

mf



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Angus  
**Respondent:** Brakes Bros Limited  
**Heard at:** East London Hearing Centre  
**On:** 21<sup>st</sup> March 2019  
**Before:** Employment Judge Reid

**Representation**

**Claimant:** In person  
**Respondent:** Miss Thomas, Counsel

## JUDGMENT (Reserved)

**The Claimant was not unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996 and his claim for unfair dismissal is dismissed.**

## REASONS

### Background and issues

1. The Claimant was employed by the Respondent until 17<sup>th</sup> July 2018 when he was dismissed for gross misconduct with immediate effect, for swearing at and making a racist comment to a colleague, Mr Kesce who is Hungarian, in the warehouse during the night shift on 4-5<sup>th</sup> June 2018 and for his behaviour on 6<sup>th</sup> June 2018 at the end of an investigation meeting. The Claimant accepted that he had sworn at Mr Kesce but said he had not made the racist comment and disputed the other allegations about his behaviour at the end of the meeting. The investigation was undertaken in two stages by Mr Letch and Mr Beddows and the decision to dismiss was taken by Mr Palmer. The Claimant did not appeal his dismissal. He started his new employment on 18<sup>th</sup> July 2018.

2. The Claimant brought various claims on a claim form presented on 31<sup>st</sup> October 2018. By letter dated 28<sup>th</sup> January 2019 the Tribunal limited his claim to the claim of unfair dismissal only. The Claimant claimed (page 7) that his dismissal was

unfair because matters had not been properly investigated and because the investigation was not impartial or fair because of the involvement of Mr Letch.

3. There was a list of issues prepared on behalf of the Respondent and a one file bundle. There were witness statements from Mr Palmer who took the decision to dismiss and from the Claimant. They both signed their statements at the hearing. Both the Claimant and Mr Palmer gave oral evidence. I then heard submissions on both sides.

4. In a nutshell the Claimant said in his witness statement that the investigation resulting in his dismissal was unfair for the following reasons:

- 4.1 a report summarising the investigation prepared by Mr Letch was dated 11<sup>th</sup> June 2018 but this date could not be right as it referred to matters arising after 11<sup>th</sup> June – it was suspicious because it suggested dates had been changed to suit the Respondent's version of events;
- 4.2 the report was in existence prior to the first disciplinary hearing on 27<sup>th</sup> June 2018 but was not provided to the Claimant prior to this meeting;
- 4.3 the witnesses of the incident (Mr Kescce and Mr Haylock) contradicted each other about what happened and the dates on their statements were wrong;
- 4.4 the witnesses (Mr Letch and Mr Hayes Allen) contradicted each other about damage to the wall, said to have been caused by the Claimant when he angrily left the meeting on 6<sup>th</sup> June 2018;
- 4.5 the Respondent should have checked about possible pre-existing damage to the wall with the Facilities Manager, Mr Smith, rather than blaming the Claimant for it;
- 4.6 the Claimant had initially been told by Mr Palmer in the first part of the disciplinary hearing on 27<sup>th</sup> June 2018 that there was no CCTV footage of the area of the warehouse where the incident occurred but then was later told by Mr Palmer in the second part when they reconvened on 17<sup>th</sup> July 2018 that there was in fact CCTV footage; that footage showed the circumstances of the incident namely a near accident;
- 4.7 the Respondent should have asked the Claimant's colleagues about whether they would give character references for him to the effect that he was not a racist person and got on with everybody and to look for evidence which supported his case, not just evidence that went against him;
- 4.8 Mr Letch who did the first part of the investigation was biased against the Claimant because of (a) a past issue when Mr Letch had recorded an incident on the Claimant's file regarding the use of abusive language, (b) in a previous grievance about a deduction from his pay, Mr Letch's decision to deduct had been overturned on appeal in the Claimant's favour and (c) the Claimant had previously had disagreements with Mr Letch about the Claimant taking time off for family reasons.

