



EMPLOYMENT TRIBUNALS

Claimant: Mr K Hall
Respondent: Country Style Foods Limited
Heard at: Leeds **On:** 30 January 2017
Before: Employment Judge Lancaster

Representation

Claimant: In person
Respondent: Mr M Winthrop, Solicitor

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Respondent is ordered to pay to the Claimant compensation as follows, reduced in respect of both the basic and the compensatory awards, by 70 percent by reason of the Claimant's contributory conduct:

Basic Award

(calculated on 3 weeks' pay capped at £479.00 per week)	£431.10
Loss of earnings before commencing temporary employment	
(calculated on 7 weeks' @ £422.00 net per week)	£886.20
Shortfall in earnings in temporary employment	
(calculated on 26 weeks replacement earnings of £481.00 per week gross, assuming 22 % deductions)	£365.04
Loss of earnings after losing temporary employment	
(calculated on a further 7 weeks' @ £422.00 net per week)	£886.20
Loss of statutory rights	<u>£135.00</u>
	£2703.54

3. On the understanding that the recoupment provisions apply:

Total award	£2703.54
Prescribed element	£886.20
Prescribed period	23 rd May 2016 to 14 th July 2016
Excess over prescribed amount	£1817.34

4. The Respondent is ordered to pay to the Claimant, as reimbursement of the Tribunal issue and hearing fees, costs in the sum of £1200.00

REASONS

1. Written Reasons having been requested by the Respondent they are provided, based upon the oral judgement delivered immediately upon the conclusion of the hearing.
2. The Claimant in this case Keith Hall was employed by Sparks Confectioners Limited from 14 October 2013. His employment had subsequently transferred to the Respondent in this case Country Style Foods Limited who summarily dismissed him on 26 May of last year. By that stage he had worked for approximately 2 and a half years.
3. At the time of applying for the post with Sparks the Claimant had disclosed that he had a criminal conviction. In 2000 he was convicted of an offence under Section 18. That must mean Section 18 of the Offences Against the Person Act, an offence of causing grievous bodily harm with intent to do grievous bodily harm and if I read the note on the application correctly he was sentenced to prison for four years. There seems to be no dispute that within the workplace it was known that he had that previous conviction.
4. During the course of his employment he had a clean disciplinary record. He had however had issues with a manager Mr John Bradshaw and in December 2015 had brought a grievance against Mr Bradshaw accusing him of bullying. That however was not upheld. The Claimant, Mr Hall, did not appeal that decision but he explains that is because he did not consider it would receive any further attention. However he tells me and I have no reason to doubt, that at the time of this incident he thought the relationship with Mr Bradshaw was in fact on the mend. As I say on 26 May of last year he was summarily dismissed and that was in relation to an incident three days earlier on 23 May which is an allegation related to conduct. Mr Hall uttered threats against Mr Bradshaw, not personally to his face but in the presence of two work colleagues.
5. I have to consider therefore the entire factual matrix known to the Respondents when they took that decision to dismiss on that allegation of misconduct and determine whether in all the circumstances it was fair or unfair to treat that as sufficient. The background that was relevant and known can be ascertained from the following chronological narrative.
6. The Claimant's mother died in the spring of last year. He had pre-booked holiday, he took additional compassionate leave and there had been off for a period before returning to work on 23 May. Prior to taking that leave of absence he had worked on nights and that was in accordance with the job description with which he had been issued when he started in October 2013. However from 23 May he was unilaterally reallocated to a day shift. There were two incidents that took place on 23rd. Subsequently the Claimant raised concerns about the circumstances with which he was allocated to tasks on the day shift and his being provided with inadequate or inappropriate equipment. That is not a particular concern of mine today though it may suggest an underlying reason for a sense of aggravation on the part of Mr Hall that morning.

