



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
BETWEEN:

Ms E Gilbert

Claimant

AND

Fundraising Auctions Ltd

Respondent

ON: 12 June 2017

Appearances:

For the Claimant: In person

For the Respondent: Mr S Wyeth, counsel

JUDGMENT

The Judgment of the Tribunal is that the claim for unfair dismissal fails and is dismissed.

REASONS

1. This decision was given orally on 12 June 2017.
2. By a claim form presented on 11 November 2016, the claimant Ms Emma Gilbert claims automatically unfair dismissal as she relies on having made a protected disclosure. The claimant did not have two years service with the respondent.

The issues

3. The issues were identified at a Preliminary Hearing before Employment Judge Andrews on 1 February 2017 as set out below. I confirmed with the parties prior to the commencement of the evidence that these remained the issues for determination.
4. The claim is for automatically unfair dismissal on the ground that the claimant made a protected disclosure. The disclosure relied upon is a

text she sent to Mr Richard Light, the respondent's Managing Director, on 15 June 2016 in which she said: "*Seb sorted the car out. Rich it doesn't have an MOT. I had a bad night last night and to be honest I'm pissed off. I won't be in, if someone wants to drive it to get MOT then let me know when they are coming.*" The respondent accepts that that text amounted to a protected disclosure.

5. Was that protected disclosure the principal reason for the dismissal? The respondent maintains that the claimant was dismissed by reason of redundancy.
6. As the claimant did not have at least two year's continuous employment prior to the termination of her employment, the burden is on her to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure.
7. If the claimant was automatically unfairly dismissed:
 - a. Does the respondent prove that the claimant's employment would have terminated in any event regardless of any unfair dismissal or not, and/or to what extent and when?
 - b. Should any compensation be reduced by up to 25% because the protected disclosure was not made in good faith?
 - c. Did the claimant contribute to the dismissal by her culpable conduct?

Witnesses and documents

8. The tribunal heard from the claimant. For the respondent the tribunal heard from Mr Richard Light, Managing Director and Ms Serena May, an external HR consultant.
9. There was a bundle of documents of 137 pages and a chronology from the respondent.
10. I had oral submissions for from both parties which are not replicated in full here. All submissions were fully considered even if not expressly referred to below.

Findings of fact

11. The claimant worked for the respondent as a Fundraising Liaison Manager from 10 April 2015 to 8 July 2016. The respondent is a silent auction and charity auction specialist. The respondent employs about 8 people and 4 in a related company. All 12 employees work together. It is a small workforce. It was originally set up by Mr Richard Light the Managing Director, from his home.
12. The claimant had the benefit of a company car, which was insured for her to drive. The claimant was the first of the respondent's employees to be given a company car. It was Mr Light's wife's car.

13. I did not see a copy of any contract of employment issued to the claimant. The claimant's evidence was that she was sent a contract of employment via a hotmail email address but as she changed to iCloud she no longer has a copy. The respondent's evidence was that they did not issue her with a contract of employment.
14. As the company grew, Mr Light appreciated the need for some HR input and in January 2016 he engaged the services of Ms Serena May who runs an outsourced HR consultancy.
15. Ms May gave input to the respondent on contracts of employment and a staff handbook. This was not until January 2016 and therefore did not result in the issue of a contract to the claimant. There was a requirement in the Staff Handbook at page 31 that: "*Company vehicles should be kept clean and well maintained, and must be roadworthy at all times. It is your responsibility to ensure that the car is roadworthy, and to alert your manager of any issues that the vehicle has*". The claimant said this was not brought to her attention. There was no evidence from the respondent that it had expressly been brought to her attention and I find it was not.

The car accident

16. On the night of Friday 10 June 2016, whilst driving the company car, the claimant was involved in a car accident. It was not a particularly serious accident, no one was hurt. Following the accident, on the same night at around 1am, the car had a blowout of two tyres. The claimant had a long wait to get this situation sorted out that night and a friend had to come and rescue her. Understandably she was very unhappy.
17. On the night of 14/15 June 2016 the claimant had a bad night's sleep due to her condition of shoulder impingement. I saw a letter from her GP to this effect dated 27 February 2017 (page 136). Although she was due in work that day (a Wednesday), she did not contact the respondent until 10:25am by text to say that she would not be coming in. This was just under an hour and a half after her start time.
18. On 15 June the claimant sent a text to Mr Richard Light, the Managing Director, and this is relied upon and accepted as being as a protected disclosure. It said: "*Seb sorted the car out. Rich it doesn't have an MOT. I had a bad night last night and to be honest I'm pissed off. I won't be in, if someone wants to drive it to get MOT then let me know when they are coming.*" (page 59). Seb is the car mechanic.
19. Mr Light replied to the claimant to say he would be collecting the car within the next 30 minutes and arranging for it to have an MOT. He asked the claimant what was wrong with walking to work as she lived within a 10 minute walk of the office. She did not attend work on 15 June 2016 and I find that this was because of a combination of having had a bad night's sleep and being very fed up about the situation with the car.