5. I identified with the parties that the test in *BHS v Burchell* applied and explained to the Claimant what that test was. I also explained to the Claimant the issues raised by the Respondent about deductions to compensation if he won his claim, namely a Polkey deduction and a deduction for contributory fault.

#### Findings of fact

6. The Respondent has a Respect at Work policy (page 46). Its Disciplinary Policy and Procedure (page 25) provides that bullying or harassment on the grounds of race or any other act of unlawful discrimination was an example of gross misconduct justifying immediate dismissal (page 26). Further examples of gross misconduct included failure to comply with reasonable management instructions/requests and wilful or deliberate damage to property or gross negligence which causes loss.

7. I find that on 5<sup>th</sup> June 2018 Mr Kesce a Hungarian national who also worked in the warehouse made a complaint that the Claimant had made a racist comment to him, first swearing at Mr Kesce to move out of his way and then saying 'Fuck off you Hungarian cunt' (page 57).

8. The Respondent obtained witness statements from Mr Kesce (page 57) and from Mr Haylock (page 58). These were obtained on 5<sup>th</sup> June 2018 and therefore shortly after the incident. Mr Haylock said that he had heard the Claimant saying 'Move out of the way you Hungarian prick'. Whilst the specific noun of abuse used was different between the two statements it was clear that both statements identified swearing at Mr Kesce linked to his nationality. A third statement was obtained from Mr Memeth (page 59) but he had not heard what was said by the Claimant. Taking into account Mr Palmer's witness statement at para 21 and his oral evidence, I find that CCTV footage of the incident (see also findings below) did not include any audio recording.

9. The Claimant was called into a first investigation meeting with Mr Letch on 6<sup>th</sup> June 2018 (page 60) and asked about the allegation (page 61). Mr Hayes Allen was present as note taker. The Claimant knew what incident was being referred to as he gave his own account of what had happened. He accepted he had sworn at Mr Kesce (page 61) calling him a 'fucking prick' (page 61) or saying 'fuck off you prick' (page 63). The Claimant did not claim Mr Kesce also swore at him which was something he only later raised in his witness statement (page 5). Mr Letch asked the Claimant to explain why he was saying Mr Kesce nearly caused an accident (page 62) from which I find that Mr Letch was properly investigating the circumstances of the alleged comments and not just focusing on the comments themselves without giving the Claimant a chance to put them in context. Mr Letch said he would investigate further (page 64).

10. Following this I find the Claimant became aggressive and stormed out of the meeting before it had ended (page 65), pushing the door on exit with such force that damage was caused to the wall (pages 67, 68, 77). Whilst the Claimant criticised the Respondent for not checking with the Facilities Manager Mr Smith whether the damage to the wall was already present, the Claimant later accepted he had 'seen red' (page 81), 'vented' for 15 minutes to his partner (page 82) and had quite possibly damaged the wall (page 83). He had been seen subsequently also still angry by Mr Helwig (page 69). I therefore find that he was angry enough that he did in fact damage the wall and

that the Respondent (Mr Palmer, when taking the decision to dismiss) reasonably concluded taking into account the statements from Mr Letch, Mr Hayes Allen and Mr Tom Smith (page 123) that he had done so. The obligation to investigate did not reasonably require the Respondent to go further and check with the Facilities Manager whether there had been prior damage, in the circumstances. The Claimant was suspended (page 70).

11. Mr Beddows took over the investigation (page 72) and a second investigation meeting was held on 13<sup>th</sup> June 2018 (page 79). I find this to be a reasonable step taking into account that the Claimant had made allegations of bias against Mr Letch (page 67) such that another manager should reasonably take over the investigation. Mr Beddows obtained the Claimant's account of the original incident with Mr Kesce and of what happened at the end of the meeting on 6<sup>th</sup> June 2018 (page 79). The Claimant was then invited to a disciplinary hearing (page 86), the charges being the original incident with Mr Kesce but now also including charges relating to the meeting on 6<sup>th</sup> June (refusing to sign the notes of the meeting, aggressive and threatening behaviour and damage to Company property). The Claimant was sent the relevant documents (page 87) but was not at this stage sent a copy of Mr Letch's summary report (page 73) dated 11<sup>th</sup> June 2018.

