



EMPLOYMENT TRIBUNALS

Claimant: Mr S Phillips

Respondent: Evergreen Coaches Limited

Heard at: Birmingham

On: 31 August and 21 September 2018
(in chambers)

Before: Employment Judge Benson

Representation

Claimant: Mr A MacMillian - Counsel

Respondent: no appearance

RESERVED JUDGMENT ON REMEDY

1. The respondent has unfairly dismissed the claimant contrary to section 103A and section 100(1)(c) and (d) of the Employment Rights Act 1996. The respondent is ordered to pay to the claimant the sum of £22,245. The Recoupment Regulations do not apply.
2. The respondent has failed to pay to the claimant 19 days accrued but untaken holiday pay. The respondent is ordered to pay to the claimant the sum of £1434.12 gross in respect of accrued but untaken holiday pay.
3. The respondent has unlawfully deducted wages from the claimant and is ordered to pay to the claimant the sum of £3773.80 in respect of his unpaid wages for the period 4 September to 11 November 2017.
4. No award is made in respect of notice pay.
5. No award is made in respect of unpaid expenses.

REASONS

Claims and Issues

1. The Claimant brought claims of unfair dismissal, breach of contract, unauthorised deduction from wages and a claim for accrued holiday pay. Judgment in default was entered against the Respondent on 1 August 2018. The matter was listed for consideration of remedy and the notice of hearing was sent to the Respondent who were permitted to participate in the remedy hearing.
2. There was no attendance by the Respondent. It had previously provided the Tribunal with representations and documentation relating to the dismissal of the Claimant (including the representations made by email of 16 August) which were available to me and were considered.
3. At the outset of the hearing it was agreed with Mr MacMillian that in order for the Tribunal to determine remedy, including whether the statutory cap would apply in respect of the claim of unfair dismissal, some findings relating to the reason for the dismissal needed to be made. Specifically, whether the reason or principle reason for the unfair dismissal was that the Claimant made a protected disclosure under S103A of the Employment Rights Act 1996; and/or he brought to the Respondent's attention and/or refused to work, because of, a health and safety issue under S100(1)(c) or (d) of the Employment Rights Act 1996. Further findings needed to be made to determine whether there should be any reductions for contributory fault and under the principles of Polkey; and whether there should be an uplift for a failure by the Respondent to use the ACAS Code of Practice on Discipline and Grievance.

Evidence

4. I heard evidence from Mr Phillips and considered the bundle of documents which was provided for use by the Tribunal. Mr Phillips also provided a copy of his tachograph for the 28 August 2017 which I admitted into evidence. I considered the oral submissions made by Mr MacMillian and considered relevant case law.

Findings of fact relevant to remedy

5. The Claimant was employed as a driver by the Respondent from 12 September 2012 to 11 November 2017 when he was dismissed by reason of his conduct which the Respondent contended amounted to gross misconduct.
6. At the time of his dismissal he was 67 years old, had an exemplary service record over 5 years with the respondent and considered that he was a hardworking and committed employee.
7. The Claimant accepted that the contract of employment which governed his employment was that signed by him on 5 January 2017. This was entitled a Flexible Hours PVS Drivers Contract of Employment and it included the following terms relating to working hours:
 - a. 'Your working hours will vary from week to week but in general you are required to work week days and term time only.'

- b. 'Your normal hours of work are governed by the EC Regulations on Driver's Hours and if ever applicable, the Domestic Hours Rules, or any other legal enactment as necessary for the proper performance of your duties. You will be required to work weekends and overtime as and when requested.'
 - c. As detailed above, your hours of work will be within school term time only and will vary and be as required by the Company.
 - d. You are required to remain within the legal requirement of the EC Drivers' Hours Rules or Domestic Hours' Rules as applicable to your employment. These include your rest entitlement which, whilst on duty shall be paid. Any breach of these shall lead to disciplinary action, including possible dismissal'
 - e. Your hours of work are those required according to the daily allocation schedule, which is normally displayed in the office. However, you will also be informed by text message and/or phone call of your working hours a daily basis. Your normal working hours will be 7-10am and 2-5pm each school term time weekday. In addition, you are required to work on short notice as and when necessary, including periods where you are otherwise free to pursue your own leisure activities.'
8. The Claimant confirmed that he worked flexible hours. He generally worked the school drop off and pick up times as per the contract during school term time, but sometimes worked extra hours each week and some weeks he didn't have any hours at all. His evidence was that he didn't consider that he had guaranteed hours of work and he was only paid for the hours he worked.
9. On 28 August 2017, he drove the Respondent's coach on a day trip to Bournemouth. The day was very hot and the traffic was bad, worse than a normal Bank holiday. He picked up the coach at approximately 7.20am and was at the pick-up point at 7.40. At 8.00am the coach left and because of the heavy bank holiday traffic and some mechanical difficulties with the coach, they did not reach Bournemouth until 2.30pm, having had an hours' break between 11.00 and 12.00. The journey should normally take two hours or so. The mechanical problems which had occurred involved the coach losing power on a couple of occasions such that the Claimant had to move into the hard shoulder on the motorway for a short period. It was a very warm day and the air conditioning on the coach was not effective in keeping the coach cool. Further the CD player was not operating. Understandably the passengers were not happy.
10. The return journey also took longer than anticipated. The coach left Bournemouth at 17.45 and with a half hour break at 20.15 reached Warwick Services at 22.15pm. By this time the claimant had been driving for a total of approximately 10 hours.
11. The Claimant was an experienced driver and realised when leaving Bournemouth that day that he would be likely to exceed his permitted legal driving hours before reaching the drop off point for the trip. He therefore contacted Mr Thandi (known as Mr Avi) the owner and a Director of the Respondent to request that another driver meet him on the route to take over the driving. Mr Avi was reluctant at that stage to agree to this and told the Claimant to wait and see how it went to see whether he made better progress. As the journey progressed the Claimant made a number of calls to Mr Avi telling him that unless he sent a replacement driver to meet him, he would be unable to complete the trip without exceeding his permitted

