EMPLOYMENT TRIBUNALS

Claimant: Mr A Davidson

Respondent: UK Plumbing Supplies Ltd (t/a Plumco)

Heard: by CVP on 8 November 2024 and, in chambers, on 5 December 2024

Before: Employment Judge Ayre

Representation

Claimant: In person
Respondent: Ian McGlashan, consultant

JUDGMENT

1. The claim for unfair dismissal is well founded. The claimant was unfairly dismissed by the respondent.

2. The basic and compensatory awards shall be reduced by 35% to reflect the claimant's conduct.

3. The claim for wrongful dismissal / notice pay is also well founded. The claimant was wrongfully dismissed by the respondent and is entitled to 12 weeks' notice pay.

REASONS

Background

1. On 10 February 2024 the claimant issued this claim in the Employment Tribunal following a period of ACAS early conciliation that started on 7 December 2023 and ended on 10 January 2024.

2. In the claim form the claimant asserts that he was employed by the respondent as Warehouse/Transport Manager from 2008 until 10 October 2023. He alleges that he was unfairly dismissed and is entitled to notice pay. The respondent defends the claim. It says that the claimant was employed from 1 May 2008 until 10 October 2023 and that he was fairly dismissed for gross misconduct.

The hearing

3. The Tribunal heard evidence from the claimant and, on behalf of the respondent, from :

    1. Carl Bergman, Profit Centre Manager for Plumco Sheffield;

    2. Paul Teesdale, Manager of Plumbase, Yeadon; and

    3. Anthony Waterhouse, Sales Development Manager

4. There was an agreed bundle of documents running to 199 pages. The Tribunal was also provided with CCTV footage of the incident for which the claimant was dismissed.

The issues

5. The respondent admits that the claimant was an employee with more than two years' continuous service and that it dismissed him without notice or payment in lieu of notice.

6. The issues that fell to be determined at the hearing were the following:

    Unfair dismissal

    1. What was the reason or principal reason for the dismissal? The respondent says the reason was conduct.

    2. Did the respondent genuinely believe that the claimant had committed misconduct?

    3. Did it have reasonable grounds for holding that belief?

    4. At the time it formed that belief had it carried out a reasonable investigation?

    5. Was the procedure followed by the claimant fair and in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

    6. Was dismissal within the range of reasonable responses?

    Remedy for unfair dismissal

    7. Did the claimant cause or contribute to his dismissal by blameworthy conduct?

    8. If so, would it be just and equitable to reduce the claimant's compensatory

award? By what proportion?

9. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

10. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / notice pay

11. What was the claimant's notice period?

12. Was the claimant guilty of gross misconduct or do something so serious that the respondent was entitled to dismiss without notice?

Findings of fact

7. The respondent is a wholesale distributor and retailer of plumbing, heating, and bathroom products which operates throughout the UK. The claimant began employment with Plumbing Supplies Company Limited (Plumco) on 1 May 2008 as a Warehouse Operative. Plumco was a family business which was owned by the claimant's father.

8. In September 2022 the claimant's father sold Plumco to the respondent and on 1 May 2023 Plumco employees, including the claimant, transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

9. Following the transfer the claimant was issued with a new statement of employment particulars which he signed on 9 May 2023. The statement identified the claimant's job title as Warehouse Operative, his rate of pay as £37,853, and stated that details of the disciplinary rules applicable to the claimant's employment are set out in the Employee Handbook, along with notice entitlement. There were brief details of notice in the statement, including the following: "*You are entitled to one month's notice from the Company. Notwithstanding the above, your employment may be terminated without notice in cases of gross misconduct.*"

10. The respondent has an Employee Handbook which contained Disciplinary Rules. The Disciplinary Rules set out examples of misconduct which it is said may give rise to disciplinary action, including "*Aggressive behaviour, assault or threat of such, whilst on Company business*". The Rules also contain a non exhaustive list of examples of gross misconduct which it is said could lead to dismissal without notice. The examples include: "*Physical violence or threat of such to colleagues or to other persons whilst on Company business*".

11. Although the claimant's job title was Warehouse Operative, in practice his role involved organising deliveries for the respondent and was more akin to one of Warehouse or Transport Manager. The claimant would prepare a daily delivery schedule and liaise with the delivery drivers to set their schedules. Members of sales staff would also contact delivery drivers directly and ask them to deliver or collect products, without telling the claimant that they were doing this. This resulted in

changes and disruptions to the delivery schedules which the claimant was not aware of.

