr Burgess had not signed their statements. However, Mr Shah assured me that he had gone through the statements with both those individuals, who had confirmed the accuracy of the content. Mr Shah undertook to provide the tribunal with a signed version of each statement within 14 days.

HOUSEKEEPING AND ISSUES

6. The name of the respondent was an amended by consent to the name given above.

7. The parties agreed that at this stage I would only deal with liability issues (and any deductions for contributory fault or on **Polkey** bases), leaving remedy for later if necessary. The issues for me to determine were therefore agreed and refined as follows:

Unfair dismissal

a. What was the reason for dismissal? As to this:
   i. The Respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of ERA).
   ii. The Claimant accepted:
      1. That if the allegation that he had head-butted a work colleague was correct, this gave grounds for the respondent to summarily dismiss him.
      2. That the Respondent believed the Claimant to be guilty of gross misconduct.
b. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular, did the Respondent have reasonable grounds, founded on a reasonable investigation, for its belief that the Claimant was guilty of misconduct?
c. If the dismissal was unfair, should any award be reduced (and if so, by how much) having regard s.122(2) and s.123(1) ERA and/or the principles set out in **Polkey v. AE Dayton Services Ltd**?

FACTUAL FINDINGS

8. The Respondent is in the business of waste disposal and recycling. It employs about 40 members of staff, in the office and as drivers. The claimant worked as a Class 2 HGV driver. On 15 November 2017, a Brazilian work colleague named RL (also a lorry driver) asserted that, in the course of a verbal altercation which involved the claimant wanting RL to move his lorry out of his way so that he could go to work, the claimant climbed up to RL's lorry cab, head-butted him, and racially abused him.

9. The incident had taken place at about 5am. RL notified Darren Peach of the respondent about the incident some five hours later. Mr Peach immediately filled in an accident report book, as well as an HSE book.

10. The claimant was sent home. He apparently returned with his son and son in law (who were present in court today) and waited outside the premises. According to the claimant in his evidence before me, this was because he was waiting for his daughter to pick him up from work. RL was escorted home by the police, in order to avoid the risk of any violence from the claimant.

11. The claimant was informed later that day that he was suspended pending an investigation.

12. An investigation duly took place. The claimant when interviewed asserted that he had done nothing wrong. He claimed he had asked RL to move his lorry (which was unnecessarily blocking him in the yard when he was due to drive to a client). He said that in response, RL had told him to "go fuck his dead mother". The claimant asserted that in reply, the claimant climbed up to and opened RL's cab door, "got in his face" and told him to "move his fucking lorry". He asserted that RL moved forwards at the same time as him, and that they "banged heads". He alleged that RL had then assaulted him by elbowing him in the face and kicking him in the chest.

13. He also alleged that RL had told him "if you were in my country I would fucking kill you".

14. Two Portuguese colleagues, AR and LR, said they had witnessed the incident. There is no dispute that they were close by to see what had happened. Both of them essentially corroborated the account given by RL, in that tthey both said the claimant had head-butted RL deliberately, this being the first contact between the two men, and had racially abused him by suggesting that all "foreigners" should "'fuck back", or "fuck off back to their own country".

15. RL was interviewed. He said that the claimant had assaulted him and racially abused him. He denied any wrongdoing towards the claimant. He accepted that he had after being head butted elbowed the claimant and kicked at him, which he said he had done in self-defence.

16. In evidence before me, as well as later in the disciplinary process, the claimant challenged the fact that RL had not been suspended or sanctioned. As to this, it was explained that RL had in fact already given notice of resignation, and that he left the respondent on the 29 December 2017. In any event, it was said, and I accept, there was an obvious difference between the claimant and RL. Two other individuals corroborated what RL had said about the claimant's alleged assault on RL.

17. The claimant was invited to a disciplinary hearing, which took place on 7 December 2017. The claimant was asked if it was correct that (as RL had claimed) he had honked his horn and revved his engine before approaching RL's vehicle. The claimant asserted that he had done so in order to "bring the air up' in his engine and for the purposes of his "defect sheet". He claimed and that he and RL had moved forwards at the same time and "bumped heads". He did not appear to dispute that he and two family members had been seen on the caravan park close by allegedly waiting for RL to return from work.

18. In his interview, the claimant was asked if there was any previous animosity between himself, AR, LR and RL. He replied that there was not, and that they "barely spoke to each other", albeit he had previously said to AR that he was a "lazy bastard". This was important, in that it helped Mr Burgess to assess whether or not the witnesses had an obvious 'axe to grind' and obvious reason to collude to give false evidence.

19. The claimant asked me to find that the five hour delay in reporting matters to the respondent meant that RL and the two witnesses had the opportunity to come up with a false story. Even if that is right, I have to say there is nothing in the paperwork which suggests that the three individuals did in fact create a false account–or, even if they did, that the respondent had any real basis to suspect they had done so.

20. The claimant provided me with evidence showing that on 23 and 24 November, 2017 the respondent advertised for other drivers. He argued this this showed the respondent was advertising for "his job", and therefore that the respondent had made a decision before the disciplinary meeting to sack him. I do not think that is right. Firstly, the adverts were for Class1/2 drivers. The claimant did not dispute Mr Bacon's evidence that he is only Class 2. Secondly, I accept Mr Bacon's evidence that the recruitment exercise and the disciplinary process concerning the claimant were (as he put it) "completely separate", caused at least in part by the "domino effect" of RL's anticipated departure.

