



EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Myles

Respondent: Enterprise Rent a Car UK Ltd

Heard at: West Midlands Employment Tribunal (by CVP)

On: 2 and 3 May 2023

Before: Employment Judge Routley

Representation

Claimant: Mr Justin Quinton (Solicitor)

Respondent: Mr Ben Mitchell (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

The Respondent unfairly dismissed the Claimant. The Claimant's claim is upheld.

REASONS

The hearing

1. The hearing took place by CVP. All parties attended. There were no connection issues.
2. At the start of the hearing, Mr Quinton identified that the correct name for the Respondent was Enterprise Rent a Car Limited, and that there was no claim against Enterprise Flex e Rent. Mr Mitchell did not object to the change of name and so I made an order that the name of the Respondent be changed to Enterprise Rent a Car UK Ltd.

3. Mr Alan Scott and Mr James Walker gave evidence to the Tribunal on behalf of the Respondent. Mr Myles gave evidence on his own behalf.
4. There was some discussion both at the start of the hearing and in submissions in respect of the scope of Mr Myles' claim and whether Mr Myles should be permitted to raise a claim of procedural unfairness.
5. Mr Mitchell maintained on behalf of the Respondent that the claim as pleaded by Mr Myles related to substantive unfair dismissal only. Mr Mitchell submitted on the part of the Respondent that, as Mr Myles had not applied to amend his claim, the allegations he had raised in respect of procedural unfair dismissal should be disregarded.
6. In support of his submissions, Mr Mitchell has pointed me to paragraphs 17 and 18 of the case of **Chandok v Tirkey [2015] IRLR 195**, and to the application of this principle in paragraph 12 of the case of **Aynge v Trickett UKEAT/0264/17/BA**.
7. I considered the authorities provided by Mr Mitchell. The thrust of these cases was, broadly speaking, the importance of clear pleadings.
8. I appreciated the points raised by Mr Mitchell in respect of the importance of pleadings, and of a Respondent understanding the nature of the case against it. However, I do not accept that the case against the Respondent was unclear in these circumstances.
9. The Respondent was aware that this was a case raised by Mr Myles was one of unfair dismissal, and that the Respondent's defence to this case was that Mr Myles was fairly dismissed on the grounds of conduct. The issues to be considered by a Tribunal in such cases are well established. The Respondent was legally represented, and so should have been well aware of the questions to be considered by a Tribunal. The general test for unfair dismissal is set out in statute, with specific considerations in respect of conduct cases set out in **BHS v Burchell 1978 IRLR 379**. The Respondent would therefore have been aware of the evidence required to defend such a claim.
10. Further, I did not see anything in these authorities which would allow me to exercise a discretion to disregard the statutory test for unfair dismissal as set out in section 98(4) of the Employment Rights Act 1996. This is the

test which Employment Tribunals have been instructed to apply by Parliament. It is well established that this includes questions of procedural fairness.

11. It has been made clear in case law that the duty on a Tribunal in applying the test in section 98(4) is to consider the question in the round, without regard to “a lawyer’s technicalities”, as set out in **Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542**. Further, as set out in **Adama v Partnerships in Care Ltd EAT 0047/14**, the test is for the Tribunal to apply and it is not for the parties to concede or agree that any aspect of a dismissal is fair. Mr Myles was not therefore in a position to concede the question of the procedural fairness of his dismissal by failing to mention it in his pleadings.
12. I have therefore considered the procedural aspects of Mr Myles’ dismissal, in addition to the questions of substantive fairness.

Findings of fact

I make the following findings of fact:

13. Mr Myles was employed by a predecessor organization to the Respondent with effect from 7 January 2008. Mr Myles transferred to the Respondent's employment on 1 January 2020. Mr Myles role was as a Mobile Heavy Goods Vehicle Technician.
14. In January 2021, Mr Myles had received a positive appraisal complementing his attitude to his work. It stated that he had a "good attitude" to his colleagues and a "very good approach and attitude with our customers".
15. On 1 April 2021, Mr Myles attended a National Trust property in order to service a leased minibus. The customer indicated that they were not expecting Mr Myles and were not aware that an appointment had been made.
16. In response, Mr Myles informed the customer that he wasn't surprised that the customer was unaware because "we have a female Eastern European woman in the office and she's always making mistakes."
17. The customer contacted the Respondent by telephone on 1 April 2021 in order to complain about Mr Myles' behaviour. This was followed by a written complaint sent by email on 8 April 2021.
18. In evidence, Mr Myles admitted that he described his colleague as a "female Eastern European woman," but was unsure as to whether he had referred to her making mistakes.
19. I find that Mr Myles did make the comment as alleged. I find this because the comment was recorded in a written complaint from a customer sent only a week after the incident in question. Mr Myles did not deny making this comment during the investigation or disciplinary process, which took place shortly after the incident in question.
20. On 19 April 2021, Mr Myles attended an investigation meeting. At this meeting Mr Myles said that he "apologised for offending" the customer. He offered to go back and apologise to him in person.

