



EMPLOYMENT TRIBUNALS

Claimant

Mr W Woods

Respondent

v NBC Bird and Pest Control Solutions
Limited

Heard at: Norwich

On: 7 November 2018

Before: Employment Judge Postle

Appearances

For the Claimant: Mr T Street, Solicitor

For the Respondent: Mr Byron, Counsel

JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant was wrongfully dismissed.
3. The claimant's claim for unpaid wages is dismissed upon withdrawal.

REASONS

1. In this tribunal, the claimant brings claim for unfair dismissal and originally a claim for unlawful deduction of wages, there is also a claim for wrongful dismissal. The claim for unpaid wages was withdrawn at the outset of this hearing and that claim will be formally dismissed upon withdrawal.
2. In this tribunal we have heard evidence from Mr Lee Rees, the investigating officer and there was a witness statement from Mr Clarke, the Service Director of the respondent's. In the end it was decided not to call him as his evidence was largely limited to the question of unpaid wages and he could not really assist the tribunal with direct evidence on events leading up to and including the dismissal. Both witnesses giving their evidence through prepared witness statements. The claimant also gave

evidence through a prepared witness statement. The tribunal had the benefit of a bundle of documents consisting of 97 pages. The tribunal did not hear evidence from Mr Graham Rees, who actually conducted the disciplinary and apparently took the decision to dismiss the claimant.

The Facts

3. The facts of this case show the respondents are an independent environmental consultancy which provides strategic environmental planning involving the use of ecology bird and pest solutions. They employ approximately 87 staff; 20 of which appear to be based at its Head Office in Norfolk and the remaining employees are field based across the UK.
4. The claimant was employed as a Bird and Pest Technician from 1 July 1999 and we see that evidence supported by documents 27a and 28, until his dismissal on 30 January 2018. There appears to be no statement of main terms and conditions of employment ever sent to the claimant. The claimant had worked for the respondents for approximately 18 years and at the time of his dismissal, apart from one verbal warning which had expired, he had an unblemished record and apparently was 'Employee of the Year' in 2015.
5. The claimant's role involved working on a variety of sites across the North West Branch area, to provide falconry and pest control services to a wide range of clients using his own vehicle, (which I understand is a car or might even be a small van), to travel across each site.
6. On 20 December 2017, the claimant was given three jobs across the North West, we see that at document 65, one was a Suez R & R UK Ltd., one was Robert McBride and one was at Viridor. Each job involved the claimant flying birds to deter nuisance birds from the client's factories or business sites.
7. When attending the second site at Robert McBride's, which is a large manufacturing site, the claimant had entered the site having passed the security gate, parked up his vehicle to obtain, no doubt, a security pass and to sign in. Apparently, he inadvertently left his handbrake off, but the car was in gear, apparently the car jumped out of gear, rolled slowly down the slope, hitting the front of a parked lorry. The impact and speed of the vehicle suggest it was minimal as there was no damage to the parked lorry and only a scratch to the claimant's vehicle. It would appear no one from McBride's actually witnessed the event, certainly there were no witness statements before this tribunal, nor given to the respondents. The claimant reported the incident himself to his team leader, Mr Hudson, who recorded the incident at page 51a, and those contents were never checked with the claimant nor were the incident reports signed. Seemingly that document never gets its way, however relevant it may be, to Mr Rees senior, who was to conduct the disciplinary.

8. The claimant was immediately suspended on full pay, oddly there is an email from Graham Rees on 28 December 2017 at page 52, which reads,

"I wish to let you know we are carrying out the investigation in relation to the incident at McBride's on 20 October, this has now been prolonged due to the holiday period with members of staff on site and with NBC on annual leave. I am aiming to have concluded the external investigations by the beginning of the week commencing the first. It would be my intention to arrange an investigating meeting with you on either Friday 5 January or as soon as possible during the week of the 8th. And you remain suspended."

That email is from Graham Rees to the claimant and that is odd seeing as it seems that Lee Rees, his son, was tasked with the investigation in any event.

9. We then have Mr Lee Rees junior having a meeting with the claimant believed to be the 3 January 2018 at McDonald's Burger Bar. Which is hardly the place to carry out an investigation meeting with an employee. The notes of that meeting, if there were any ever taken, seemingly have disappeared or have gone walk about. Mr Lee Rees attends McBride's site, (believed to be on 3 January 2018), he refers to photographs having been taken, the distance the car travelled said to be 40 yards. However, those photos have mysteriously gone missing and he reports to Mr Rees senior on the 18 January about a site meeting on 5 January, there seems to be some confusion there, that's at page 53b, and Mr Lee Rees confirms the vehicle rolled 40 yards, it was left in gear, no handbrake, no injury or damage to vehicles and that he had taken photographs.
10. The claimant was invited to the disciplinary by email of 22 January 2018, that is at page 54. That sets out the allegation that the claimant left the vehicle in a dangerous condition at McBride's, failing to ensure that the handbrake was applied. We now have the vehicle described as rolling approximately 50 metres, quite where that came from is difficult to understand and he encloses two documents.
11. The documents enclosed are, the disciplinary procedure and one is an email from Lee Rees following his site investigation which one can only assume is the email of the 18 January 2018.
12. What is not enclosed is the incident report, there is no photographs, no minutes of the investigation meeting with the claimant. The disciplinary hearing takes place on 29 January 2018, unfortunately the tribunal does not have the benefit of Mr Rees senior, attending the tribunal to give evidence, who conducted the disciplinary hearing, to give evidence as to what, if anything, he took into account in deciding that dismissal was the only sanction available to him at the time, and although notes of that

disciplinary hearing were clearly taken, they have also mysteriously disappeared during the course of the lead up to these proceedings.