7. But more particularly there was an incident involving a cleaner, that is Rita Varadiova. That arose because the Claimant considered that there were inadequate toilet facilities and those that were available to him were being cleaned. Therefore access was blocked by Ms Varadiova and he had words with her. The Claimant described that as being the cause of his initial aggravation that day. Following that altercation he was reprimanded by the manager Mr Bradshaw for that matter and also potentially for an issue regarding the use of the engineer's phones. On either account the Claimant considered that that was an unjust reprimand, that he was always being blamed and particularly he had the historical issues with Mr Bradshaw.
8. Shortly after that the Claimant went into a separate office, a cabin. There were two other employees there, Joseph Dinsdale and Rob Siree. And it is their evidence which was crucial in the Respondent's determining what was or was not said. They gave differing accounts of the actual words used but both of them are clear that the Claimant was in a state of some aggravation.
9. Mr Dinsdale was interviewed shortly afterwards. He timed the incident at around quarter past twelve. He is the only witness that gives any time. For some reason when the investigation meeting was held later that same day at 2.50pm the timing was given by Mr Ettete Ndrassien as around 11 o'clock. It is wholly unclear where that time of 11 o'clock comes from. It is not referred to by any witness. But whatever time it was Mr Dinsdale records that the Claimant entered in quite an aggressive manner, he seemed very upset and started explaining that there was an issue with the cleaner that morning and he was getting blamed for it. He perceived it as the Claimant saying that whenever he gets in trouble he has always been blamed. It was described as him "*kind of having a vent above (about?) the situation*" which I understand to mean that he was letting off steam. When he finished speaking Mr Dinsdale said he told him he should not let it get to him and he should try and rise above the situation at which Mr Hall carried on saying people always blame him when there is an issue. Then his final comment is recorded by Mr Dinsdale as saying "*I've had to serve time before and it wouldn't be a problem to serve it again just to get rid of thwart out of this world*" presumably an obviously derogative reference (it is sometimes recorded as "twat"). At this point Mr Dinsdale did not know who he was referring to so he asked him and he was told it was "*that silly bollocks in there*" which was taken to be a reference to Mr Bradshaw: again an obviously derogative term but not by any means the most offensive. Mr Dinsdale in that statement does not say anything at all about how he perceived the genuineness or otherwise of the threat against Mr Bradshaw.
10. The other person present Mr Siree also records the Claimant returning to the workshop shouting and bawling about some incident to do with a cleaner and toilets. He says: "*All he was doing was shouting so I told him to chill out and just fucking calm down*". He says that he went to say he had a bollocking about leaving engineers, phones in the workshop, asking why is he getting a telling off when they all leave it there to which Mr Siree said "*you have started the "bubbling game", that is grassing on others*". He continued to be irate and then said "*I'm going to kill that bastard, its worth doing time for, I've done it before, I'd do it again, it doesn't bother me he is just another twat out of this world*" Mr Siree says he told him to fucking calm down and he stormed off shouting and swearing. Again he understood the reference to be to Mr Bradshaw. Once again at that stage Mr Siree does not say anything whatsoever in his statement about whether he perceived that threat to be

threatening and like Mr Dinsdale it is recorded as being in the context of his becoming irate about an incident that had just happened.

11. There was also a statement taken from Mr Bradshaw who of course was not present at the time. At some stage however the conversation was reported by to him by Mr Siree but the words Mr Bradshaw recalls again are slightly different namely “ *I’m going to kill that bastard, it is worth doing time for.*”
12. So as the dismissing officer Mr Crossley indicated he did not and was not able to make any conclusive findings as to what was actually said. But as between the three witnesses there was a degree of consensus in that there was a reference to the Claimant having served time, as he had, and to his issuing a form of threat.
13. However there is one part of the statement of Mr Bradshaw that was also of course before Mr Crossley as it was before the investigating office, that is Mr Ndrassien, and at all subsequent stages of appeal. And that is that before any of this conversation was reported back to Mr Bradshaw he describes himself returning to the workshop, seeing the Claimant outside, telling him that he needed to speak to him to which he records the reply “*I’m sat here calming down*”. So the factual information before the Respondent was that immediately after the allegedly uttered threats the Claimant saw Mr Bradshaw, told him in terms that he was taking time out to calm down, did not utter any direct threats to Mr Bradshaw or express any form of aggression to him at all.
14. As well as those three statements from the principle witnesses to this incident the Respondent also took statements about the trigger incident involving the cleaner - though none of those statements were in fact disclosed to Mr Hall. The first of those was from somebody called Judy Shepherd. She describes him shouting and swearing at the cleaner and also making an allegedly racist comment. The nature of that comment was referred to subsequently in the disciplinary hearing but the statement was never disclosed and they did not report it in full to the Claimant. There were two other statements about that incident which were not put to him at all and both of those are in large measure supportive of the Claimant.
15. The first from a Mr Amin. He says in terms that he did not hear the Claimant swearing but he was always loud and he, Mr Amin, was used to him being like that. But more particularly the statement from Rita Varadiova herself taken on 26 May. She records the Claimant shouting at her but she does not allege any racist comment and that of course has always been categorically denied by the Claimant and forms no substantive part of the issues in this case. But more significantly Ms Varadiova records that “*I saw the Claimant later that day approximately two hours and he said he was sorry*”. Clearly that apology must have been given by the Claimant voluntarily and before the investigative meeting with Mr Ndrassien. That necessarily follows because immediately following that investigative meeting he was suspended and escorted from the premises so he would not have had no opportunity to have uttered the apology them.
16. So there were two hugely significant pieces of evidence known to the Respondents at all material times. In addition to the allegations of what was said. Those were that immediately after the outburst in the cabin before his two colleagues the Claimant had gone outside and calmed down as he had been instructed to do in no uncertain terms by Mr Siree and he did not utter