driving hours. Mr Avi was unresponsive to the Claimant's request and made no arrangements to send another driver. He eventually would not answer the Claimant's calls. As the Claimant approached Warwick Services, he considered that this was the last suitable place he could stop before exceeding his permitted hours and therefore stopped the coach there and tried to contact Mr Avi again.

12. The passengers were very unhappy, particularly having had a hot, long and difficult journey and expressed their unhappiness to the Claimant. The Claimant sought to explain his position and the difficulty he was in to them. One of the passengers contacted the police and eventually Mr Avi came to the services and drove coach and passengers back. Mr Avi was angry at the claimant for refusing to drive further and swore at him. He refused to allow the claimant to board the bus and left him at the service station. The Claimant had to get a taxi home.
13. On 13 September, another issue arose with the bus which the claimant was driving. He had been asked to drive on a school run. Again there was a mechanical problem with the bus. The engine cut out and a passenger indicated they could smell fuel. The claimant called Mr Avi who said he would attend straight away. A teacher called the police, but neither they nor Mr Avi could smell petrol and the bus continued its trip and dropped off the children. As far as the Claimant was concerned the matter was resolved.
14. On 22 September 2017, the claimant received a letter from the respondent inviting him to a disciplinary meeting on 28 September. The allegations against him were:
 - a. Serious complaints concerning his behaviour, professionalism and his fitness to be a professional coach driver on 28 August 2017 and 11 September 2017. Also a refusal of certain schools allowing the claimant to be a driver on their services and hires.
 - b. Serious complaints about a female and her profession on board the claimant's vehicle without prior permission.
 - c. The claimant's ability to read, understand and adhere to driving restrictions and limitations.
15. There were documents with the letter being (i) a sheet of paper with two unsigned and undated 'reviews' from the company website relating to the trip on 23 August; Both referred to the air conditioning and CD player not working which they say the Claimant refused to put on maliciously, and that he refused to drive further without good reason, and further that an 80 year old passenger fell ill on the trip. They expressed their unhappiness with the claimant and the trip. (ii) An invoice from the school that the claimant had driven for on 11 and 13 September. The invoice was dated 22 May 2017, four months before for the sum of £520. (iii) A notice from Highways England headed 'Advisory Letter Only' relating to the claimant's driving on the hard shoulder on 28 August 2017.
16. The Claimant couldn't attend the disciplinary hearing on 28 September and it was rearranged for 10 October. He was given no work after 13 September and he was not paid for the work he carried out from 4 September. The hearing was conducted by Ravinder Soomal, a director and the wife of Mr Avi. At the hearing, Ms Soomal would not give the claimant an opportunity to provide his explanations and instead demanded that the claimant agree with her version of events. The claimant did not admit any wrongdoing which frustrated Ms Soomal who cut the meeting short.
17. By 1 November, the claimant had heard nothing about the outcome of the meeting and contacted the respondent. On 7 November the respondent wrote enclosing a copy of a letter dated 17 October which advised that the

Claimant was dismissed without notice by reason of his conduct and performance which the respondent said were unsatisfactory. Four reasons were given: unsatisfactory behaviour; threatening behaviour to customers; driving or stopping illegally on hard shoulder as letter explained by highway agency; and general performance relation to duties of PSV driving. There was no other detail and they did not accurately match the allegations in the letter inviting him to the meeting.