12. It also resulted in tensions between the claimant and members of the sales team, in particular with Jack Hobson in that team. Although the two had worked together for some years, Mr Hobson's attitude towards the claimant changed after the claimant's father sold the business, and he began to ignore instructions given by the claimant and speak to him impolitely.

13. On 17 April 2023 one of the sales team ignored the claimant's instructions and arranged an unplanned delivery for a customer, causing some planned deliveries not to be made. The claimant spoke to two managers, Mitchell Hicks and Carl Bergmann, about the difficulties that were being caused by the sales team asking drivers to do deliveries without letting the claimant know. Mr Bergmann, in his evidence to this Tribunal, acknowledged that the sales team contacting drivers directly, rather than going through the claimant, could prove disruptive as the sales team would not know what other deliveries were planned or how the claimant had arranged them.

14. The following day the claimant was in the sales office with Mitchell Hicks, Carl Bergmann, members of the sales team and customers. A member of the sales team asked the claimant if he could fit in an unplanned delivery that day. The claimant replied that he could not promise anything and would need to check the delivery schedule. In response, Jack Hobson told the claimant, in front of customers and colleagues, to "*fuck off and stop being a dick head*". Neither of the managers present intervened. The claimant was very upset and left the office.

15. Shortly afterwards the claimant spoke to Mitchell Hicks and told him how upset he was. Michell Hicks assured the claimant that he would 'sort it out'. The claimant heard nothing further from Mr Hicks and believed, with good reason, that no action had been taken in relation to Mr Hobson's behaviour towards the claimant. Mr Hobson did not change his behaviour towards the claimant and continued to be rude towards the claimant. The claimant felt that his concerns about Mr Hobson's behaviour towards him were being ignored by management

16. On the morning of Saturday 2 September 2023 the claimant was at work and due to finish at 12 noon. He had recently separated from his partner and needed to leave work promptly to collect his children. Shortly before noon the claimant began preparing to close the premises. He had the keys and needed to ensure that the premises were locked before he left. Jack Hobson and two colleagues were taking stock from the warehouse out into the yard for a customer. The claimant asked Mr Hobson how much longer they would be and explained that he needed to leave on time. Mr Hobson replied that it would take as long as it took, and then told the claimant to "*fuck off*" and "*stop being a dickhead*".

17. The claimant momentarily 'lost it' and became angry. He grabbed Mr Hobson by the shirt and pushed him into some boards. Mr Hobson retaliated and spun the claimant round. Two colleagues who were present then intervened and separated the claimant and Mr Hobson. The incident lasted just a few seconds and took place

at the back of the workshop. There were no customers present, although customers were present in the yard outside.

18. The incident quickly de-escalated and the claimant and Mr Hobson resumed working together without any further difficulties that day. The entire incident was captured on CCTV, although without any sound recording.

19. On Monday 4 September at approximately 7.30 am Mr Hobson told Mr Bergmann that the claimant had attacked him at work on Saturday. Mr Bergmann told Mr Hobson that he would investigate the incident.

20. Mr Bergmann began by looking at CCTV footage of the workplace. He saw that shortly before 12 noon on Saturday 2 September, the claimant appeared to have grabbed Mr Hobson by his shirt and pushed him, before two colleagues intervened and restrained both the claimant and Mr Hobson.

21. At approximately 3 pm on the 4 September, Mr Bergmann called the claimant into the office to speak to him about the incident on 2 September. Mr Bergmann's evidence was that the meeting took place at approximately 9.30 am. The notes that he made of the meeting did not however record the time that it took place. The claimant was very clear in his evidence that the meeting did not take place until the afternoon that day, causing him to believe that, because he'd been allowed to remain working with Mr Hobson until the afternoon, no further action would be taken in relation to the incident. On balance I prefer the evidence of the claimant on the timing of the meeting. I found him generally to be a clear and consistent witness. He was willing to accept that he had made mistakes, and his evidence in relation to the incident itself was consistent with the CCTV footage.

