Case No: 3314128/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Dumbrill	v	Hexcel Composites Limited

Heard at: Bury St Edmunds (By CVP) **On:** 28 and 29 January 2021

Before: Employment Judge Cassel

Appearances:
For the Claimant: Ms S Segar, Friend and Colleague
For the Respondent: Ms C Jennings, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers

JUDGMENT

The claimant was not unfairly dismissed and his claim for unfair dismissal fails.

REASONS

1. The Claimant, Mr B Dumbrill, complains of being unfairly dismissed from his employment as a Process Operator with the Respondent.

2. Under the Employment Rights Act 1996, Unfair Dismissal is provided for under Section 94 and as far as these proceedings are concerned, the relevant provisions are in Section 98. Very simply it is in the following terms:

> *(1) 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*

Under:

(2) (b) relates to the conduct of the employee.

3. Under paragraph 98(4) the following provisions are provided for:

(4) 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.

Background

4. The Claimant was employed from 1 April 2016 until 20 February 2019 when he was dismissed. The reason given for his dismissal was gross misconduct.

5. An incident occurred on 14 November 2018 when the claimant was working on a nightshift in what was described as Tower 3.The claimant was working with a number of colleagues including another process operator, Kevin Angus. There was a verbal altercation following a work break and Mr Angus subsequently reported that the claimant had called him "not a nigger but a wigger." The respondent considered that the term "Wigger" was a hybrid term incorporating "white" and "nigger." In any event it was considered to be extremely offensive. In the investigation that subsequently followed the claimant denied the allegation and claimed that he had used the word "Winger" which he described as someone who "never does his work and we all have to do it for him." An investigation was undertaken by Mr James Williams who interviewed a number of witnesses. He took the view that the matter should go to a disciplinary hearing and Mr Steve Mortimer was appointed as the chair of the disciplinary hearing. He concluded that the claimant was in breach of the respondent company's policy described as the Code of Conduct and that the claimant breached the policy in three ways. First that he had breached the code in that he had failed to respect the privacy and dignity of all individuals; second that he had breached the code in creating a work environment that does not tolerate sexual or any other forms of harassment or prohibited discrimination and third that he had used abusive language and behavior. Mr Mortimer considered the appropriate sanction to be summary dismissal. The appellant appealed and an appeal took place following the appointment of Mr Mark Blance as appeals officer. Mr Blance considered the appeal, and the points raised in a lengthy letter of appeal from the claimant and dismissed it confirming the dismissal of the claimant. That is the background to the dispute.

6. The claimant brings a claim of unfair dismissal only, and as was explained to the claimant the statutory provisions are paramount and it is only in circumstances when a breach of contract claim is brought does the tribunal have jurisdiction to substitute its own view as to the evidence rather than follow the statutory provision under the Employment Rights Act as highlighted in paragraph 2 above. I make this comment as the claimant was of the view that the hearing would enable him to "clear his name." I stressed that I would make no finding of fact as to whether he was "guilty" of the signal event but whether the respondent was able to discharge the burden upon it under the Act.

7. I heard evidence from the claimant, Mr James Williams, Mr Steve Mortimer, and Mr Mark Blance, all of whom had prepared witness statements and confirmed the truth of those statements. I was also provided with a bundle of 340 documents, a cast list and a chronology.

8. At the end of the evidence I heard oral submissions from both Ms Segar and Ms Jennings, for which I am grateful.

Findings of Fact

9. I make the following findings of fact based on the balance of probabilities having considered those documents to which my attention has been drawn:

    (1) On 1 April 2016 the claimant started work with the respondent and throughout his employment was engaged at the respondent's Duxford site.
    (2) On 14 November 2018 the claimant was at work on a nightshift on the same piece of machinery as colleagues, Kevin Angus and Gary Bruce. There was a verbal altercation between the claimant and Mr Angus during the nightshift. Mr Angus informally reported the altercation to the duty manager Mr Steve Cowling and alleged that the claimant used racially abusive language towards him. Mr Angus is white, his wife is black and their children are of mixed race.
    (3) On 6 December 2018 the claimant and Mr Angus exchanged private messages via the Facebook messenger application and on 7 November 2018 Mr Angus formally raised a complaint about the claimant's behaviour towards him with H R.
    (4) On 10 December 2018 Mr James Williams commenced a fact-finding investigation. There is a dispute as to fact as to whether Mr Williams told the claimant that an investigation was underway. A note of the interview was produced at page 110 of the bundle and having seen that document and heard evidence from Mr Williams I prefer the account of the respondent and that the claimant would have been under no misapprehension that an investigation was underway and that principally involved allegations made against the claimant.
    (5) Over the next few weeks Mr Williams interviewed a number of employees and produced an investigation report summarising findings of fact which he completed on 1 February 2019.
    (6) A letter was sent to the claimant dated 1 February 2019 in which he

was told he was required to attend a disciplinary hearing. The letter is produced at pages 137/138 of the bundle. The allegations that he faced were clearly set out, he was told of his right to be accompanied and warned that he might face summary dismissal if the allegations were proved.

(7) The disciplinary hearing took place on 11 February 2019 and was chaired by Mr Mortimer. The claimant was accompanied by Ms Segar. During the hearing, questions were put to the claimant in an open manner, his responses were recorded and following the hearing Mr Mortimer interviewed Mr Williams and some of those who had given statements to Mr Williams.

