



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Dixon

v

TM Telford Dairy Limited

Heard at: Telford

On: 9 & 10 March 2017

Before: Employment Judge Broughton

Appearances:

For Claimant: Mr Craig

Respondent: Mrs Ashberry

JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed.

Employment Judge Broughton

Date: 14 March 2017

Sent to the parties on: 28 March 2017

REASONS

Facts

1. The claimant was employed by the respondent as a production operative from 18 August 2014.
2. Apparently the claimant used to socialise with another employee, Lukas Knas and others. That socialising included alcohol and recreational drug use which led to an investigation at work and absence issues.
3. The claimant was placed on a final written warning for absence in May 2016.

4. As a result he apparently made the decision to break away from his social circle and focus on his work.

5. Over the next few months it appears that various rumours spread about money and personal relationships and the relationship between the claimant and Mr Knas deteriorated as a result, although there was little evidence of this within the workplace.

6. In September 2016 the claimant asked to change his shift. He apparently did so because he wanted a fresh start. He wanted to distance himself from the gossip although he acknowledged that he did not formally reference any allegation of bullying in this regard.

7. The claimant suggested that he had made some passing reference to bullying to a supervisor, Andy Wise, in a chance meeting outside work but that hadn't clearly been understood as a reference to Mr Knas.

8. The claimant also suggested that he had mentioned it to his line leader on his last shift before he changed shifts, 1 October 2016. The line leader, Borg Buchmann, however, viewed the request for a change more as a result of a desire for a new start.

9. On 3 October 2016, the claimant had been drinking with another work colleague. It was the first anniversary of the death of the claimant's grandfather. The work colleague, Viktor, apparently informed the claimant that Mr Knas had been calling him a "pussy" and saying that he had better watch his back as he knew where he lived.

10. This caused the claimant to initiate a WhatsApp exchange with Mr Knass that included 18 text messages and 6 voicemail messages.

11. The claimant acknowledged that the exchange was childish and heated but denied that it was threatening despite him seemingly inviting Mr Knas to his home for a fight.

12. On 4 October 2016 the claimant had a 1-2-1 with Dan Millea on commencing his new shift. He apparently mentioned the social media exchange off the record but didn't pursue it formally as he wanted a clean start on the new shift.

13. On Friday 7 October 2016 the claimant went to the locker room at the end of his shift and met Lukas Knas. Andy Wise had offered to accompany the claimant but the claimant went alone. There was an altercation and the claimant was punched in the face receiving a black eye.

14. On 9 October 2016, Neil Jones, shift manager, interviewed the claimant about the incident by telephone.

15. The claimant acknowledged that the situation had been building “tit for tat” for a few weeks and suggested that this was the reason that he had asked to move shifts.

16. He further acknowledged that he shouldn’t have contacted Lukas via WhatsApp and that it was wrong that he had effectively invited Lukas round for a fight.

17. The claimant also acknowledged that he had made reference to seeing Mr Knas on the Friday (7 October) and that he would “be in for a fucking surprise”. He suggested that this was a reference to the fact that he had made a report to management and was going to make a further report. That said, the claimant acknowledged that the message could equally have been perceived as a threat of an altercation on the Friday, which was the next time that the two men would be at work together.

18. Mr Jones also interviewed Lee Evans, Danny Westwood and Andy Wise, lead operator, Craig Tooze and Lukas Knas.

19. Mr Jones was initially only investigating the assault on the claimant. His investigation led him to understand that the reason that Mr Knas had assaulted the claimant was the WhatsApp exchanges on 3 October 2016. His evidence was that he considered that Mr Knas was shaking, tearful, remorseful and scared of the claimant. Mr Knas showed Mr Jones the WhatsApp messages and he also played one of the voice recordings from the claimant which Mr Jones considered to be violent and aggressive.

20. Mr Knas was invited to a disciplinary hearing and he was subsequently dismissed for violent conduct. It transpired that Mr Knas had already obtained alternative employment leading the claimant to believe that the assault on him was premeditated.

21. Mr Jones considered that the claimant’s actions were also potentially gross misconduct.

22. As a result the claimant was suspended by letter dated 10 October 2016 for threatening a colleague outside of work.

23. The matter was passed to Glyn Jeavons, production manager, who invited the claimant to a disciplinary hearing by letter dated 13 October 2016.

