Claim No: 3303594/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr B Krol

Respondent: The Haulage (Holdings) Organisation Limited

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)

On: 26 to 28 January 2022

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Mr L Werenowski, Counsel
Ms M Rodwell, Interpreter

Respondent: Ms L Gould, Counsel

REASONS

1. Reasons having been given orally on 28 January 2022, the claimant requested written reasons by email dated 10 February 2022, which unfortunately, was only referred to me on 22 April 2022.

2. This is a claim brought by the Claimant originally against his former employer for automatic unfair dismissal for health and safety reasons and against his former employer and manager for race discrimination.

The hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. One observer from the Respondent attended although no members of the public attended. The participants were told that it was an offence to record the proceedings.

5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective, there were no difficulties with the hearing being held remotely.

6. A Polish interpreter was booked to attend the remote hearing, although, having not received the log in details in advance, was slightly late joining. The Claimant's representative confirmed that the interpreter was required to assist the claimant during cross examination, but would not be required to interpret the hearing generally since he had a good grasp of English, despite it not being his first language. It was therefore agreed that the interpreter would remain in the hearing, and should the claimant not understand something, he would raise his hand. The interpreter and his representative agreed to inform me should he do so, should I not notice.

Background

7. The claim form was presented on 31 March 2020 following a period of early conciliation from 27 March to 30 March 2020.

8. A preliminary hearing for case management was held on 17 February 2021 before EJ Cassel which resulted in a Case Management Order [P47-52].

9. The claimant withdrew his claim for race discrimination against both respondents and therefore the claim for direct race discrimination against the first respondent and all claims against the second respondent were dismissed in a Judgment dated 12 January 2022 [P70].

10. I had been provided with an electronic bundle of agreed documents of approximately 500 pages and page numbers referred to in this Judgment refer to page numbers within that bundle. I was also provided with witness statements for all witnesses attending to give oral evidence.

11. I therefore heard from the following witnesses:

    a. The claimant himself;

    b. Mr N Dutton, former Head of Compliance of the Respondent;

    c. Ms R Savry, Planning and Operations Manager of the Respondent; and

    d. Mr G Schofield, Group Driver Trainer of the Respondent.

12. It was agreed by all parties, that I would consider liability and go on to consider remedy should the claimant succeed in his claim for automatic unfair dismissal.

List of issues

13. The parties had agreed a draft list of issues during the preliminary hearing which were set out in the case management order, however, in light of the withdrawal of the race discrimination complaints, it was necessary to revisit the list. It was therefore agreed that the only issues on liability to be decided at the hearing were as follows:

14. Automatic Unfair dismissal

    a. What was the reason or principal reason for the Claimant's dismissal?

    b. Was the reason for the claimant's dismissal an automatically unfair reason pursuant to section 100 (1) (c) or alternatively, 100 (1) (d) of the Employment Rights Act 1996 ('ERA')?

Findings of fact

15. The claimant was employed as a HGV driver by the respondent, a company which transports freight by road. The claimant was employed from 30 September 2019 until his dismissal on 17 March 2020.

16. The claimant's role involved transporting tonnes of chicken carcasses in liquid (referred to as 'chicken slurry') in a 44 tonne lorry to the respondent's customers for use in dog food.

17. The trailers transporting the chicken slurry were covered with tarpaulin which the claimant considered was dangerous since, should the driver have to brake suddenly or swerve, it was highly likely that chicken slurry would spill out of the trailer. I accept Ms Savry's evidence that this is standard industry practice for the transportation of chicken slurry. It is not possible to have trailers with a hard top due to the gases which are released from the chicken slurry. Further, the lorries have splash plates to try and minimise losses from the trailer.

Additionally, the drivers are trained to ensure that they drive cautiously and keep the correct distances between themselves and vehicles in front of them in order to avoid unnecessary sharp braking and therefore spillage.

18. The claimant considered that the practice of changing over trailers in a lay by was dangerous since it meant that drivers would reverse into the lay by from an A road. The respondent gave evidence that drivers are not meant to reverse from A roads in order to change trailers.

19. The claimant had been provided with a contract of employment [P 70 – 81]. In addition, the respondent had a number of policies governing various situations relating to the claimant's employment. These included a disciplinary policy and procedure [P146 – 152], a driver accident reporting pack [P169 – 172], driver statement [P173 – 175] together with various policies for dealing with transport spillage. Other than the disciplinary procedure, all of the policies were available with Polish translations.