- Mr Light was not impressed by the late reporting and the non-attendance at work that day. He felt that the claimant's work ethic was not good.
20. Mr Light attended the claimant's home on 15 June to collect the car together with the respondent's Operations Manager Mr Nick Simkin.
 21. The claimant was asked in cross-examination whether she was suggesting that the respondent did not want the car MOT'd. She said she was not suggesting this at all. I accept the claimant's evidence that she was extremely unhappy that the car did not have an MOT as she considered that this compromised her safety.
 22. As soon as the respondent became aware that the car lacked an MOT, they made arrangements for it to be MOT'd. Mr Light said it was an oversight and I find that it was. This company was in its early stages, it was new to employing staff and this was the first employee to whom a company car had been issued. It was inexperience in these matters and an oversight on Mr Light's and the respondent's part that there had been a failure to ensure that it had a current MOT certificate.

The claimant's performance

23. The claimant was responsible for outbound sales. In the context of this company this meant looking for and identifying organisations, usually charities, that might wish to make use of their services in holding a fundraising auction. The respondent sells the organisation a product, such as a holiday. Once the organisation reaches the reserve price in the auction, anything above it is kept by the charity.
24. The claimant also did some freelance work running auctions for the respondent at weekends. The respondent has about 8 – 10 freelancers doing this work.
25. There was an expectation on the claimant that she would make 8 outbound sales per month. It was not a target as such but an expectation.
26. The claimant had an appraisal in October 2015. It was at page 38 of the bundle and covered the months of April to October 2015. It said that the claimant was not set any specific targets but she knew that the respondent was looking for around 8 outbound auctions per month. I find that the claimant was aware of this expectation. She did not deny it.
27. Due to the claimant's medical condition of shoulder impingement, she sometimes had time off work for sickness and when she had a bad night's sleep due to the condition, she was sometimes late for work. She lived close to the respondent's offices and went home at lunchtime to feed her dog, with the respondent's agreement. She did not always make up the time as the respondent expected.

28. I saw a spreadsheet setting out the claimant's results for the period from April 2015 to May 2016. It is not in dispute that the claimant failed to meet the expectation of eight outbound auctions per month save for in the month of August 2015. January is the respondent's quietest month and some of the claimant's time in January 2016 was spent stocktaking from the warehouse which will have affected her ability to achieve that expectation.
29. It is not in dispute that there was no performance management process.

HR input

30. On 23 June 2016 Mr Light and his wife met with Ms May to discuss the claimant's lack of performance. They discussed the options, bearing in mind that the claimant did not have two years service and therefore she did not have the right to claim ordinary unfair dismissal. They discussed the problems with the claimant's timekeeping, attendance and performance.
31. From Mr Light's point of view the role was not working out because the claimant was not generating enough income to cover her salary and make a profit. Ms May outlined two options to the respondent, either to dismiss the claimant for poor performance or to make her redundant. Mr and Mrs Light decided that redundancy was a kinder option as it would be more difficult for the claimant to find another job if she had the capability dismissal on her record.

The 27 June 2016 meeting

32. Mr Light decided to give the claimant a final opportunity to improve her performance. A meeting took place on 27 June 2016 between the claimant, Mr Light and Mr Simkin in which they asked her to complete a spreadsheet to show that she had contacted and minimum of 50 new outbound leads each month. They discussed the claimant's timekeeping and reached an agreement that the claimant would work from 9am to 4:30pm each day with a 30 minute lunch break.
33. Mr Simkin sent the claimant an email at 17:47 hours on 27 June 2016, page 60, in which he confirmed what had been discussed at the meeting. After about a week, Mr Light noted that the claimant had not started filling in the spreadsheet. It is not in dispute that the claimant did not make any entries on the spreadsheet. It was at this point that Mr Light decided that he no longer wished to continue with the claimant's employment.

