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THE EMPLOYMENT TRIBUNALS

Claimant: Fabian Williams
Respondent: FALCK Medical Services Limited
Heard at: East London Hearing Centre
On: 23 January 2018
Before: Employment Judge Burgher (sitting alone)

Representation

Claimant: In person
Respondent: Ms K Fudakowski (Counsel)

JUDGMENT

The Claimant's claim for unfair dismissal fails and is dismissed.

Reasons

Issues

1 At the outset of the hearing the issues in the case were identified as follows.

Unfair Dismissal

2 Whether the Respondent has established a potentially fair reason for dismissal. The Respondent asserts conduct, namely the Claimant disconnecting the tracker from the vehicle he was driving.

3 If the Respondent establishes a potentially fair reason for dismissal the Tribunal will consider whether the dismissal was fair and reasonable in all the circumstances having regard to matters including:

- 3.1 Whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct;
- 3.2 Whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, and
- 3.3 Whether a reasonable employer would have dismissed the employee for that misconduct.

4 If the Tribunal finds that the Claimant was unfairly dismissed the Respondent will contend that the Claimant caused or contributed to his dismissal and/or that the Claimant would have been dismissed in any event had a fair procedure been followed.

Evidence

5 The Respondent called Mr Michael Duda, Fleet Manager, Mr Gareth Cadmore, Operations Manager and dismissal officer, and Ms Birjess Mirza, HR Adviser, to give evidence on its behalf. The Claimant gave evidence on his own behalf. All witnesses gave evidence by way of sworn witness statements and were subject to cross examination and questions from the Tribunal.

6 The Tribunal was also referred to relevant pages of a hearing bundle consisting of 246 pages. The Respondent also submitted its driver responsibility policy as an additional document during the hearing.

Facts

7 The Claimant commenced employment with the Respondent on 6 July 2015 as a Round Robin Driver undertaking deliveries between the Respondent's sites. He subsequently developed to become a PTS driver and undertook Ambulance Care Assistant (ACA) training to be responsible for patient transport.

8 The Claimant was also given a copy of the Respondent's driver responsibility policy. Clause 4.5 of this policy made reference to vehicle trackers and stated that all of the Respondent's vehicles are fitted with trackers that report on the location and speed of the vehicle and that audits could be carried out and disciplinary action taken in cases of serious or continued breach of safe driving. Further, during early 2017 the Claimant was questioned on occasions by management relating to the discrepancies between his stated movements and the vehicle tracker where precise times and locations were put to him. In these circumstances I do not accept the Claimant's evidence that he did not know what a tracker was.

9 Clause 4.14 of the driver responsibility policy referred to driver shift start and end times. It was stated that drivers who have a company vehicle to travel to work would be required to have a start time 30 minutes after leaving home and an end time 30 minutes before arriving home. This policy was not consistently applied between managers and on 8 August 2017 a circular was distributed to drivers from the Mr James Graydon, Director of Patient Transport Services, explaining how it would be applied going forward.

10 The Claimant was aware of the Respondent's disciplinary policy that states that, amongst other things, a serious breach of trust and confidence and wilful damage to Company, employee or customer property were examples of gross misconduct which may result in dismissal without notice.

11 Mr Cadmore assumed operations for the Claimant's region in August 2017. He determined that the staff and the site had not been properly managed and he put in place steps to seek to improve performance. One such step was to enforce the consistent application of clause 4.14 of the driver responsibility policy which was interpreted as meaning that drivers who had company vehicles were expected to start their shifts 30 minutes before the normal shift time and finish their shifts 30 minutes after their normal shift time as per the circular distributed by Mr Graydon to drivers on 8 August 2017.

12 A discussion concerning the new way shift start and end times would be determined was held between the Claimant and Mr Cadmore on 13 December 2017. The Claimant was not happy about the change and stated it was unacceptable to be expected to work an extra hour a day on shift. The Claimant was informed that drivers who did not wish to work the extra hour a day could leave the vehicle at the work site and commence at the usual start and end times. The Claimant was unhappy with this but decided to leave his vehicle at the work site and make his own travel arrangements. The Claimant stated that following this disagreement Mr Cadmore sought to contrive a reason to dismiss him. Mr Cadmore stated that given that the Claimant decided not to take the vehicle home he considered the matter closed. I accept Mr Cadmore's evidence in this regard.