20. These policies made clear that all accidents or incidents, including any spillages, must be reported to the respondent so that they could be properly dealt with. It was clear, and accepted by both parties, that a spillage of chicken slurry onto the road could cause a hazard to other road users.

21. Some vehicles were provided with cleaning kits although it was accepted that the lorry driven by the claimant in relation to the incident on 11 March 2020 did not contain such a kit. It was not a legal requirement for the vehicles to carry this cleaning equipment.

22. The claimant had been inducted in to the respondent's organisation when he commenced employment. This consisted of one day of training on 30

September 2019 during which he sat with Mr Schofield and two other new drivers. As part of this training, the claimant watched various powerpoint demonstrations and carried out training modules on laptops. The Claimant initially disputed that he had received any training from the respondent, other than taking a driving assessment and had been asked to purely sign the training record [P96 – 97]. However, in cross-examination, he accepted that he had undergone some training on 30 September but could not say that he had been trained in all of the modules contained within the training record. Mr Schofield's evidence, which I accept, was that he had been through the training with the claimant, some of which were PowerPoint demonstrations and some of which were modules watched on a laptop computer.

23. The claimant gave evidence that he did not consider it was possible for all of the matters contained on the training record at pages 96 to 97 to have been discussed during the one day induction. I do not accept this.

24. There was a concern raised by the claimant that on a number of documents within the agreed bundle, the signature did not appear to be that of the claimant's. There did appear to be some differences between the signatures although I accept the evidence of Mr Schofield who said that, despite the differences, the claimant had signed these documents in his presence.

25. Therefore, I am satisfied on the balance of probabilities that the claimant had signed the various documents contained within the agreed bundle. It was clear that there were a number of signatures required on the induction day and that the claimant may not have recalled doing so, and may have signed in a different way to usual.

26. I am therefore satisfied that the claimant did undergo some training in respect of his role and was provided with the various policies referred to above, many of which had been translated into Polish.

27. During the claimant's employment there were two incidences of spillages allegedly occurring whilst the claimant was driving. These were said to have occurred on 27 January 2020 and 9 March 2020. These spillages had not been reported by the claimant, as required by the respondent's policies, but were brought to the attention of the respondent by other drivers who had either witnessed the claimant cleaning down a vehicle following a spillage or had complained about the state of a vehicle being handed over to them by the claimant.

28. On 11 March 2020, the claimant drove his lorry containing chicken slurry. At approximately 10:30 PM, the lorry in front of the claimant dropped a pallet into the road causing the claimant to swerve and brake to such an extent that there was a large spillage of the chicken slurry over the claimant's lorry and onto the road. The claimant reported this spillage although, confirmed at the time that there was no chicken slurry in the road since he was able to clean up the spillage. There were photographs provided of the vehicle before and after his clean up [P300-305] and it was clear that a significant amount of chicken slurry had been lost from the trailer due to the incident.

29. However, there was no requirement for the respondent to send out a cleaning team to the site, since the claimant had confirmed when he reported the incident that the road was clear.

30. From various documents contained within the bundle, the claimant sought to show that approximately 2,000 kg of chicken slurry had exited the vehicle as a result of the incident on 11 March 2020. However, I accept the evidence of Ms Savry that whilst a significant amount of chicken slurry had been lost due to the incident (being approximately 20 – 40 kg) the difference in weights of the vehicle was explained by the removal of water from the product when it arrived at the customer's site and that the loss was therefore much less than that suggested by the claimant.

31. There was an initial investigation into the spillage carried out by Mr Dutton and one of his colleagues. As part of this investigation, the respondent identified that the tachograph equipment within the claimant's lorry had been damaged. Also that files had been deleted from the lorry's dashcam so that the incident from 11 March could not be viewed.

32. At approximately the same time as that initial investigation was taking place, Mr Dutton was informed about the claimant's involvement in earlier spillages which had not been reported to the respondent in line with its policies and procedures. The respondent's landlord had complained verbally to Mr Dutton about effluent being found in a wash bay on 10 March 2020. Mr Dutton requested the landlord to confirm this in an email which he did on 12 March 2020 [P318].