18. The Claimant appealed by letter of 14 November. The appeal was also heard by Ravinder Soomal and the claimant prepared a statement setting out his grounds of appeal which appeared in pages 102 and 103 of the bundle of documents. In this the claimant explained in detail his responses to the allegations including the difficulties with the trip on 28 August and the problems there had been with the bus and the traffic. He refuted that he had in any way acted unprofessionally or maliciously or that there was anyone on the bus who collapsed or was taken ill. He could understand why the customers were unhappy that day but contended that none of it was his fault. The bus had mechanical problems, the traffic was particularly busy and he was about to exceed his driving hours when he stopped at Warwick services. In respect of the events of 11 September, he stated that there was nothing untoward that day, but he explained the events of the school trip on 13 September. There was no evidence that the school had refused to use him again and he contended that he had done nothing unprofessional on that date. He had no understanding of the allegation concerning the female passenger on his bus and again denied that he had done anything untoward.
19. Ms Soomal refused to read the statement while the claimant was present and advised him that she would read it and provide her decision. The claimant did not receive an outcome to his appeal. A letter has been disclosed by the respondent dated 14 December which upholds the decision to dismiss. The reasons were repeated to be as per the dismissal letter and Ms Soomal responded to the claimant's grounds of appeal as follows: she disputed that the claimant was outside his legal driving hours on 28 August; stated that he was late for the pick up on that day; that he didn't make sufficient efforts to contact the respondent; that the CD and air-conditioning were working; that the coach did not break down on 28 August; that a number of schools had asked that he not be sent on their routes; that he was not professional or courteous; that he had been advised that his female friend should not be present on his buses; that he was unprofessional on 13 September and was disrespectful; and finally that he had not returned company property including his tachograph.
20. The Claimant brought claims, including unfair dismissal, to the Tribunal and Judgment in default was entered.
21. Since his dismissal the Claimant, who is aged 67 has been unable to obtain alternative work. He has assisted a friend with driving a minibus in order that he can borrow it to drive to see his children, but has not earned any income from this.
22. Although he had a good work record during his 6 year's service with the respondent and had not been out of work since 1999, the fact that he has been dismissed and his age have made it difficult for him to find other work. He has confirmed that he has asked locally for driving work and has applied for some other work. He has sought to mitigate his losses but more recently he has explored opportunities with little enthusiasm having lost confidence and felt depressed following his dismissal. He states that he intended to keep working until he failed his annual PSV licence. He is now in receipt of

his state pension.

23. The Claimant was not paid his wages between 4 September to 11 November 2017 and was not given any period of notice. Mr MacMillan confirmed that there was no separate claim for notice pay.
24. It is accepted by the respondent that the Claimant is owed 19 days accrued holiday pay.
25. No evidence was produced of car parking and taxi fares claimed.

The Law

26. Protected Disclosures

Section 103A provides that:

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 the employee made a protected disclosure.

Section 43A defines a protected disclosure as a qualifying disclosure as defined by Section 43B. Section 43B makes it clear that:

“A “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following -

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
- (d) that the health or safety of any individual has been, is being or is likely to be endangered

The disclosure must be to the employer or some other responsible person as defined by the legislation.

If therefore an employee is dismissed because they have made a protected disclosure their dismissal will be automatically unfair dismissed.

27. Health and Safety Cases

Section 100 provides:

- (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)...
 - (b)...
 - (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,
 - (c) 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..

(2).....

- (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

29. Remedy

Section 123(1) provides that:

The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Section 123(6) provides:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensation award by such proportion as it considers just and equitable having regard to that finding.

Section 122(2) provides:

Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Decision

30. My findings on the issues relevant to remedy are as follows:

31. The Claimant alleges that he made a qualifying disclosure on 28 August 2017 when he called Mr Avi on a number of occasions on the route from Bournemouth and advised that he would be unable to complete the journey without driving longer than his legal driving hours. The claimant reasonably believed that he would be in breach of his legal obligations if he continued to drive that evening, further that he was committing a criminal offence and that his health and safety and that of others was put at risk if he continued the journey. The claimant made strenuous efforts to persuade the respondent to send a replacement driver. I am satisfied having seen a copy of the claimant's tachograph for that day that he would have been in breach of his legal obligations had he continued and his concerns were well founded. I am further satisfied that the claimant's disclosure was made in the public interest.

32. Having considered section 100 of the Employment Rights Act, the claimant in making the decision not to continue to drive on 28 August, based upon his knowledge of how long it would take him in those driving conditions to reach their destination and his knowledge of how long he had driven that day, 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, in line with section 100(c).

I am satisfied that even if there was a health and safety representative or committee, and I understand from the claimant that there was not, at that time of night and in those circumstances it would not have been practicable to bring his concerns to the attention of any health and safety representative or committee. I also consider that on 28 August at Warwick services, the claimant reasonably believed that there were circumstances of danger which were serious and imminent and which he could not reasonably have been expected to avert and that 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. As such the circumstances set out in section 100(1)(d) applied.