22. At the start of the meeting on the afternoon of 4 September the claimant apologised to Mr Bergmann for his behaviour on 2 September and said that he did not want to cause trouble. He then gave his version of events. In summary he said that he had asked Jack Hobson if they could put goods being collected outside or around the front of the building, so that the claimant could start locking up, and that Mr Hobson had replied 'you will have to wait'. The claimant told Mr Bergmann that he had then explained to Mr Hobson that he could not wait much longer because he needed to pick up his children, in response to which Mr Hobson replied, "*Stop being a fucking dickhead"*.

23. The claimant told Mr Bergmann that this was not the first time that Mr Hobson had spoken to him in this way, and that he had 'seen red'. He did not seek to deny grabbing Mr Hobson and apologised for his actions.

24. Mr Bergmann took notes of the meeting which he asked the claimant to sign at the time. The claimant signed the notes but was not provided with a copy of them until January 2024, after his dismissal and appeal.

25. At the end of the meeting Mr Bergmann told the claimant that he was being suspended. He was told to collect his personal belonging and leave the premises, which he did. The claimant did not hear from the respondent again until 13

September, a week later, when he received an email from Mr Bergmann attaching a letter (dated 4 September) confirming his suspension. The letter instructed the claimant not to come onto company premises or contact any employee during the suspension without Mr Bergmann's permission.

26. Mr Bergmann also interviewed Jack Hobson and the two colleagues who had been present on 2 September. Mr Hobson admitted that he had told the claimant to 'fuck off' and described the claimant as having grabbed him by the shirt and pushed him up against ram raid blocks.

27. Ben Foster, one of the colleagues present during the incident, described the claimant and Mr Hobson as arguing and swearing at each other, and the claimant as grabbing Mr Hobson and shoving him backwards. The other person present, Blaze Lee, described the claimant as having Mr Hobson 'pinned' against the blocks. He also said that the argument had continued for about 10 minutes, and that the claimant had continued to act aggressively and said to Mr Hobson 'let's take it around the back'.

28. Mr Blaze's version of events was inconsistent with the version of the other people present, and with the CCTV footage itself. That showed a very brief incident with the claimant grabbing Mr Hobson's shirt and pushing him briefly, before the two were separated and then continued to work together without apparent further incident.

29. Mr Bergmann took notes of his interviews with the three colleagues of the claimant. He did not send the notes or the CCTV footage to the claimant.

30. Mr Bergmann decided that the matter should progress to a formal disciplinary hearing and asked Paul Teesdale, the manager of Plumbase (another of the claimant's trading brands) in Yeadon to act as disciplinary manager.

31. Mr Bergmann sent the notes of the interviews he had carried out, and the CCTV footage, to Mr Teesdale. On 29 September 2023 Mr Bergmann wrote to the claimant inviting him to a disciplinary hearing on 3 October. In the letter he wrote that the purpose of the hearing was to "*deal with an allegation of a physical attack on another member of staff*" and warned the claimant that the outcome of the hearing could include dismissal without notice. He informed the claimant of his right to be accompanied at the meeting.

32. Before the disciplinary hearing Mr Teesdale spoke to the people who had been interviewed by Mr Bergmann, with the exception of the claimant himself. He also spoke to Carl Bergmann. There were very few notes of these conversations, and what notes that exist were not shown to the claimant prior to these proceedings. Mr Teesdale could not recall whether he had told the claimant that he had spoken to four other people prior to the disciplinary hearing.

33. Mr Teesdale did not view the CCTV footage of the incident before the disciplinary hearing, or even before he made the decision to dismiss. He has, however, seen it subsequently.

34. The disciplinary hearing took place on 3 October and was chaired by Mr Teesdale. Mitchell Hicks, Assistant Manager of Plumco Sheffield, took notes. The claimant attended without a representative. Mr Teesdale began the meeting by asking the claimant for his version of events. The claimant admitted that he had grabbed Mr Hobson but said that he had been provoked by Mr Hobson calling him a "*fucking dickhead*" and that Mr Hobson had called him the same name previously.

35. The notes of the meeting, which were not signed by the claimant but were shown to him during the appeal hearing, record that Mr Teesdale told the claimant that "*in the interview with Blaze it was mentioned Jack was leant over backwards against a barrier this was not denied by Andrew*". In fact the notes of the interview with Blaze do not record Blaze saying that Jack was leant over backwards against a barrier, and nor does the CCTV footage show this.