13. The claimant was dismissed for gross misconduct, that was confirmed in a letter to the claimant, at page 59, and that letter is dated 30 January 2018. In that letter, there is no mention of whether Mr Rees senior took any account of the claimant's length of service, any mitigation, the fact that he left the car in gear, the fact that there was no damage or injury to any vehicle or persons, and the claimant had a good record of employment over the 18 years, or whether he even considered the possibility of a lesser sanction. The fact of the matter was that he was not considering what to do because he had to go to a Mr Dixon to get authority to dismiss the claimant as seen by an email in the bundle, where Mr Rees openly admits that he does not have the authority to sanction a dismissal.
14. The letter of dismissal does grant the claimant the right of appeal to Mr Dixon, whom in fact was to conduct the appeal ultimately, the claimant did not appeal as he did not feel he would get a fair hearing given the fact the appeal was to be conducted by Mr Dixon and he sanctioned the claimant's dismissal in the first place.

The Law

15. The law in this matter is contained in the Employment Rights Act 1996, s.98 in determining for the purpose of this part whether a dismissal of an employee is fair or unfair, it is for the employer to show the reason, or if more than one, the principle reason for the dismissal and that it is either a reason falling within sub-section 2, or some other substantial reason of a kind such as can justify the dismissal of an employee holding the position that the employee held.
16. A potentially fair reason is conduct, but that is not the end of the matter. S.98(4) says that where the employer has filled the requirements of the sub-section, (namely the reason for dismissal), the determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, depends on whether in the circumstances, including size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case.

Tribunal Conclusions

17. Clearly, conduct is a potentially fair reason to dismiss and that is the reason advanced in this case. The fact that a claimant or an employee admits the conduct does not alleviate the need for the respondents to carry out an investigation into the surrounding circumstances of that conduct and any mitigating factors, it is something that was sadly lacking in this case.

18. It is clear the conduct was the reason for dismissal and the tribunal accepts that largely the focus, but not in its entirety is more whether the decision to dismiss falls within the range of reasonable responses under s.98(4) and not whether an employer has shown a statutory acceptable reason for dismissal under s.98(2).
19. In reaching the tribunal's decision, the tribunal reminds itself that it is not for the tribunal to substitute its view as to what it would have done. Was it a serious breach of the Health and Safety Rules? No, it was an error of judgment, it was a mistake. No account appears to have been taken of the claimant's exemplary record of employment over a very long period of time, 18 years. Given also the fact that the claimant was the 'Employee of the Year 2015', the fact that the claimant had put the vehicle in gear and appears to have been dislodged, and we do not know whether there was a defect with the claimant's vehicle, that was never checked. There was no suggestion that the respondents considered any lesser sanction given those mitigating factors and therefore the decision to dismiss fell outside the band of a reasonable response test.
20. The claimant must however, accept responsibility for some of his actions and the tribunal consider it just and equitable to reduce the basic award by 50% and likewise the compensatory award.
21. As for the Acas guidelines, the idea of an appeal is that an appeal should be fair and reasonable. It was difficult to disagree with the claimant with him saying that the reason I did not follow or proceed with the appeal is because, "*I did not think I would get a fair hearing*", given the fact in the circumstances it was to be conducted by Mr Dixon, who actually authorised the dismissal in the first place. Therefore, the tribunal make no deduction under the Acas guidelines in those circumstances for the failure to follow an appeal.
22. At the end of the judgment, the tribunal were going to proceed to deal with remedy, but it turned out that the claimant had obtained employment in April 2018 to the beginning of June 2018 with a company called Urban Holt which was temporary work two days a week, the claimant confirmed he had no pay slips. Not surprisingly, the respondent felt this was insufficient to enable the tribunal to proceed to determine remedy without further evidence.
23. The tribunal took time to agree the basic award before any deduction amounted to £9,915.21. That is 27 weeks at £367.23.
24. The tribunal agreed with the parties that the loss of statutory rights given the claimant's service, would be at £500.
25. Furthermore, the claimant's net pay with the respondent could be agreed at £315.20.

26. A remedy hearing was arranged for one day on 25 February 2019. The following orders were therefore made in connection with the remedy hearing and were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Practice

Work Found

27. The claimant shall send to the respondent's, **within 21 days** of the Full Merit's Hearing, namely the **28 November 2018**, all the details as to any temporary, part-time, agency or locum work carried out since the dismissal and if there are no payslips, (as the claimant has indicated), copies of any bank accounts where money for wages has been paid, together with a schedule of each day worked, the number of hours worked and the rate of pay after the tax and national insurance was deducted.

Evidence of Work Applied For

28. The claimant shall also, provide documentary evidence in support of all jobs applied for since dismissal, together with details of any outcome, i.e. rejection letter, again send to the respondents by **28 November 2018**.

Schedule of Loss

29. The claimant shall prepare an updated schedule of loss taking account of the above matters and the agreed net and gross week's pay and send to the respondents by **28 November 2018**.

Job Vacancies

30. The respondents shall within **6 weeks** of today's date produce documentary evidence of the availability and vacancies in the job market in the claimant's relevant area, within a reasonable travelling distance.

Employment Judge Postle

Date: ...11.12.18.....

Sent to the parties on: ..11.12.18.....

.....
For the Tribunal Office