24. The allegation was that the claimant had threatened and abused Lukas Knas which had resulted in the violence against him in the locker room.

25. The claimant was invited to a disciplinary hearing on 20 October 2016. He was provided with the relevant policy and investigation documents. He was given the right to be accompanied.

26. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing. He acknowledged that he had been wrong but did not

feel that it justified being attacked. He also did not believe that the allegations against him warranted dismissal.

27. Mr Jeavons concluded that the claimant had threatened and abused Mr Knas and provoked the reaction from him. He further concluded that the claimant could, and should, have done more to inform management and diffuse the situation.

28. Mr Jeavons acknowledged the mitigation arguments regarding the claimant being under the influence of alcohol, the message exchange taking place outside work, the claimant grieving his grandfather and having raised the matter with management. Nonetheless he felt that the matter was sufficiently serious to amount to gross misconduct and determined that the claimant should be summarily dismissed.

29. The decision to dismiss was confirmed in writing by letter dated 26 October 2016. The claimant was given the opportunity to appeal.

30. The claimant appealed the same day. He suggested that the investigation was not thorough enough and that character references should have been taken. He disputed that he had provoked the physical violence and felt that the sanction was too harsh.

31. After a further exchange of emails the appeal took place on 7 November 2016 before Paul Thomas, plant manager.

32. The claimant was effectively suggesting that Mr Knas had started the threats and he was merely responding to them. He contended that the issue was outside of work but Mr Thomas felt that the claimant had been goading Mr Knas and putting "fuel on the fire".

33. There was further investigation following the appeal and three further witnesses were interviewed. The claimant also produced a recording that he had inadvertently made following the assault.

34. Mr Thomas reviewed all of the evidence but concluded that the original decision to dismiss should be upheld. He confirmed the outcome in a letter to the claimant dated 17 November 2016.

The issues and the law

The issues between the parties which fell to be determined by the Tribunal were as follows:

Unfair dismissal

35. What was the reason for the dismissal? The respondent asserted that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
36. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds following a reasonable investigation? The burden of proof is neutral here but the claimant's challenges to the fairness of the dismissal are addressed in turn below.
37. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses available to a reasonable employer?
38. In determining fairness it is necessary to consider the procedure followed and the size and administrative resources of the respondent.
39. There may also fall to be considered whether any adjustments should be made for failure to comply with the relevant ACAS Code. There are a number of elements to this, including:
- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions
 - Employers and employees should act consistently.
 - Employers should carry out any necessary investigations, to establish the facts of the case.
 - Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
 - Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
 - Employers should allow an employee to appeal against any formal decision made

Decision

40. There was no challenge to the potentially fair reason for dismissal, nor to the genuine nature of the respondent's belief. I accept that the claimant was dismissed for misconduct, specifically threatening and abusive conduct.
41. The principal challenge was to the reasonableness, or otherwise, of the respondent's belief and the sanction imposed. There were also challenges to the process and investigation.
42. The claimant also referenced a previous employee who he alleged had not been properly supported by the company following allegations of bullying. He suggested that this was why he had not raised his own allegations of bullying formally. Whilst it may be that, with the benefit of hindsight, the respondent could have done more to prevent the situation escalating to the violence that ensued in the locker room on 7 October 2016 that was not the central issue in this case.