33. Mr Dutton arranged for the claimant to be invited to an investigation meeting on 17 March 2020. The invitation letter dated 12 March 2020 [P329] informed the claimant that the investigation related to, "*three incidents where two have not been reported by [the claimant] and one which has been reported which*

happened on 11 March 2020 at 22.30 hrs. This then resulted in us looking for the footage and finding issues where the tacho head was damaged, and files deleted from the nextbase dashcam."

34. The claimant was informed that Mr Dutton would be carrying out the investigation and that he would be accompanied by Mr Bolton who would attend as notetaker.

35. Prior to the investigation meeting taking place, Mr Dutton obtained a spillage report relating to the incident on 27 January 2020 [P275 – 281], a spillage report relating to the incident on 9 March 2020 [P318 – 326], a spillage report relating to the incident on 11 March 2020 [P282 – 314], photos of the damaged tachograph after the incident on 11 March 2020 [P315] and screenshots showing issues relating to the recovery of the dashcam footage from the incident on 11 March 2020 [P316 – 317].

36. The claimant requested a postponement of the investigation hearing since he had received the invitation on Saturday, 14 March 2020 and he did not consider he had sufficient time to prepare. He sent an email to Ms Bruce, HR administrator for the respondent, on 16 March 2020 [P330] which requested a, "*change the date of appointment. I am currently waiting for feedback from United Road Transport Union and [availability] of Spire solicitors LLP*".

37. The claimant's evidence was that the postponement had been agreed and he was awaiting a date for that meeting. He thought he may have spoken to Ms Bruce to confirm this. Whilst Ms Bruce did not attend the tribunal to give evidence, I accept Mr Dutton's evidence that any such postponement would have been discussed with him and he had not agreed to accommodate this

postponement. Therefore, whether or not the claimant had been told that a postponement was agreed, I accept that Mr Dutton and Mr Bolton were expecting the claimant to attend the investigation meeting at 5pm on 17 March 2020.

38. There were minutes of an earlier investigation meeting contained within the bundle [P338 – 339] which suggested that an earlier meeting had taken place at 8:45 AM on 17 March 2020. Both parties agreed that no such meeting had taken place and it was therefore concerning that minutes had been prepared and disclosed for a meeting which had clearly not taken place. However, whilst I am concerned about these minutes, they do not affect the evidence of the witnesses concerning the actual meeting which took place on 17 March 2020. There was no suggestion that Mr Dutton had fabricated these minutes.

39. There was a difference in evidence concerning the timing of the meeting between the claimant and Mr Dutton on 17 March 2020. The claimant says that he arrived for his shift which commenced at 6pm as he considered that the investigation meeting had been postponed. Mr Dutton's evidence was that the claimant was late for the 5pm investigation meeting but arrived at approximately 5:35/5:40pm. When he was seen to have arrived, Mr Dutton says that he sent Mr Bolton to collect the claimant in order to start the investigation meeting, which appeared to be accepted by the claimant.

40. The claimant's evidence was that he saw an unusual car, which he assumed to be from management, in the car park and, as he was concerned, arranged to send a grievance letter referred to below on his way to the meeting.

41. Mr Dutton's evidence was that the grievance letter was sent after the meeting on 17 March 2020 during which he had dismissed the claimant.

42. I am satisfied that the claimant sent his grievance email at 6:13pm, which he resent again at 6:17pm, both having been sent after his meeting with Mr Dutton. The timeline provided by the claimant during cross examination was not plausible since it relied upon him being late for his shift, something which he did not ordinarily do, and that he had sent the email to Mr Dutton in the 30 seconds it would have taken him to walk from his car to the office for the meeting. The meeting would have had to have concluded during the four-minutes between sending the first email attaching his grievance and the drafting and the sending of his second email attaching the same grievance but providing further wording, "…*Please read the attachment letter in the email. Kind Regards Blazej*."

43. My finding is further supported by the email which Mr Dutton sent to HR on 17 March 2020 at 6:46pm [P343] which said, "*Sent to me minutes after he was dismissed*". Also, the claimant's statement which was, on the whole set out chronologically, confirms:
   "*89. I left work on 17 March 2020 a bit dazed and I drove home.*
   90. Following the advice of my lawyer I had already written and sent a grievance to my employer about the safety conditions at work".