any repeated threats directly to Mr Bradshaw, though he saw him and also, in relation to the trigger incident involving the cleaner, the Claimant had apparently reflected better upon his actions. Though he may have been unnecessarily abusive earlier, he had already apologised and that on the face of it appears to have been accepted by the woman involved.

17. Having had the matter reported to him Mr Bradshaw however then made a complaint and that triggered the investigation. That was conducted as I have said at 14.50 that same day, 23rd by Mr Ndrassien with a note taker. There is a minute of that meeting though again it is not at all clear that was ever in fact disclosed to the Claimant at any stage. Mr Ndrassien starts by informing the Claimant that he was to investigate threats towards John Bradshaw to which the immediate response is "*don't know anything about it*". He is then asked about an alleged meeting at 11.00 o'clock which certainly appears not be the correct time. He said "*did you make any threat regarding another colleague*". The claimant said "*no we talked about lots of things*". He was then told "*we have received a formal complaint from John Bradshaw regarding a threat.*" The Claimant says he can not recall saying anything.
18. Although it is only a relatively brief note of what was said, it is a reasonable implication that this is recording in the initial conversation an alleged threat made directly by Mr Bradshaw, which is not the Respondent's case and which of course the Claimant has always denied. The interview therefore commenced on a false premise and it is not fair to hold the Claimant's perceived lack of response to an inaccurate assertion against him. It is then that Mr Ndrassien quotes from the statement of Mr Dinsdale. He made the allegation that the Claimant said he would be happy to serve time again to get rid of that twat out of the world. But then also at the same time before given the opportunity of any immediate answer to that more specific allegation he goes on to say that Mr Bradshaw was informing the police about this threat. He then summarises the position as follows "*but you say you can't remember anything and based on the evidence you don't have any recollection and it was just a friendly chat*" at which there is a response from the Claimant, "yes" And at that moment the investigative meeting is suspended. Mr Ndrassien consults with Mr Crossley and the decision is taken to suspend the Claimant, which happened immediately, and to also to invite him immediately to a disciplinary meeting.
19. So though it is right that by that stage the Claimant has not volunteered any account of what was said, when you look at the actual context of that investigative meeting, it is obvious that there may well be good reasons for that. The Claimant's account now is that having been informed the police may be involved, he decided not to say anything that may incriminate him even though he did not consider them as any substance to the allegations. And although he did not refer to that reason for maintaining his account that he could not remember what was said, if that was genuine, at the first disciplinary meeting on the 25th I do note that after that meeting was adjourned to 26th he did then say in express terms "I took legal advice and they told me not to say anything". So that corroborates to a large extent the Claimant's account that he was concerned if the police were involved, that he did not wish to say it about the incident. He maintained in evidence before me that he genuinely has no recollection of what was or was not said and concedes, as he did in the course of the interview, that the account of the two witnesses may possibly therefore be true as to the words used.