12. Meanwhile Mr Letch had prepared a report of his investigations (page 73). He had by this stage also reviewed the CCTV footage (page 74) but the quality was too poor to be of use (page 74). The CCTV contained no audio, and the issue was whether the Claimant used the word 'Hungarian' or not, but I find that Mr Letch was nonetheless seeking to find out if the circumstances of the incident claimed by the Claimant (Mr Kesce in effect acting in a dangerous way) in any way mitigated what had happened. In this way I find that Mr Letch was investigating whether the Claimant's account did give rise to any mitigating circumstances. The Claimant was not told at this time that the CCTV footage had been viewed but was later told that it had been – see findings below.

13. The Claimant was not provided with a copy of this report before his first disciplinary hearing on 29<sup>th</sup> June 2018 but was provided with a copy before the reconvened disciplinary hearing on 17<sup>th</sup> July 2018. I therefore find that any unfairness arising from the non-provision of this report at an earlier stage was put right by the Respondent before the reconvened hearing and before the decision to dismiss was taken.

14. The Claimant claimed that Mr Letch's report could not have been written at the time it was said to have been written because it took into account things he himself or his union representative raised on a later date (C witness statement page 6-7), namely in relation to the time of the incident (page 94, 5am) and in relation to the witness statements of the wall incident (page 99). In cross examination he was taken to page 73 and accepted that the time of the incident was already known by this point (ie by 11<sup>th</sup> June, the date of the report), evident from the meeting notes on page 61, although not noted in the statements taken at the time. The Claimant also accepted that there were two references to a loud bang in the report on pages 73-74 which is consistent with Mr Letch's earlier statement reporting a loud bang (page 67). I find that Mr Letch's 11<sup>th</sup> June 2018 report was therefore written or completed at the time it was dated and was not created after the event.

15. The disciplinary hearing was on 29<sup>th</sup> June 2018 (page 89). The Claimant was accompanied by his union representative, Mr Waite. Mr Palmer wrongly stated that the CCTV footage had not been checked (page 95). Mr Palmer then adjourned the meeting (page 103) pending further investigations into the date of the witness statements, the date of Mr Letch's report and the evidence about the damaged wall (page 121). Mr Palmer interviewed Mr Letch to clarify the timeline and the wall damage (page 105) and Mr Hayes Allen about the wall damage (page 109). He also interviewed Mr Haylock about the incident involving Mr Kesce (page 114) and Mr Kesce again (page 118), including in relation to the physical circumstances of the incident again showing that the Respondent was not just looking for evidence against the Claimant but was exploring whether there might be some mitigating circumstances, had Mr Kesce been acting dangerously. Mr Palmer also reviewed the Claimant's personnel file. The Claimant was provided with copies of all the new statements and a copy of Mr Letch's 11<sup>th</sup> June report prior to the reconvened disciplinary hearing (page 128). He was also provided with two file notes from his file.