36. The claimant was asked whether he had apologised to Mr Hobson and said that he had not. The claimant's explanation for this in his evidence to the Tribunal was that he had apologised for his behaviour to Mr Bergmann at the start of the interview on 4 September and that he had considered reaching out to Mr Hobson but had been expressly told by the respondent that he must not contact any colleagues during the period of his suspension. This explanation, which I accept, is in my view a reasonable one.

37. The notes of the disciplinary hearing record that Mr Teesdale ended the meeting by telling the claimant that he would be in touch to discuss the outcome of the investigation, and that a further meeting may be arranged. At the disciplinary hearing the claimant was not shown or asked questions about the statements taken by the respondent, or the CCTV footage.

38. After the disciplinary hearing Mr Teesdale spoke again to Jack Hobson. There were no notes of his conversation, and Mr Teesdale did not tell the claimant what Mr Hobson had said or give him an opportunity to comment on it before he reached his decision.

39. On 10 October 2023 Mr Teesdale wrote to the claimant dismissing him with immediate effect. In the letter he wrote that:

"*At the hearing, you gave me a brief account of an altercation that took place between you and Jack Hobson…. On a Saturday September 2nd, and admitted that during this incident you grabbed Jack and pushed him up against some barriers. You and Jack were separated by another member of staff, but you continued to be aggressive and asked Jack if wanted to go to another part of the premises where there were no cameras and carry on. You mentioned that Jack had called you names before which made you angry, at this point I adjourned the hearing as I needed to speak to Jack who was away on holiday at the time. Jack is back now and having spoken to him directly and another couple of staff members I don't see how this contributed to what happened on the occasion when you laid hands on Jack.*

Having carefully considered all the facts, I find that you are in breach of company policy and have committed gross misconduct, on top of this the trust between you

and some of the other staff at Plumco, Sheffield has been broken. With all this in mind there is no other option open to me other than dismissal without notice and with immediate effect…."

40. The suggestion that the claimant had continued to be aggressive towards Mr Hobson and had asked him if he wanted to go to another part of the premises where there were no cameras and carry on, is a serious allegation. It was not put to the claimant during the disciplinary hearing or indeed at any point during the disciplinary process prior to the claimant's dismissal. There is no mention of it in the notes of the disciplinary hearing produced by the respondent.

41. Similarly, the suggestion that trust had broken down between the claimant and some of the other staff at Plumco was not put to the claimant in the disciplinary hearing, yet it also forms part of the reasons for dismissal.

42. At the time the claimant was dismissed he had an entirely clean disciplinary record and had never received any previous warnings about his conduct. In his evidence to the Tribunal Mr Teesdale said that he did not consider any alternatives to dismissal. In response to the question whether there was anything the claimant could have said or done which would have caused Mr Teesdale not to dismiss him, Mr Teesdale replied "there was nothing he did say".

43. Mr Teesdale did not consider the fact that the claimant had a long period of service with the respondent, or that he had a clean disciplinary record. When asked whether he considered that the claimant had been provoked by Jack Hobson on the day of the incident he replied that is was 'six of one and half a dozen of the other'.

44. There was no evidence to suggest that Mr Teesdale has taken any disciplinary action in relation to Mr Hobson, despite his comment that the incident for which the claimant was dismissed was 'six of one and half a dozen of the other'. Mr Bergmann said that he had given Mr Hobson a warning for telling the claimant to 'fuck off' but there was no documentary evidence of that before the Tribunal and Mr Bergmann accepted that there had been no formal disciplinary process in respect of Mr Hobson.

45. On 13 October 2023 the claimant appealed against the decision to dismiss him. In his appeal he raised the following issues:

    1. The circumstances leading to his dismissal were not adequately taken into account;

    2. He had demonstrated dedication and commitment to the respondent and made positive contributions;

    3. He was willing to learn and grow; and

    4. He was committed to rectifying any mistakes made and ensuring that they did not happen again.

46. An appeal hearing was scheduled for 31 October 2023 but postponed, at the claimant's request, and rescheduled for 14 November. The hearing was chaired by

Anthony Warehouse, Sales Development Manager. Darren Foster was also present and took notes. Those notes are very brief, running to just one page, and were not shared with the claimant at the time.

47. During the appeal hearing the claimant told Mr Waterhouse that the respondent had failed to consider the history between him and Jack Hobson, and that Mr Hobson had bullied and ridiculed him for months, with management failing to act. The claimant also challenged the new allegations mentioned in the dismissal letter, strongly denying them and asking why they had not been raised in the disciplinary hearing.