43. The issue was whether the claimant had behaved in a manner that was threatening and abusive to a work colleague and whether that had caused or contributed to the situation in which he found himself.
44. The respondent took the view that by starting the WhatsApp exchange the claimant had, at least, escalated matters. Moreover, by threatening a “fucking shock” on Friday he had brought them into the workplace.
45. In terms of the challenges to the investigation it was not necessary for a reasonable employer to seek character references on the facts of this case. The issue was whether the claimant had provoked the attack on himself by engaging in threatening and abusive conduct. The precise detail of the history of the dispute between the claimant and Mr Knas was not an essential element of the investigation. The respondent was entitled to conclude on the evidence before them that the claimant had, at the very least, responded to the actions of Mr Knas in a threatening and abusive manner.
46. The evidence of the WhatsApp exchange was available and largely self explanatory. The relevance of witnesses, therefore, was only to the context of those messages and the apportioning of blame between the claimant and Mr Knas. The supporting witnesses only partially supported the claimant’s case with regard to the extent to which he had raised his concerns with his employer. That said they did, at least, offer up the possibility that the claimant was right in asserting that his threat related to Friday was in relation to management action as opposed to physical violence.
47. Those witnesses that were only interviewed at the appeal stage could have been interviewed earlier but it was not unreasonable for Mr Jeavons to place his principal focus on the WhatsApp messages themselves. Even if that were not the case any failing was duly rectified by the appeal.
48. Nothing turned on the fact that the claimant’s first interview was over the telephone and some statements were not immediately signed.
49. Whilst it may have been more thorough for the respondent to have listened to all of the voicemail messages it seemed unlikely that they would have evidenced anything other than further threats and abuse. The claimant had not retained the messages and did not suggest that their content would have altered the general thrust and understanding of the exchange. That was the case both in the internal proceedings and before me.
50. The respondent followed a fair process and the claimant was made aware of the allegations against him. He was given time to prepare and the opportunity to be accompanied. His responses were considered. He was given the right to appeal and there was further investigation. All managers involved were independent. There was nothing procedural to suggest that the respondent’s actions were outside the band of reasonable responses.
51. Turning to the issue of the reasonableness of the respondent’s belief. The WhatsApp messages were self evidently threatening and abusive and the respondent was entitled to conclude that fact. The claimant had initiated the direct exchange even if he was only responding to rumours of abuse that he had heard from a colleague. The claimant was clearly responding in similar terms and using language that was likely to be interpreted as inviting Mr Knas round to his home for a fight on 3 October 2017.

52. The claimant called Mr Knas a “pussy” on more than one occasion, swore aggressively in both texts and voicemails and then, when it became clear that Mr Knas would not come around to his home, the claimant began making threats about what would happen on Friday morning.
53. The claimant suggested that the threat was actually referencing the fact that he had reported Mr Knas to management and was going to do so again. I would accept that it is possible that this is what the claimant meant. There was, at least, some supporting evidence to suggest that he had raised concerns but it fell far short of a formal complaint of bullying.
54. The claimant acknowledged that he had not previously raised the issue with Mr Jeavons and that he had merely stated that he wanted a clean start on the new shift. His discussion with Andy Wise had been in the car park at Asda and, whilst it may have referenced bullying, it had not been understood at the time to reference Mr Knas. Borg Buchmann may have been aware of some tension but no more and Dan Millea expressly said that the claimant had not alleged bullying but may have mentioned Mr Knas.
55. Nonetheless, all of those facts may have led some employers to give the claimant the benefit of the doubt in relation to what his threats about Friday had actually meant. In addition, I am sure that with the benefit of hindsight the respondent may feel that they could have responded more proactively to the issues raised by the claimant, however vaguely. They did, however, move the claimant and offer to escort him to the locker room. It cannot be said that they did nothing.
56. Moreover, in the context of the messages and voicemails, it was not unreasonable for the respondent to conclude that the claimant was threatening an altercation at his home and, in the alternative, at work the next time the two men would be on site together. It appears that this was also the understanding of Mr Knas. That is what brought these events into the work arena.
57. That appeared to be further confirmed, in the understanding of Mr Jeavons at least, by the fact that the claimant had not waited to be accompanied to the locker room despite Mr Wise offering to go with him if he was concerned.
58. Again, it may be that Mr Wise was otherwise occupied and the claimant expected that Mr Knas would have already commenced his shift, but it was not unreasonable for the respondent to conclude as they did.
59. In any event, even if the respondent had accepted the claimant’s explanation in its entirety it would not have altered their conclusion. Specifically, the claimant had clearly initiated a WhatsApp exchange that was threatening and abusive. He brought that exchange into the work arena by suggesting that Mr Knas was “in for a fucking surprise” on Friday. The claimant was clearly goading and provoking Mr Knas. The claimant did then engage in a verbal altercation with Mr Knas in the locker room before being punched. The claimant then pushed Mr Knas.
60. Such conduct was, therefore, potentially gross misconduct under the respondent’s policy and I cannot say that no reasonable employer would have reached the same conclusion as the respondent in this case. Furthermore, I cannot say that no reasonable employer would have dismissed.

61. Accordingly, the claimant's claim for unfair dismissal fails and is dismissed.