16. The Claimant attended the reconvened meeting on 17<sup>th</sup> July 2018 with his union representative (page 129). Although he criticised the timings of the incident varying between the witness statements (between 4am and 5am) (page 132) the issue was whether he had used the word Hungarian in conjunction with other abuse and he accepted that he had used the other abusive words to Mr Kesce; whether it was at 4am or 5am or any time in between was therefore not the issue. Mr Palmer explained to the Claimant that Mr Letch had been superseded by Mr Beddows in the investigation because of an issue of independence (page 133). Mr Palmer explained the correct position about the CCTV having now viewed it himself (page 135-137) and confirmed that it was too unclear to make anything out (page 137). In any event there was no audio so CCTV would not have been relevant to the issue of whether the Claimant had used the word Hungarian or not; the exploration into CCTV had been a step taken by both Mr Letch and Mr Palmer to see if there were any mitigating circumstances arising out of the physical location of Mr Kesce and the Claimant at the time, given the Claimant said that Mr Kesce was acting in an unsafe manner. Mr Palmer adjourned the meeting (page 146) to consider the points the Claimant had made about bias and to consider the previous notes on his file (page 145). The meeting then reconvened and Mr Palmer then took the decision to dismiss the Claimant with immediate effect for gross misconduct (page 150,152).

17. At the time he took the decision to dismiss Mr Palmer had two statements taken twice from the witnesses of the incident with Mr Kesce, the first taken by Mr Letch and the second by Mr Palmer when he re-interviewed them. The only issue was whether the word Hungarian had been used in connection with the expletives the Claimant accepted he had used. Mr Palmer was aware there was no audio recording and had viewed the CCTV footage himself which did not assist. I find that it was reasonable for the Respondent not to have looked for evidence that the Claimant got on well with other colleagues of different backgrounds because those other colleagues could not shed any light on whether the Claimant had in fact used the word Hungarian in a situation when there were two witnesses to the effect that he had.

18. Mr Palmer also reasonably concluded that the damage to the wall had been caused by the Claimant taking into account he had two statements taken twice from Mr Letch and Mr Hayes Allen, including when Mr Palmer re-interviewed them himself and the Claimant had accepted he was very angry and it could have been him. I find it

was not unreasonable for Mr Palmer not to have checked with the Facilities Manager about whether there was any prior damage to the wall because he had statements from witnesses that the Claimant had stormed out, there had been a loud bang and there was damage to the wall caused by the door handle having been pushed into it. It was reasonable to conclude that the damage had been caused by the Claimant.

19. I find that Mr Palmer also had reasonable grounds for finding that the Claimant had left the 6<sup>th</sup> June meeting before it was concluded based on the evidence before him and that the Claimant had acted aggressively at the end of the meeting.

20. I find that Mr Palmer had investigated the allegation the Claimant had made about bias regarding Mr Letch. Mr Palmer considered the previous November 2017 file note (page 55) but the initial investigation by Mr Letch into the incident with Mr Kesce was thorough and well documented and based on two statements obtained shortly after the incident from which it was reasonable to conclude that Mr Letch was not biased against the Claimant but just doing his job when faced with an accusation that an employee has made a racist comment. Mr Letch then dropped out of the picture and it was Mr Beddows who took over the second part of the investigation. Mr Palmer took the decision to dismiss and not Mr Letch and by the time of dismissal Mr Palmer had conducted a significant amount of further investigations (see findings above) such that even if Mr Letch had been biased against the Claimant (which I do not find to be the case) that had no impact on the outcome which was an independent decision taken by Mr Palmer, not based solely on what Mr Letch's investigation findings had been but on statements taken from third parties including by Mr Palmer himself. The fact that the Claimant and Mr Letch had had some issues in the past did not mean that Mr Letch was biased against the Claimant when the issue Mr Letch investigated was whether the Claimant had used the word Hungarian or not and Mr Letch had two statements to the effect that the Claimant had. The other manager said to be biased against the Claimant in his ET1 (Mr Castillo) took no part in the events of 5<sup>th</sup> and 6<sup>th</sup> June 2018 or in the investigation or in the decision to dismiss.

21. At the hearing the Claimant also raised that he had past issues with various other managers or that they were involved in or affected by a 'bullying' management culture, namely Mr Hayes Allen, Mr Murphy, Mr Beddows and Mr Boyes but none of these other managers were involved in the decision to dismiss him save for Mr Beddows who did the second part of the investigation but with whom the Claimant said he had had no past problems and that Mr Beddows had in fact helped him in the past.