21. By a letter dated 11 December 2017, the claimant was informed that he was summarily dismissed. The dismissal was founded on the alleged assault, and not on the alleged racist abuse. Mr Bacon told me, and I accept, this was because the respondent chose to focus on the most serious element of the claimant's alleged misconduct.

22. The letter was sent to the wrong address. Or, at least it had the wrong postcode on the envelope. As a result, it was re-sent. I reject any suggestion that this was anything other than an honest mistake. In any event, the claimant suffered no prejudice, because he was allowed additional time within which to bring an appeal.

23. The claimant's appeal took place on 23 January 2018. It was heard by Ms Bacon. At the appeal, the claimant asserted that the witnesses had colluded. However, he provided no evidence to support that assertion. The claimant also argued that he had been singled out because he was the only one that had been suspended, and because photos of his bruises were not taken. He also pointed out that a statement from a colleague called Malcolm had not been taken until 5 December 2017.

24. The difficulty he faced with these points was that Malcolm did not really add anything, as he did not appear to have seen the incident itself. The fact that only the claimant was suspended is explained above. In any event, the claimant appeared to accept in questioning before me that, had both he and RL had been suspended on 15 November, the respondent could have validly lifted RL's suspension on or about 16 November when RL's account was corroborated. Photos of the claimant's own bruising and t-shirt would not have helped because, even on the claimant's account, one might expect some minor bruising to the claimant's head. And RL accepted he had kicked at the claimant, albeit in self-defence. Hence the photograph showing a footmark on the claimant's T-shirt did not progress matters.

25. Having duly considered the issues raised on appeal, Ms Bacon chose to uphold the decision summarily to dismiss. Her outcome letter is dated 6 February 2018.

26. Amongst other things, Ms Bacon observed that the witness evidence was not identical. She explained she had no reason to disbelieve the witnesses' version of events. She explained that consideration had been given to taking formal action against RL given his admitted use of physical force against the claimant (albeit in alleged self-defence). However, she explained that as he had left the respondent's employment, no formal action was taken. She also explained that the claimant had in fact provided his own photographs, even though the respondent might sensibly have taken shots itself, and that these photographs had been used at the disciplinary hearing. She considered that the wrong address on the decision letter was a genuine administrative error, and not done with any malicious intent. She found the claimant's assertion that the whole incident was "a playground thing" was not a fair description of a deliberate head-butt, and she preferred RL's account of events.

27. Before me (but not at the appeal), the claimant asserted that he was not consistently treated, because he had witnessed a physical altercation between Ms Bacon and her elderly father in which he had intervened. Neither Ms Bacon nor her father were disciplined as a result. I have to say, there is a very obvious distinction between two directors and family members having an unfortunate argument, and a member of the workforce

head-butting a colleague. Had that point been raised by the claimant at the time, therefore, I strongly suspect the same distinction would have been drawn by the respondent.

THE LAW

28. The following principles are material:

a. It is irrelevant for an unfair dismissal purposes whether or not a claimant has in fact committed an act of misconduct. Guilt or innocence is nothing to the point. Rather, the question is whether the respondent had reasonable grounds, following a reasonable investigation, to consider such an act had been committed by the claimant.
b. When considering whether or not a dismissal was fair for s.98(4) purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small** [2009] IRLR 563, CA, para 43 *per* Mummery LJ.
c. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt.** [2003] IRLR 23, CA.
d. As regards that process:
    i. It is incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as information which points towards guilt.
    ii. Section 98 of ERA does not require an employer to be satisfied on the balance of probabilities that the employee whose conduct is in question had actually done what he was alleged to have done. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd** [2003] IRLR 273, *per* Wall J, at paras 35 & 36.
    iii. It does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably unfair. A "*forensic or quasi-judicial investigation*" is not required. **Santamera.**
    iv. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94.

e. Disparity in treatment can found a claim for unfair dismissal. However, it is uncommon for such a case to be made out. See the dicta of Waterhouse J in **Hadjioannou v. Coral Casinos Ltd** :

> "… evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate …. [Nevertheless] … Tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument.."

f. In the event of a finding of unfair dismissal:
   i. If the dismissal was 'procedurally unfair' but the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.
   ii. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.
   iii. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal.

APPLICATION TO THE FACTS

29. In the light of the factual findings I have made above, and given the claimant's sensible concessions as recorded above regarding the respondent's belief and the seriousness of allegedly headbutting a colleague, I find the dismissal to have been fair for s.98(4) ERA purposes. Dismissal was in the band of responses reasonably open to the respondent. The only real basis on which the claimant sought to argue otherwise was founded on a contention that the investigatory process was flawed. However, as set out above, an investigatory process commenced shortly after the events in question. Two eye witnesses as well as the complainant had asserted shortly after the event that the claimant had head-butted RL. There was no real basis to suspect collusion. The claimant was given the opportunity to give his account, both at the investigatory, disciplinary and appeal stages. Particularly in the light of the respondent's relatively small size, I consider that the process followed was fair the purposes of the employment rights act.

30. Even if I am wrong in my assessment as to the fairness of the dismissal, I do not think that any of the respondent's procedural failings made any difference to the inevitable final outcome. For that reason, a 100% **Polkey**

reduction would apply. I would also have made a 100% reduction for the purposes of contributory fault.

31. Despite the claimant's measured attempts to persuade me otherwise, the claim must be rejected.

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Employment Judge Michell, Cambridge

Date…28 June 2019……

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS