



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE FRANCES SPENCER

BETWEEN:

MR J GARCIA CASTANO

CLAIMANT

AND

LONDON GENERAL TRANSPORT SERVICES LIMITED

RESPONDENT

ON: 1ST MAY 2018

Appearances

For the Claimant: Mr J. Neckles, trade union official

For the Respondent: Mr R Bailey, counsel

JUDGMENT

- 1 The Claimant's claims
 - a. For ordinary unfair dismissal
 - b. For automatic unfair dismissal under section 101(1) or detriment under section 45 (Sunday working) of the Employment Rights Act 1996 (the ERA);
 - c. For unlawful deduction of wages; and
 - d. For detriment on the grounds set out in section 45A (working time) of the ERAare dismissed on withdrawal.
- 2 The Claimant's claim that he was dismissed and or subjected to a detriment contrary to sections 44 and 100 of the ERA are struck out as having no reasonable prospect of success.
- 3 The remaining claims shall proceed to a hearing save only that the Claimant's claim, pleaded as a claim under section 99 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), is replaced by

a complaint of detriment and/or dismissal on the ground that the Claimant sought to exercise his rights under section 10 of the Employment Relations Act 1999.

REASONS

- 1 The Claimant worked as a bus operator for the Respondent until he was summarily dismissed on the 29th March 2017. At the time of his dismissal the Claimant not have 2 years' service and so did not qualify for the right under section 94 of the ERA not to be unfairly dismissed. The Respondent's case is that the Claimant was dismissed for conduct.
- 2 The claim form, as originally presented, pleaded a significant number of causes of action relying on sections 13, 94, 100, 101, 44, 103 A, 47B, and 45A of the ERA, on section 99 of TULRCA as well as claims of direct race discrimination and victimisation (sections 18 and 27 of the Equality Act 2010) and wrongful dismissal.
- 3 As set out above some of those claims have now been withdrawn but the Claimant continues to rely on the right not to be unfairly dismissed under section 103A (whistleblowing) and under section 100(1) (a) or (c) (health and safety cases) and the corresponding rights not to be subjected to a detriment on those grounds.
- 4 At this open preliminary hearing the Respondent sought a strikeout of the claims brought by the Claimant under sections 44 and 100 of the ERA. The Respondent's application for a strikeout of the whistleblowing complaint was withdrawn during the course of the hearing and replaced by an application for a deposit order.
- 5 I had a bundle of documents, heard evidence from Ms Ryder, and heard submissions from Mr Bailey for the Respondent and Mr Neckles for the Claimant.
- 6 Rule 37 of the Employment Tribunal's Rules of Procedure 2013 provides that the Tribunal may either on its own initiative or on the application of a party strike out all or part of a claim or response on the grounds that it has no reasonable prospect of success; provided that no claim may be struck out unless the party in question has been given a reasonable opportunity to make representations. It is common ground that where there are crucial disputed facts a strikeout is not appropriate as those facts should only be determined by evaluating all the evidence.
- 7 Section 100 of the ERA provides as follows

"100 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 –*

- (a) *having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
- (b) *....not relied on*
- (c) *being the 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.*

- 8 Section 44, so far as relevant, provides that an employee has a right not to be subjected to any detriment by any act, or deliberate failure to act, done on the same grounds as those set out in section 100.
- 9 Mr Bailey for the Respondent submits that the Claimant had not been designated by his employer as a health and safety representative and did not qualify under subsection 100(1) (c) as the Respondent had appointed a health and safety representative at the Putney bus garage where the Claimant worked.
- 10 Mr Neckles, on behalf of the Claimant, on the other hand says that the Claimant has the right set out in section 100. His case is that all bus operators are required to carry out health and safety duties, such as checking the vehicle for mechanical defects and observing the Respondent's rules designed to ensure health and safety. Mr Neckles refers to clauses 8.1 – 8.3 of the Claimant's contract of employment which requires the Claimant to take reasonable steps to safeguard his own health and safety and those of any other persons who may be affected by his actions work, to check his vehicle for mechanical defects, and to report accidents at work. He submits that the Claimant can refuse to take his bus out if he considers that it is not safe. He refers to the Respondent's disciplinary policy which notes that failure to observe rules and regulations designed to ensure safety would be considered to be gross misconduct. He also refers to the Regulations governing public service vehicles with which the Claimant is required to comply.
- 11 In the alternative, Mr Neckles submits that there was no designated health and safety representative at the Claimant's place of work. He submits that the Claimant's place of work was not the Putney bus garage (where there was a designated health and safety representative) but the bus route which the Claimant was required to drive. As the only employee driving the bus he was therefore the designated health and safety representative at his place of work.
- 12 While I congratulate Mr Neckles on the boldness of his argument I am satisfied that it is ultimately bound to fail. This is not a case where there are

disputed facts. Mr Neckles accepts that there was an employee who was designated as the health and safety representative at the Putney bus garage where the Claimant worked. The Claimant's place of work was set out in his contract as being Putney. Although he was a bus driver his place of work is plainly not the bus route or, even, for that matter, the bus itself.

- 13 There is potentially a bit more mileage in Mr Neckles first submission that the Claimant was "designated by his employer to carry out activities in preventing or reducing the risk to health and safety", but it is apparent from the structure of the section that this is not intended to be a right conferred on all employees unless there is no health and safety representative at their place of work. As Mr Bailey submits, ultimately all employees have obligations for health and safety in the workplace; although I accept that a bus driver may have more onerous duties than, say, an office worker, given that they are carrying members of the public. The rights conferred by section 100 and section 44 are intended to be rights conferred on specific individuals within the workplace either by the employer, or by the trade union (or other workers' committee) unless there is no such representative. There is a difference between having contractual obligations to carry out health and safety duties in the normal course of work (as all bus operators plainly did) and being "designated by the employer to carry out activities in connection with preventing or reducing risk to health and safety at work".
- 14 I am therefore satisfied that the claims brought under sections 100 and 44 of the ERA have no reasonable prospect of success and are struck out.

Employment Judge F Spencer
Date: 17th May 2018