44. The claimant's statement does not make clear when his grievance had been sent, but the claimant accepted in cross-examination that the reference in his grievance letter to, "*we spoke earlier and I now wish to make a written grievances about two matters please*" referred to the only meeting he had had

with Mr Dutton on 17 March 2020. This could only have been the dismissal hearing as it was accepted by both parties that no other meetings took place that day, despite there being purported minutes for an earlier meeting.

45. The grievance letter dated 17 March 2020 confirms that the claimant considered that the way they were asked to work was unsafe in the following two ways:

    a. "*The content of the lorry trailer move about too much and there should be proper trailer to hold the content that stop this. This is not safe. And*

    b. *We are asked to make lorry trailer exchange on a [layby] and not in a yard where there is no danger of being hit by passing traffic. This is very unsafe.*
    I think that both of these are serious and looming danger that I no longer want to be expose to without changes at the work."

46. The grievance went on to cite complaints about Polish drivers being treated worse than British drivers but as the race discrimination complaint has been withdrawn, it is unnecessary to discuss this further.

47. The claimant also said that he had told his immediate boss, Tomek, "*didn't he think the work was dangerous?*" Although no further specifics were provided. He also gave evidence that he had spoken with other Polish drivers and they agreed that the work was dangerous although again, no further particulars had been provided about what was said, or to whom. During cross examination, the claimant for the first time gave evidence that he had spoken to Mr Dutton and raised health and safety concerns orally with him. Mr Dutton

denied this and no specifics were given of matters alleged to have been raised, nor the dates of any such disclosures. I do not accept, therefore, that such matters concerning health and safety were discussed with Mr Dutton orally.

48. Whilst the meeting was intended to be an investigation meeting, it was accepted by both parties that the claimant had been requested to sign a deductions form relating to the spillage on 11 March 2020. This form related to the driver's weekly bonus being reduced due to the spillage. The claimant refused to sign this form and, from Mr Dutton's evidence, would not engage in the investigation process.

49. Mr Dutton's evidence was that he had already arrived at the decision to dismiss the claimant prior to the meeting with him at 5pm on 17 March 2020 due to what he considered to be clear evidence that the claimant had failed to report two earlier spillages and had tampered with evidence in relation to another spillage which he had reported relating to the incident on 11 March 2020. Namely, the tacograph head and the dashcam footage. Mr Dutton's evidence was that this was an extremely serious matter and the claimant's behaviour and attitude during the meeting, together with his refusal to engage in any discussion, resulted in Mr Dutton confirming in the meeting that he had decided to terminate his employment with immediate effect as the respondent could not trust the claimant to report spillages in the future.

50. There were no minutes for this meeting which Mr Dutton accepted was unusual in these circumstances despite the meeting lasting only approximately 10 minutes. I would have expected minutes to have been

available particularly as Mr Bolton was there to take these minutes. However, I acknowledge that sometimes documents go missing and there did not appear to be much dispute between the parties over what was discussed in the meeting. The dispute related to the timings of the meeting and not its content.

51. The claimant subsequently emailed Ms Bruce on 1 March 2020 [P345 – 346] to confirm whether he had in fact been dismissed. Mr Dutton confirmed in response to HR's email to him [P347] what had happened during the meeting, namely that the claimant was asked to sign the deduction form for the spillage which he refused to do and that the meeting was not being rescheduled. It makes reference to the claimant's attitude deteriorating and then being told that it had been decided to terminate his contract with immediate effect. It also states, "*within minutes that email I forwarded to you and Robyn landed in my inbox, so he had obviously already got a plan together*."

52. Confirmation of the claimant's dismissal was sent by letter dated 23 March 2020 [P353]. The claimant states that this was sent on 25 March 2020. The letter confirmed that the claimant had been dismissed with immediate effect but that he would be paid one weeks' salary in lieu of notice and receive his accrued but untaken holiday entitlement. The letter did not give the right to appeal.

53. Ms Savry provided an initial response to the claimant's grievance to HR on 6 April 2020 [P358]. A grievance outcome letter was then sent to the claimant on 16 April 2020 [P361 – 363] which was received by the claimant on 23 April

2020. The outcome letter went into some detail concerning the claimant's allegations.

54. The respondent had not followed its own grievance procedure in respect of the claimant's grievance since he was not invited to a grievance hearing. He was, however, given the right to appeal against the grievance outcome. The claimant did not appeal and confirmed this in an undated letter [P374].