33. I go on to consider whether the claimant raising these issues with Mr Avi and/or refusing to continue driving on the evening of 28 August were the reason or principal reason for his dismissal in November 2017.
34. In the Claimant's view, the respondent's attitude and behaviour towards him changed after the events of 28 August. The Claimant had been employed by the respondent for some 6 years without any problems. The Claimant felt that after that date he was given the vehicles which had mechanical issues, he believed, in order to cause him problems. Whether that was the case or not, one month later the Respondent wrote to him inviting him to a disciplinary hearing with various allegations as set out above. He had an exemplary record to that date and I am not satisfied that the Respondent has shown that the Claimant's conduct or performance was the reason for his dismissal. The reasons given by the Respondent in the dismissal and appeal outcome letters are not matters which in my view amount to gross misconduct. The evidence which was presented at the disciplinary hearing was limited and did not support the decisions which the Respondent came to. Ms Soomal had little interest in hearing the Claimant's representations at the disciplinary and appeal meetings. I conclude that the reasons given by the Respondent were not the true reasons and I must consider what the reason for the claimant's dismissal was. In view of my findings above, I conclude that it was the claimant's disclosures to Mr Avi that he was about to exceed his legal driving hours and his refusal to continue to drive his bus on 28 August 2018, both of which frustrated Mr Avi and led to his change in behaviour towards the Claimant and his ultimate dismissal.
35. For the reasons set out above, that the reason or principle reason for the claimant's dismissal was therefore that the Claimant made a protected disclosure under S103A of the Employment Rights Act 1996; in that he was dismissed because of his refusal to drive further than and/or he brought to the Respondent's attention and/or refused to work, because of a health and safety issue under S100(1)(c) and (d) of the Employment Rights Act 1996.
36. The Respondent did follow a disciplinary procedure but it did not give the Claimant a proper opportunity to give his explanations or put forward his defence to the allegations. The outcomes were delayed or not sent and a reasonable investigation was not undertaken as there was CCTV on each of the buses but this was not considered or shown to the Claimant.
37. I have considered whether the Claimant caused or contributed to his dismissal, but I am satisfied that the evidence does not support this.
38. I have also considered whether there should be any reduction under the principles set out in Polkey. The dismissal was substantively unfair and as such a Polkey reduction would not be appropriate.

Remedy

39. I now consider the remedy and compensation payable to the Claimant. The claimant had irregular and flexible hours and he considered that he had no guaranteed hours. Having said that, his contract of employment provides that during school term times he would have regular hours of six per day. I have been referred by Mr MacMillan to the authority of the EAT in Borror v Cardinal Securities Limited EAT 0416/2012 which reminds a Tribunal that when considering whether an employee has guaranteed hours of work that all of the relevant evidence must be examined, including the written terms of the contract, how the parties conduct themselves in practice and their expectations of each. In the case of Mr Phillips, there is no express term that this is a zero hours contract, rather there is an express term that during school terms the Claimant will work set hours for school drop off and pick up times. This is what the claimant did and in fact he worked additional hours during the school holidays as required by the respondent but on other weeks he had no work. I accept Mr MacMillan's submission that in assessing the Claimant's normal weekly pay, the appropriate approach in this case is to take an average of his 12 weeks wages prior to the dismissal. That sum amounts to £346.23 net and £377.38 gross per week over that period.
40. The Claimant has made efforts to mitigate his losses by looking for new work, initially in the immediate period after he was dismissed when he asked his various contacts and local businesses for work. He has found it difficult to find driving work, particularly in view of his age and that he had a dismissal on his record. His mental health has been affected and he has become depressed and has had a loss of interest in doing anything. This has impacted upon his enthusiasm for finding a new role. The claimant has produced some documentary evidence of his job applications (three applications each within the few weeks before this remedy hearing), but I note that much of his searching has been by way of him enquiring about work from his contacts locally. Having heard the Claimant's evidence and spoken to him about his efforts to find new work, I consider these have been limited more recently, but I am satisfied that that he has done enough to have mitigated his loss to the date of the hearing. Should the claimant wish to find a new role going forward, I consider that with the finding that he has been unfairly dismissed, and with his skills and his PSV licence, he would find a position within a reasonable period and for that reason, I am awarding future losses of 3 months from the date of the remedy hearing.
41. The procedure followed by the Respondent was deficient. In addition to lack of opportunity for the claimant to provide his explanations, and the delay in providing the outcome of the hearings, the investigation was limited in a number of respects, including that there was CCTV (with sound) on the buses which could have substantiated the claimant's version of some of the key events. There was however a disciplinary process of sorts followed. I consider that an increase of 15% is appropriate to reflect the failure to follow the ACAS Code.
42. The calculation of the awards ordered are set out in the attached schedule.
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Employment Judge Benson

11 November 2018