22. I find that prior to dismissal Mr Palmer considered the matters the Claimant had raised as mitigation (page 153-154). Mr Palmer had reasonably concluded that the Claimant had used racist language and had left the investigation meeting before it was concluded. The Claimant had said he left early because Mr Letch was being sarcastic and not acting neutrally but Mr Palmer had reasonably concluded that Mr Letch was not biased against the Claimant and Mr Palmer had in any event conducted his own further investigations about the events of 5<sup>th</sup> and 6<sup>th</sup> June 2018. Mr Letch had checked CCTV footage knowing there was no audio which was consistent with investigating the physical locations of the Claimant and Mr Kesce as possibly relevant to mitigation, given the Claimant said the situation was a potentially dangerous one caused by Mr Kesce.

23. The Claimant did not appeal his dismissal.

Relevant law – unfair dismissal

24. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

25. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 23*.

26. *Shrestha v Genesis Housing Association Limited [2015] I.R.L.R. 399* considered the extent to which an employer is required to investigate possible defences raised by the employee in order to meet the *Burchell* test, deciding that this depended on the circumstances as a whole.

Reasons

27. Taking into account the above findings of fact the Respondent conducted a reasonable investigation into the matters for which the Claimant was dismissed. Statements from the two witnesses to the Mr Kesce incident were taken promptly and Mr Beddows took over the investigation after the meeting on 6<sup>th</sup> June 2018. The Claimant was ultimately supplied with a copy of Mr Letch's report dated 11<sup>th</sup> June 2018 by the time of the reconvened disciplinary hearing even though he had not had it at the first part of the meeting. Although Mr Palmer had incorrectly told him in the first part of the meeting that there was no CCTV footage he told the Claimant at the reconvened meeting that there was and that he had viewed it and it was unclear. In any event CCTV footage would not have assisted the Claimant in establishing that he did not use the word Hungarian, as he claimed, or have any impact on the other three allegations. Mr Palmer had investigated the Claimant's allegation that Mr Letch was biased against him due to past issues and reasonably concluded that he was not and had not therefore 'tainted' the investigation into the Mr Kesce incident (which was the only part of the investigation that Mr Letch was responsible for and which Mr Palmer in any event effectively repeated by re-interviewing the witnesses).

28. Mr Palmer had undertaken further investigations himself and followed up on the points raised by the Claimant in the first part of the disciplinary meeting and provided the Claimant with relevant documents arising from those further investigations. Taking into account the above findings of fact the Respondent had not excluded consideration of the possibility that CCTV footage might be relevant despite it having no audio, inconsistent with excluding consideration of evidence which might help the Claimant's case (even though, without audio, it was unlikely that the footage would shed any light on what was said). The Respondent acted reasonably in not seeking evidence from other colleagues of the Claimant given that they could shed no light on what the Claimant had in fact said to Mr Kesce on the night in question and in the context that the Respondent had two statements confirming the Hungarian comment had been made (albeit there was a difference in the account as to the expletive noun it was attached to). It was going beyond the test in *Burchell* to require

the Respondent to do this. The Respondent also acted reasonably in not checking with the Facilities Manager whether there was pre-existing damage to the wall in the context where it had two statements confirming anger, aggression, storming out, a loud bang and the Claimant accepting he had been angry and it could have been him. Although the Claimant apologised if it had been him, the Respondent acted reasonably in not accepting that as mitigation for the wall damage incident in the context in which it reasonably concluded that the damage had arisen.

29. The Respondent therefore conducted an investigation which was within the range of reasonable investigations in the circumstances. The Respondent (acting by Mr Palmer who took the decision to dismiss) genuinely believed that the four acts of misconduct had occurred on reasonable grounds following a reasonable investigation. The decision to dismiss the Claimant was within the band or range of reasonable responses and was not unfair.

Employment Judge Reid

26 March 2019