21. On 30 April 2021, Mr Myles was invited to a disciplinary hearing. The invite letter stated that the disciplinary charges against Mr Myles were (paraphrasing) that he had spoken of a colleague in a derogatory manner, and that his language could be deemed as discriminatory. The letter did not state that Mr Myles was being accused of discrimination and hostility.
22. The hearing took place on 10 May 2021. The hearing was chaired by Mr Scott. Mr Myles was accompanied at this hearing by a trade union representative.
23. At the hearing, Mr Myles offered to apologise to the customer regarding the incident.
24. It is common ground that Mr Myles was dismissed as a result of this comment. However, there was some debate as to the precise reason for dismissal, and whether it was because the Respondent believed Mr Myles to be hostile towards Eastern European women. This was significant because Mr Quinton submitted on behalf of Mr Myles that there had been no investigation into the question of whether Mr Myles was “hostile” towards Eastern European women.
25. I find that the reason for Mr Myles’ dismissal was that the Respondent believed that Mr Myles was hostile and discriminatory towards Eastern European women.
26. The Respondent disputed that Mr Myles’ alleged hostility and prejudice towards Eastern European women formed part of the reason for his dismissal. Mr Mitchell submitted that it was the fact that Mr Myles’ comments created a perception of prejudice which had resulted in his dismissal.
27. However, Mr Scott specifically referred to Mr Myles being “hostile towards her and possibly other Eastern European women” in paragraph 31 of his witness statement.
28. Further, the Respondent’s grounds of resistance at paragraph 2.13 specifically refer to the fact that Mr Scott believed that Mr Myles’s comments demonstrated that he had a prejudice towards Eastern European colleagues.

29. In addition, Mr Scott stated in his outcome letter that he “considered this statement to be discriminatory”.
30. I therefore find that Mr Myles was dismissed because the Respondent believed that he was discriminatory and hostile towards Eastern European colleagues.
31. The Respondent also stated that Mr Myles’ comment could have damaged the Respondent’s reputation, given that it implied that the Respondent often made mistakes. However, I find that this was not the reason for dismissal but an exacerbating factor. I find this because the reasons given by Mr Scott for Mr Myles’ dismissal (both at the end of the disciplinary hearing and in the outcome letter) focused heavily on the alleged acts of discrimination and made only a brief mention of other potential reputational damage.
32. Mr Myles appealed against his dismissal. An appeal hearing took place on 28 May 2021. Again, Mr Myles was accompanied by a trade union representative. Mr Myles’ appeal was not upheld.

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. On this basis, I make the finding that Mr Myles' dismissal was unfair.
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 Mr Myles had carried out the acts of misconduct set out in paragraph 25 above. Mr Myles did not deny that he had carried out the acts of which the customer complained. It was not put to the Respondent's witnesses that they did not hold such a belief.
 - b. The Respondent also has to demonstrate reasonable grounds on which to base this belief. I find that the Respondent did not have reasonable grounds on which to base its belief that Mr Myles was discriminatory and hostile. The Respondent did not put the charge of hostility to Mr Myles, and he was not given an opportunity to respond to it.
 - c. Mr Myles was not directly asked if he held discriminatory or hostile views about women in general or Eastern European women in particular. These were not listed as charges in the invite letter. Clearly Mr Myles may have acted very differently had he been told that these were the charges against him.
 - d. There was no accompanying evidence which demonstrated any hostility on the part of Mr Myles to either his female or Eastern European colleagues. The Respondent, on its own evidence, employs a diverse workforce, and there was no evidence of any difficulty in the working relationship between Mr Myles and his colleagues. There had been no previous complaints from either comments or customers, and Mr Myles had received positive comments regarding his attitude in a recent appraisal.
 - e. Further, I find that the Respondent did not carry out a reasonable investigation. At no point during the investigation process was Mr Myles asked if he held discriminatory views, or whether he was

hostile to Eastern European colleagues. Whilst the question of what amounts to a reasonable investigation is determined on the basis of a “range of reasonable responses”, it is a basic and fundamental step in a fair investigation process that the person investigated is given an opportunity to respond to the charges against them.

8. On this basis, I find that the Mr Myles’ dismissal was unfair.

Remedy

1. I do not believe it would be appropriate to apply a Polkey deduction in this case. The Respondent has provided no evidence to indicate that Mr Myles was in fact hostile and discriminatory. The available evidence, including: a) Mr Myles willingness to apologise for his behaviour; b) the positive feedback he had received for his attitude; and c) the fact that there had been no previous complaints from either staff or customers about his behaviour, indicate that Mr Myles was not in fact hostile or discriminatory. It is therefore unlikely that a full and thorough investigation of the charges would have revealed evidence that would have allowed a fair dismissal to take place.
2. I do find that Mr Myles’ behaviour was inappropriate, and that he should not have complained to a customer about mistakes being made within the Respondents’ organization. I therefore find that there should be a deduction to any compensation paid to Mr Myles on the basis of his contributory conduct. I find that Mr Myles’ behaviour was an example of minor misconduct, and find that a deduction of 15% is appropriate.

Employment Judge **Routley**

24/05/2023