48. On 17th November 2023 Mr Waterhouse wrote to the claimant informing him of the outcome of the appeal. In the outcome letter Mr Waterhouse stated that he had investigated concerns raised by the claimant as to why the disciplinary meeting was held at Plumco Sheffield, and the history between himself and Mr Hobson. He wrote that:

"I have since interviewed Carl Bergmann (PCM Plumco Sheffield) after reviewing the lead up to the altercation, Carl did tell me he had verbal conversations with Jack and yourself on your conduct leading up to this to warn you both to stop arguing and to work together better. So I am satisfied that you were on notice not to continue to get into conflict with Jack and to work together better. The altercation shows that you had not learn from the warning that was given to you by Carl."

49. Mr Waterhouse concluded that the claimant had assaulted Jack, that the assault was gross misconduct and in breach of the respondent's rules, and that dismissal was the correct sanction. The appeal outcome letter is brief and does not specifically address all of the issues raised by the claimant in his appeal.

50. Contrary to the assertion made by Mr Waterhouse in the letter, the claimant had not in fact been given a warning by Mr Bergmann about his behaviour towards Mr Hobson. A point that was raised by the claimant in mitigation (namely the provocation by Mr Hobson) was turned round by Mr Waterhouse and used against the claimant. Mr Waterhouse did not put the purported comments by Mr Bergmann to the claimant or give him the opportunity to comment on them before reaching his conclusion. Once again the respondent relied upon evidence which was not put to the claimant.

51. During his evidence to the Tribunal Mr Waterhouse said that it was not in fact Carl Bergmann who had purportedly given the claimant a warning about his behaviour to Mr Hobson, but was Mitchell Hicks, another manager in Sheffield. When he was asked whether there was anything the claimant could have said or done to persuade him to overturn the dismissal, Mr Waterhouse replied that he was 'only going off what was in front' of him, and that the claimant 'had the opportunity during the appeal hearing'.

52. After the claimant was dismissed he asked the respondent on several occasions for copies of the statements and documents used during the disciplinary process. He was repeatedly told that they were for internal use only and that he was not

entitled to see them.

The Law

Unfair dismissal

53. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.

54. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

55. Section 98(2) lists the potentially fair reasons for dismissal and states that a reason falls within this subsection if it:

"*(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

56. Section 98(4) states as follows:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

> *(a) Depends 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; and*
> *(b) Shall be determined in accordance with equity and the substantial merits of the case. "*

57. Conduct does not have to be culpable, blameworthy or reprehensible in order to amount to a fair reason for dismissal, although this can be a factor when deciding the fairness of the dismissal (***Jury v ECC Quarries Ltd [1980] WLUK 116*** and ***JP Morgan Securities Plc v Ktorza [2017] 5 WLUK 237***). In the latter case the EAT held that the Tribunal was wrong to find that in order for an employee to be fairly dismissed for conduct that conduct had to be culpable, and that sections 98(1) and

(2) of the ERA did not require that an employee was aware that their employer would not approve of their behaviour.

58. Where conduct is established as the reason for dismissal, the starting point for the Tribunal when considering whether the dismissal was fair is the test in ***British Home Stores Ltd v Burchell [1980] ICR 303***, namely:

1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct?
2. Did the respondent have reasonable grounds for holding that belief; and
3. At the time it formed that belief, had it carried out as much investigation as was reasonable ?

59. One of the considerations under section 98(4) is whether dismissal was within the range of reasonable responses, i.e. was it an option that a reasonable employer could have adopted in all the circumstances. The Tribunal must not substitute its view of the appropriate disciplinary sanction for that of the employer (***Iceland Frozen Foods v Jones [1983] ICR 17***). The range of reasonable responses test is not a perversity test, and it applies also to the procedure followed by the respondent including the investigation (***Sainsbury's Stores Ltd v Hitt [2003] IRLR 23***)

60. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-

"*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

61. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

62. In ***Nelson v BBC (No.2) 1980 ICR 110*** the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-

1. There must be conduct which is culpable or blameworthy;
2. The conduct in question must have caused or contributed to the dismissal; and

3. It must be just and equitable to reduce the award by the proportion specified.

63. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (Nelson v BBC (No.2)).