20. As I have said the meeting was convened initially for 25 May. At that point no proper information had been disclosed to the Claimant to identify the charges he had to face. However because the meeting was then adjourned to the 26th he was given the opportunity, shortly before that meeting resumed, to see what were now typed versions of the witness statements. He never saw the original handwritten statements taken.
21. Having expressly said that he had been advised not to say anything further the meeting continued on the 26th and he was summarily dismissed.
22. From the records of the disciplinary meeting it appears firstly on 25th that Mr Crossley the dismissing officer appeared to regard this as a case where the Claimant had to prove his innocence or establish a reason why he should not be sacked. He said in terms that he had no evidence to prevent the Claimant from losing his job for gross misconduct. That appears therefore to indicate a presumption that on the basis of the words used this would be gross misconduct and without anything more would lead to dismissal. That is in large measure corroborated by the evidence that Mr Crossley has given before me. I do not doubt the entirely genuine evidence that in weighing up a difficult matter he considered he had “been given nothing by the Claimant”. But, even though in terms the Claimant had indicated that he could not and would not hurt Mr Bradshaw, on the basis of his having not answered questions about what was said and because of the previous conviction, some 16 years earlier Mr Crossley took the view that he did not believe that account. However the indications within the notes of the meeting are that that was not an objective but a subjective view. In announcing the reason for the decision to dismiss on the 26th Mr Crossley said “I think you are a threat to other people. I have a duty of care towards them. I believe the risk is genuine”. Similarly in a memo of 27 May he writes “I thought he was a significant threat to John, the two witnesses who gave statements and the product site.”
23. As I have said by this stage there was no indication that either of the two witnesses to the threatening comments had regarded them as intended to be carried out. Indeed there is some confusion on the part of Mr Crossley as to whether he in fact interpreted this as a threat to kill, which on the face of it would be, or a threat to do some harm.
24. The police were involved at some stage. It is not entirely clear when. The matter was certainly only progressed by the police after 15 June by which point of course the Claimant had already been dismissed for some three weeks. When the police did contact the Claimant they initially left a note for him to speak to the officer involved but said there was nothing to worry about. That was followed up almost immediately by a harassment notice. It is unclear at what stage this document came into the possession of the Respondents but it certainly must have been there before the conclusion of the appeals. And if it was not seen by any of the appeals officers then it ought to have been and the failure to pay attention to it is a failure to carry out a reasonable investigation in all the circumstances. Because what the police reported as having been reported to them- this again I consider significant- was: “It is alleged that over a period of time whilst working as an engineer on Hackney Road Industrial Estate you have made *several idle threats and derogatory* (sic – presumably it has omitted the words “remarks” or “comments”) towards your manager John Bradshaw following a staff meeting. These threats were made in front of other staff members. Mr Bradshaw found

the threats and derogative comments upsetting and does not wish to have any further contact with you save for in the course of your employment. Any evidence of further such behaviour would be treated as ongoing harassment for which you may be liable to arrest". (Emphasis added).

25. The only express statements that go beyond that to indicate there was any alleged fear of what the Claimant may in fact do were contained in documents taken by Mr Blackburn, the first appeal officer, following that appeal hearing on 14 June. On 16 June he then took further statements himself from Mr Bradshaw and Mr Siree and at that stage for the first time, when the Claimant had already been dismissed for more than three weeks, Mr Bradshaw alleged that he believed he was capable of carrying out the threat and Mr Siree alleged that at the time he heard it said he thought he had every intention of doing it. There is no such corroborative statement from Mr Dinsdale. Those statements are clearly on the face of it at odds with the initial statements taken in the course of the investigation which made no reference to any such feelings or concerns.
26. So in all of those circumstances even though I am satisfied the Respondent has established that this was a dismissal for a reason related to conduct and therefore potentially fair and although, absent any contrary indication from the Claimant, they were entitled to accept the evidence - although not entirely consistent between the witnesses - as to what he had said, I have reached the conclusion that it is outside the range of reasonable responses. It was not open to a reasonable employer to dismiss in these circumstances based upon this entire factual matrix as known to them and established in the course of the entire disciplinary process. It is unfair to have treated as justifying dismissal this expression, used only in front of a third party and which a key witness record as "having a vent" and which is followed, on the evidence before the Respondents, by an immediate period of calming down.
27. There was no indication either on the past history of two and a half years employment or on the subsequent albeit limited involvement with Mr Bradshaw that there was any intention to carry out the threat or do anything or say anything directly to Mr Bradshaw. The dismissal on the facts is substantively unfair as well as there being a number of procedural irregularities. Having said that however the Claimant clearly on the evidence did use wholly inappropriate language. Also because of his personal history of having this serious conviction, the reference to him having done time and not being concerned about doing it again, even if it was not meant to be taken literally or seriously is significant. It is at face value an extremely unpleasant thing to have said. I consider that any award I make either of a basic award or a compensatory award should therefore be substantially reduced because of the inappropriate language, even in the heat of the moment, and that reduction I consider in both instances should be 70%.

Employment Judge Lancaster

Date: 10 February 2017

Date sent: 13 February 2017