(8) The disciplinary hearing was reconvened on 20 February 2019, the claimant was again accompanied by Ms Segar. The claimant was told that he was to be summarily dismissed and the outcome was formally notified in a letter to him dated 1 March 2019. The letter is a lengthy and is produced at pages 183 to 190. In my judgement it demonstrates Mr Mortimer's conscientious care in dealing with the disciplinary hearing. He did consider a lesser penalty but rejected it as he concluded that the claimant showed no remorse and only conceded using the form of words that had been rejected. The thought processes and manner in which the conclusions that he reached were well illustrated in that letter and as such should not be criticised. A concern raised by the claimant was that the further interviews and notes of interviews that were undertaken were not formally disclosed to him prior to that reconvened disciplinary hearing. It was conceded that that might have been in error. However in my judgement the reality was that Mr Mortimer undertook those enquiries so that he could be sure that the original statements of those witnesses that were taken were consistent and true and that it would have made no difference to the outcome or his thought processes had they been disclosed to the claimant and on which he could have commented. Looking at it sensibly and reasonably, the claimant would still have disputed the statements in the same manner. In any event that omission formed part of the appeal raised by the claimant and subsequently considered by Mr Blance.

(9) On 13 March 2019 an appeal hearing took place chaired by Mr Blance. The claimant attended and was again accompanied by Ms Segar. At the end of the appeal hearing Mr Blance reinterviewed Mr Williams and spoke to Mr Mortimer before reaching the conclusion that he did.

(10) On 27 March 2019 Mr Blance dismissed the appeal giving extensive reasons as to why he was so doing and giving explanations as to his thought processes. Notes of his enquiries and methodology were produced and again it demonstrates that Mr Bland's was a conscientious and thorough appeals tribunal and I find no fault in the manner in which he approached the appeal nor would criticise the conclusion that he reached.

(11) The claimant was dismissed, the reason for his dismissal was his conduct and the contract of employment formally terminated on 20 February 2019.

Conclusions

10. The Respondent maintains that the Claimant was fairly dismissed for the potentially fair reason of conduct and that a fair process was followed.

11. I again remind myself that I should not put myself in the position to decide guilt or innocence. There is no claim of breach of contract. What I have to decide is whether the process undertaken by the Respondent was a reasonable one.

12. Burchell v British Home Stores is often cited as the Burchell test. I refer to Sheffield Health Social Care NHS Foundation Trust v Crabtree [2009] UK EAT 00331-09-1211, where HHJ Peter Clarke clarified the position for the benefit of Tribunals hearing conduct dismissal cases. At paragraph 14 he makes the following comment,

    "It might be thought that the Burchell test as stated by Arnold J must be literally applied in conduct unfair dismissal cases. That would be a misunderstanding. The first question raised by Arnold J, 'Did the Employer have a genuine belief in the misconduct alleged?' goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions reasonable grounds of belief based on a reasonable investigation go to the question of reasonableness under s.98(4) and there the burden is neutral. To combine all three questions as going to the reason for dismissal is wrong."

13. I am satisfied that the reason for dismissal is conduct. There cannot sensibly be said to be another reason. The claimant suggested that in some way Mr Williams approach was coloured by a complaint that the claimant had in regards to an injury, presumably sustained at work, which formed the basis of a claim, so I understand it, against the respondent. This was first raised today. It was not put to Mr Williams and he had no opportunity to answer it. Ms Jennings in her submission quite properly pointed to the fact that Mr Williams was not the decision maker and I could see no evidence to suggest that the manner in which he approached the investigation was affected by this apparent injury claim.

14. I also refer to the Acas Code of Conduct which I am required to consider and in particular to the manner of the investigation undertaken by Mr Williams. As noted above, although ideally the claimant should have been informed in unequivocal terms that he was the subject of an investigation, in dealing with the investigation in the manner that he did I find that there was no breach of the Code of Practice numbers 5 to 8. There was a suggestion by the claimant that both he and Mr Angus should have been suspended during the investigation. This had been considered and rejected and it cannot sensibly be argued that in failing to suspend them the process was in some way unfair.

15. The claimant was invited to the disciplinary hearing by letter, was clearly told the allegations that he faced and that these were serious, warned that he could face summary dismissal and given the right to be accompanied. Within the invitation letter he was provided with material subsequently considered by Mr Mortimer. He was given ample time in which to prepare

for the meeting and was able to put forward all those matters on which he wished to rely. The process was a fair one.

16. The claimant was able to appeal and did so. The process was a fair one and any minor procedural breaches, and in particular the nondisclosure of additional witness statements taken by Mr Mortimer formed part of the process and in my judgement were rectified on appeal. The conclusions reached by Mr Mortimer and Mr Blance were hardly surprising.

17. I was reminded that the test of reasonable responses applies to the sanction. The tribunal has to determine whether the respondent's decision to dismiss the claimant fell within the range of reasonable responses that a reasonable employer would have adopted in the circumstances. I am satisfied that dismissal does fall within that range of reasonable responses given the findings made against the claimant and the consideration of any mitigating circumstances that were relevant.

18. For these reasons I find the claim of Unfair Dismissal fails.

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Employment Judge Cassel

Date: 29 January 2021

Judgment sent to the parties on

09.02.2021
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J Moossavi
.....
For the Tribunal office