64. In ***Hollier v Plysu Ltd [1983] IRLR 260*** the EAT said that contribution should be assessed broadly and should generally fall within the following categories: employee wholly to blame (100%); employee largely to blame (75%); employer and employee equally to blame (50%) and employee slightly to blame (25%).

Wrongful dismissal

65. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the claimant's employment.

66. In a wrongful dismissal claim, where it is admitted that the claimant was not given or paid for his notice period, the question is whether the claimant was in repudiatory breach of his contract of employment such that the employer was entitled to dismiss him without notice. Questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (***Enable Care and Home Support Ltd v Pearson EAT 0366/09***).

67. Section 86 of the Employment Rights Act 1996 sets out the rights of employers and employees to minimum periods of notice. The relevant sections are as follows:

"*(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*

(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more….

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice….

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

Conclusions

Unfair dismissal

68. The burden of proving the reason for dismissal, and that it was a potentially fair one, falls on the respondent. In ***Abernethy v Mott, Hay and Anderson [1974] ICR*** 323, the Court of Appeal described a 'reason for dismissal' as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employer'.

69. Having heard the evidence of Mr Teesdale, who took the decision to dismiss and Mr Waterhouse, who heard the appeal, I am satisfied that the reason the claimant was dismissed was because the respondent believed that he was guilty of misconduct. I accept the evidence of both witnesses that they genuinely believed that the claimant had committed gross misconduct.

70. The claimant did not suggest any other motive for the dismissal, and all of the evidence before me indicates that it was the claimant's behaviour towards Mr Hobson on 2 September that caused Mr Teesdale to dismiss him, and Mr Waterhouse to dismiss the appeal.

71. The respondent has therefore discharged the burden of establishing a potentially fair reason for dismissal, namely conduct which falls within section 98(2)(b) of the Employment Rights Act 1996.

72. I have then gone on to consider whether the dismissal was fair or unfair, applying the principles set out in section 98(4) of the Employment Rights Act 1996. I have reminded myself that it is not for the respondent to prove that it acted reasonably in dismissing the claimant for misconduct, but rather that is a neutral question for the Tribunal to decide (***Boys and Girls Welfare Society v Macdonald [1997] ICR 693***).

73. I take account of the fact that the focus of the Tribunal should be on the conduct of the respondent and have reminded myself that the Tribunal must not substitute its view of the appropriate response to the incident, for that taken by the respondent (***Foley v Post Office; HSBC Bank plc v Madden [2000] ICR 1283***).

74. I find that the respondent did have a genuine belief that the claimant was guilty of misconduct. I accept that, at the time he took the decision to dismiss the claimant Mr Teesdale genuinely believed that the claimant's behaviour during the incident on 2 September amounted to gross misconduct. That was clear from his evidence. I also accept that Mr Waterhouse had a similar view at the time he made his decision on the claimant's appeal.

75. I accept that Mr Teesdale also genuinely believed that the claimant had continued to be aggressive towards Mr Hobson after grabbing him and had asked him if he

wanted to go to another part of the premises (where there were no cameras) and carry on the dispute, and that the trust had broken down between the claimant and some of the other staff.

76. The next consideration therefore is whether, at the time he decided that the claimant was guilty of misconduct, Mr Teesdale had reasonable grounds for doing so. I find that he did not. He had not viewed the CCTV footage of the incident and had not put two important parts of his reason for dismissing the claimant to the claimant. It is clear from the letter of dismissal that part of Mr Teesdale's reason for dismissing the claimant was that he believed that the claimant had asked Mr Hobson if he wanted to go to another part of the premises where there were no cameras and carry on the dispute, and that the trust had broken down between the claimant and some of the other staff. He did not even put those allegations to the claimant. Rather, he accepted without challenge what he was told by other employees, without even asking the claimant for his version of events.

77. I turn next to the investigation carried out by the respondent and have asked myself whether the investigation carried out was a reasonable one. The respondent did interview relevant members of staff, including the claimant and all those who were present during the incident. Mr Teesdale did not however obtain the CCTV footage and watch it before making the decision to dismiss the claimant. Nor was there any proper investigation into the claimant's assertion that he had been provoked by Mr Hobson, and that he had previously complained to managers about Mr Hobson's behaviour towards him but no action had been taken.