55. The dismissal also did not follow the respondent's own disciplinary procedure nor the ACAS code of practice.

Submissions

56. Both parties addressed me orally on the case and the Claimant provided written submissions which were sent the following morning.

57. In brief, the Respondent contended that the Claimant had not put a valid claim under section 100(1)(d) ERA since he had not said that he had left work or refuse to return to work when he was dismissed. Therefore, his only possible claim was under section 100(1)(c) ERA that he had raised health and safety concerns that he had reasonably believed were harmful and had been dismissed for that reason. However this claim should fail since he had not proved that the health and safety concerns had been raised prior to his dismissal. Importantly, the claimant had only raised in cross-examination his assertion that he had previously told Mr Dutton verbally about his concerns regarding health and safety although it was still not known what was said and when. The claimant's case therefore fell at the first hurdle. Not only had the claimant not proved his case on automatic unfair dismissal, the respondent had

clearly demonstrated genuine reasons for concern and therefore reasons for his dismissal.

58. The Claimant stated that section 100 provides protection to an employee, such that he is automatically unfairly dismissed if the reason, or principal reason, for the dismissal is that he brought to the employer's attention by reasonable means circumstances connected with his work which he reasonably believed was harmful, or potentially harmful to health and safety. The claimant was claiming automatic unfair dismissal under both s100(1)(c) and (d) of the ERA. He had confirmed that he no longer wanted to be exposed to a serious and looming danger without changes at work and had raised what he reasonably believed to be concerns over health and safety. The claimant was dismissed on the spot moments after Mr Dutton saw the claimant’s grievance. No procedures were followed and there were many basic defects in the process. As this is an automatic unfair dismissal case, the reasonableness of the decision was not an issue.
59. I was referred to two authorities by the claimant. Namely, it is the claimant’s belief that counts and not the respondent’s opinion about the serious and imminent danger from Oudahar v Esporta Group Ltd [2011] ICR 1406. And that potential danger is not imminent danger – ABC News Intercontinental inc v Gizbert UKEAT/0160/06/DM.

Law

60. I had regard to the following sections of the ERA:
61. Section 94 ERA:

“**The right**

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

62. Section 100 ERA:

"**Health and safety cases**

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work…"

63. Section 108 ERA:

64. "**Exclusion of right**

"108 Qualifying period of employment

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination…

(3) Subsection (1) does not apply if—…

(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies."

Conclusion

65. I had to consider whether the claimant had proved the reason or principal reason for this dismissal was either that he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety (section 100(1)(c)) or whether, in circumstances of danger which the employee reasonably believed to be serious and imminent which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work (section 100(1)(d)).

66. In light of my findings of fact, I do not accept that the reason for the claimant's dismissal, or the principal reason, was in any way due to the health and safety concerns raised by him in a grievance on 17 March 2020. I do not accept that he raised health and safety issues orally prior to this date either to his colleagues or to Mr Dutton.

67. I am satisfied that Mr Dutton had not received the claimant's grievance [P344] prior to the meeting of 17 March 2020, nor had the claimant raised any health and safety concerns with him prior to his dismissal.

68. I am satisfied that the grievance letter was emailed after the claimant had been dismissed and therefore cannot have formed the basis for that decision. Whilst the grievance had clearly been drafted prior to his dismissal, I do not believe that it had been sent.

69. Further, I am satisfied that the reason for the claimant's dismissal was his conduct related to the spillages that had occurred whilst he was driving vehicles and his failure to report two of these in accordance with the respondent's procedures, together with the damaged tachograph and deleted dashcam files.

70. The respondent failed to follow a fair procedure in respect of the claimant's dismissal and certainly did not follow the ACAS code of practice. However, that in itself does not affect my decision, since in order to succeed, the claimant must prove the reason for his dismissal or principal reason is as set out in sections 100(1)(c) and (d) ERA. He has failed to do so.

71. In light of this, it is unnecessary to deal with remedy and the case is dismissed.

Employment Judge Welch

Date written reasons provided: 11 May 2022

WRITTEN REASONS SENT TO THE PARTIES ON

16 May 2022

FOR THE TRIBUNAL OFFICE