Redundancy meetings

34. On 5 July 2016 the claimant's role was put at risk of redundancy. Mr Light held a meeting with the claimant on that date and confirmed it by letter at page 77. There was a follow-up meeting on 8 July 2016 at which

- Mr Light dismissed the claimant, giving as his reason, redundancy (letter page 78).
35. The claimant appealed against the decision to dismiss. She did not agree that the termination of her employment fell within the statutory definition of redundancy and she observed that the company had recently recruited an apprentice. She said she was not offered alternative employment and she felt the real reason that she was dismissed was because of the complaints she made about the lack of the MOT. She also said that it was clear that relations broken down and she strongly believed that that was the real reason for her dismissal. She specifically raised section 103A Employment Rights Act 1996 (page 79).
36. The claimant attended an appeal hearing on Tuesday 26 July 2016 before Ms May. Mrs Caroline Light attended as the notetaker, the notes were at page 82-83. At the hearing the claimant continued to express her unhappiness as to what had happened with the car and the lack of the MOT. Ms May asked the claimant to explain what she meant about relations breaking down and the claimant said she could not believe that the company would allow her to drive a car without an MOT. The claimant said she did not believe she was redundant and she believed the company would replace her in September.
37. Ms May did not uphold the appeal and her outcome letter was at page 87-88. The position was maintained that the role was redundant and that there was no intention to replace the role in the foreseeable future. The recent recruitment of apprentice was not comparable to the role held by the claimant. Ms May denied the claimant's contention that the claimant was dismissed because of matters related to the company car.

The law

38. Section 103A provides that an employee who is dismissed shall be regarded.....as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
39. For dismissal purposes whistleblowing must have been the reason or principal reason for the dismissal. It is important to note that the test is different to the test under section 47B Employment Rights Act 1996 for whistleblowing detriment as held in ***Fecitt v NHS Manchester 2012 IRLR 64***. In a detriment case the test is whether the detriment was "on the ground that the worker has made a protected disclosure", which has been interpreted as meaning that the disclosure must have been "*a material factor*". In a dismissal case the test is more stringent, namely whether the whistleblowing was "*the reason (or, if more than one, the principal reason) for the dismissal*".

Submissions

40. The respondent submitted that once the claimant accepted that the respondent had no reason to wish the car to be lacking an MOT, it was hard to see her reasoning that this was a whistleblowing dismissal. The respondent submits that the claimant cannot offer a logical reason why this is a whistleblowing dismissal when as soon as they became aware of the MOT situation, they dealt with it.
41. The respondent's case is that whether this is performance or redundancy, it is not a whistleblowing dismissal. The claimant had less than 2 years service and on the respondent's submission she does not establish her reason for dismissal.
42. The claimant submitted that prior to the car accident she was happy working for the respondent. She accepted that her shoulder problems affected her work. She was very unhappy about the situation with the car. As to the reason for dismissal she said she honestly did not believe that it had anything to do with her timekeeping or not meeting targets.

Conclusions

43. I have to make a decision as to the reason or principal reason for dismissal. I have found above that the lack of an MOT on the claimant's company car was an oversight by Mr Light. It was not intentional. It was the first time that he had issued a company car. It was a relatively new company and he was getting started. He did not have any HR input until January 2016. He was getting up to speed with the matters that he needed to deal with as his company and business grew
44. The claimant accepts that her shoulder condition caused her to have time off work and affected her work. Mr Light was not impressed by the claimant reporting one and half hours after her start time on 15 June 2016, that she would not be coming to work. In the period from April 2015 to June 2016 she had only once met the expectation of 8 outbound auctions per month. She had not attempted to fill in the spreadsheet to monitor her outbound activities. The claimant was not covering her cost and making a profit. Mr Light decided that he could do without her.
45. The claimant accepts that the respondent did not want to have a company car without an MOT. It was addressed as soon as she raised it.
46. The claimant takes issue with the fact that she was not performance managed and that her dismissal should not have been based on one appraisal in October 2015. This would be a relevant argument if she had the right not to be unfairly dismissed, other than for an automatically unfair reason.
47. I find that Mr Light was growing a new business, he was not happy about the claimant's work ethic, the amount of time she took off and her performance. Save for one month, she was not reaching the expectation

of 8 outbound auctions per month. Financially she was not proving viable for his business.

48. I find that his principal reason for dismissing was the standard of her work performance which was below what he wanted to see. He was not happy with her work ethic and the results she was bringing in. I find that the claimant's text about the MOT did not form part of his reasoning in making the decision to dismiss. He accepts that the car should have had an MOT and he attended to it once it was brought to his attention.
49. I am not condoning the lack of an MOT on a company car. Of course the car should have had an MOT and it is understandable that the claimant was upset about this, given what happened to her on the night of 10 June 2016.
50. This is not a case in which I have to consider any further, the performance or redundancy arguments. I have found that the reason for dismissal was performance and as such the dismissal was not automatically unfair. The fairness of the process or otherwise is not in issue.
51. The claim for automatically unfair dismissal therefore fails and is dismissed.

**Employment Judge Elliott
Date: 12 June 2017**