78. An investigation should look into both evidence of guilt and evidence of 'innocence' or to support the claimant's explanation for his behaviour. In this case the respondent did not investigate the claimant's explanation for the incident. Nor did the respondent properly investigate all of the allegations which formed part of the rationale for dismissal, as it did not obtain any evidence from the claimant on the allegation that he asked Mr Hobson if he wanted to go to another part of the premises where there were no cameras and carry on the dispute, or on the allegation that trust had broken down. Moreover, at the time he took the decision to dismiss the claimant Mr Teesdale had not obtained or viewed highly relevant evidence in the form of the CCTV footage.

79. For these reasons I find that the investigation conducted by the respondent fell out with the range of what a reasonable employer would have done to investigate.

80. The respondent also failed to follow a proper procedure when dismissing the claimant. None of the evidence that it obtained during the investigation was sent or shown to the claimant, so he did not know what his colleagues had said about the incident or have the opportunity to comment on it. He was not even told about two of the allegations that formed part of the reason for dismissal, namely the allegations that he asked Mr Hobson if he wanted to go to another part of the premises where there were no cameras and carry on the dispute, and that trust had broken down.

81. The failings in procedure followed by the respondent continued at the appeal stage, where Mr Waterhouse still did not show the claimant any of the evidence

including the CCTV footage. He did not investigate all of the matters raised by the claimant in the appeal and his outcome letter, which is brief, does not address the claimant's grounds of appeal. Mr Waterhouse spoke to Mr Bergmann after the appeal hearing and drew conclusions from his conversation with Mr Bergmann which were adverse to the claimant (the conclusion that he had previously been given a warning by Mr Bergmann about his behaviour towards Mr Hobson) without telling the claimant what Mr Bergmann had said or giving him the opportunity to comment.

82. The procedure followed by the respondent was, for these reasons, fundamentally flawed.

83. I have also considered whether it can be said that dismissal was, in all the circumstances of the case, within the range of reasonable responses. I have reminded myself that I must not step into the shoes of the employer and substitute my view of the appropriate disciplinary sanction for the view taken by the dismissing manager and the appeal hearer. Rather I have to consider whether the sanction of dismissal was outside the range of sanctions available, in the circumstances, to a reasonable employer.

84. A finding by an employer that an employee has committed gross misconduct does not necessarily mean that the dismissal is a fair one. In ***Burdett v Aviva Employment Services Ltd EAT 0493/13*** the EAT overturned a finding by a Tribunal that the dismissal of an employee for sexually assaulting four women when he had stopped taking his medication for paranoid schizophrenia, was a fair one. The EAT held that the Tribunal had failed to properly consider whether there were reasonable grounds for the employer to conclude that the claimant's conduct was culpable gross misconduct and commented that it cannot be assumed that a finding of gross misconduct will always justify dismissal. Consideration should be given to mitigation.

85. In this case, the respondent failed to properly consider the mitigation put forward by the claimant. Neither the dismissing manager nor the appeal hearer placed any weight on the claimant's repeated comments that he had been provoked by Mr Hobson, and that he had previously complained about Mr Hobson's attitude and behaviour towards him to no avail.

86. Rather, the decision makers took a 'tariff' approach to their decision making and decided that because they believed the claimant was guilty of gross misconduct, the claimant must be dismissed. I am not convinced that there was anything the claimant could have said or done that could have persuaded them not to dismiss.

87. I do not consider that either of the decision makers in this case approached the decision making with impartiality or an open mind. Mr Teesdale spoke to the other witnesses before the disciplinary hearing and did not tell the claimant what they had said. Mr Waterhouse also spoke to witnesses without telling the claimant.

88. Neither of the decision makers properly considered the mitigation put forward by the claimant by way of the background to the incident and Mr Hobson's provocation of the claimant on the day itself. Neither of the decision makers appeared to take account of the fact that this was a one off isolated incident that lasted a matter of

seconds. There was no evidence before me to suggest that either of them considered alternatives to dismissal, or that they took into account the claimant's length of service or previous good record.

89. The claimant was a long serving employee with more than 15 years' service. That appears to have carried no weight whatsoever with either Mr Teesdale or Mr Waterhouse.

90. In ***Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] IRLR 119*** the EAT held that the Tribunal was wrong to find that the employer acted reasonably in dismissing an employee with more than 20 years' service and a good disciplinary record for hitting a colleague because the employer's disciplinary rules stated that such an offence would lead to dismissal. The EAT stated that the proper test for the Tribunal is not what the policy of the employer is, but what the response of a reasonable employer would have been in the circumstances, and a reasonable employer would have taken account of the claimant's long service and good history with the employer.

91. Mitigating circumstances such as provocation, previous good conduct and length of service are relevant to the issue of reasonableness, as is the employee's attitude following the violent incident. In this case the claimant demonstrated remorse by apologising to the respondent at the start of the investigation meeting on 4 September. He did not seek to deny any wrongdoing, and accepted in his evidence to the Tribunal that he should not have acted as he did, and that some form of disciplinary sanction was appropriate.

92. In ***Stanton and Stavely Ltd v Ellis EAT 48/84*** the EAT held that the employer acted unreasonably in dismissing the claimant for assaulting a colleague who had racially abused him. The respondent had not properly considered the provocation of the claimant.

93. Moreover, the claimant was treated much more harshly than Mr Hobson who appears, at most, to have received an informal warning, despite Mr Teesdale's view that it was 'six of one and half a dozen of the other'.

94. I find that a reasonable employer would, in this case, have taken account of the provocation faced by the claimant, his length of service and his previous good record, as well as the remorse he showed for the incident. The decision to dismiss fell clearly outside the range of reasonable responses.

95. I therefore find that the dismissal was both procedurally and substantively unfair.

96. In light of my findings about I have considered whether it would be appropriate to make a reduction in the basic and compensatory awards to reflect the conduct of the claimant prior to his dismissal. I find that the claimant was guilty of conduct which was culpable or blameworthy. Physically grabbing another employee in the workplace is not by any standards acceptable behaviour. The claimant recognised as such and acknowledged that some disciplinary action was appropriate.

97. It is clear from the evidence before me that it was the claimant's conduct on 2 September 2023 which caused the respondent to dismiss the claimant. I have therefore considered whether it would be just and equitable to reduce the compensatory award, and I find that it would be. The claimant finds himself in this situation due to his inappropriate behaviour on 2 September. When considering what proportion to reduce compensation by I take account of the fact that the claimant was more than 'slightly' to blame for his dismissal, but that it cannot be said that he and the respondent were equally to blame. For the reasons set out above, the failings of the employer in this case were significant and include the fact that no formal action was taken against the claimant's colleague who Mr Teesdale suggested was equally to blame.

98. In the circumstances I find that a deduction of 35 % is the appropriate one to make. That deduction applies to both the compensatory award, pursuant to section 123(6) of the Employment Rights Act 1996, and to the basic award, pursuant to section 122(2) of the Employment Rights Act 1996.

99. I have also considered whether it would be appropriate to make a reduction in the compensatory award to reflect the possibility that the claimant would have been dismissed in any event had a fair procedure been followed (a ***Polkey*** deduction). The procedural failings in this case are significant, and I have also found that the decision to dismiss fell outside of the range of reasonable responses. In light of this, it would not in my view be appropriate to make any ***Polkey*** deduction.

Wrongful dismissal

100. By virtue of section 86 of the Employment Rights Act 1996 the claimant was entitled to a notice period of twelve weeks from the respondent, because he had continuous service of more than 15 years. He was dismissed without notice and without payment in lieu of notice.

101. Section 86(6) provides that an employee is not entitled to the statutory period of notice if his employer was entitled to treat his contract of employment as terminable without notice due to the employee's conduct.

102. In a wrongful dismissal claim the test that I have to apply is different to that in an unfair dismissal claim. The focus is on what the claimant actually did, rather than what the respondent believed he had done, and whether the claimant's conduct amounted to a fundamental breach of his contract of employment.

103. There will be cases in which grabbing a colleague will amount to a fundamental breach of an employee's contract of employment. In this case, however, I find that it did not. The incident was very brief and a 'moment of madness' for which the claimant apologised at the earliest opportunity. It was the result of significant provocation by Mr Hobson, both on the day in question and on previous occasions. No formal action was taken against Mr Hobson.

104. The claimant's conduct did not amount to a fundamental breach of his contract of employment or, in the words of section 86(6) conduct which entitled the respondent

to treat his contract as terminable without notice.

105. The claim for wrongful dismissal therefore succeeds. The claimant is entitled to be paid for 12 weeks' notice

Employment Judge Ayre

Date: 11 December 2024

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