13 Mr Cadmore stated that from Autumn 2017 the Respondent had been experiencing problems with the trackers in some of its vehicles. He stated that there were 4 or 5 incidents of trackers not working among the 38 or so drivers concerned. The Claimant was a driver where a problem tracker had been identified on his vehicle.

14 On the 18 December 2017 Mr Cadmore wrote an email to the Fleet Manager, Mr Duda, the Workshop Manager, Mr Kevin Davis and others stating

"Please can we book [The Claimant's vehicle] to have the tracker fixed. Failing that could we change the vehicle with someone who is trustworthy"

"The Driver [The Claimant] is taking too long transporting patients throughout the day and we are currently going off his PDA time which is blatantly wrong"

15 Mr Cadmore did not put these stated concerns about the Claimant's honesty or performance to the Claimant at all.

16 Mr Davis, replied Mr Cadmore's email by saying that the tracker has been replaced and looked at 3 times and it was working when it left him. Extra investigation was required from Mr Cadmore and the matter was referred to Mr Paul Page, Patient Experience Coordinator. Mr Page responded to Mr Cadmore on 28 December 2018 enquiring whether records were kept of when the tracker has been worked on with the Claimant or any other vehicle and enquired what was always breaking on the Claimant's his tracker. Mr Duda responded to this by stated the tracker stopped working on the Claimant's vehicle in September 2017 but, contrary to Mr Davis' statement, there were

no records of the Claimant going in for tracker repairs. Mr Duda stated that faulty tracker emails are sent out at least once a month asking site managers to send the vehicles to workshops. Mr Duda then requested a tracker repair for the Claimant's vehicle.

17 On 29 December 2017 Mr Graydon, PTS Director sent an email to all concerned that there were concerns that the Claimant's tracker was being tampered with and enquired whether there was anything that could be done to check this. Again, these concerns were not put to the Claimant. Mr Davis responded to Mr Graydon by email of the same date that tampering can be ascertained only by looking at the tracker to see if the wiring has been removed. Mr Davis wrote

"The down side is if the driver knows what the tracker looks like hand he can get to it. They can remove the wiring and replace it later. We will see if we can hide it somewhere"

18 On 2 January 2018 the Claimant was sent to collect a different vehicle. Mr Duda recorded the collective plan to be to swap vehicles to one with a tracker with a very good working history with no faults at all. It was stated that if it fails in the next few days they will know that the tracker has been tampered with. It was further stated that that they will also glue the plastic compartment where the tracker is hidden for more difficult access. Ms K Fudakowski, for the Respondent, stated that this was a test for the Claimant. However, I find that it would be more accurately described as a trap set for the Claimant.

19 The tracker in the second vehicle that the Claimant was given on 2 January 2018 was working properly at 11.38am. It was sending vehicle speed and location. However, it stopped transmitting speed at 12.15pm and recorded a constant location of Moorfields Hospital from that time. The tracker stopped transmitting at all at 13.50pm on that date. Mr Duda stated that this was consistent with the tracker battery becoming depleted which would occur once the tracker was disconnected from the vehicle power supply.

20 An investigation was undertaken by Natasha Vukic, Patient Liaison Manager on 15 January 2018 and concluded on 18 January 2018. The Claimant gave his account of events on 18 January 2018 and denied knowledge of a tracker, where it was located and whether it was working properly. He later stated in the investigatory interview that he found it weird that he had never had a problem with the tracker for the 5 years he had been working and it must have been sabotage.

21 Ms Vukic was provided the tracker event report for the day, a brief statement from Mr Duda, a statement from Mr Davis and a photograph of the tracker console from the vehicle indicating that the tracker was forcibly removed. Having considered this information she concluded, on balance of probabilities, that it was unlikely that the tracker could have been accidentally removed. Disciplinary action was recommended.

22 The Claimant was invited to a disciplinary hearing before Mr Cadmore on 23 January 2018. The Claimant reiterated that he did not know what a tracker was and stated that there would be no reason for him to have tampered with a tracker and replied that it was sabotage when stated it was his word against Fleet Management.

23 Mr Cadmore summarily dismissed the Claimant on 23 January 2018 on the basis that he had tampered with the vehicle tracker which was said to amount to loss of trust and confidence and wilful damage to property.

24 The Claimant appealed against his dismissal by letter dated 1 February 2018. The Claimant requested matters including manufacturers and suppliers' reports of the tracking systems and previous tracking reports on all vehicles driven by him. The Respondent's HR was in a state of flux at the time and did not provide this documentation to him. It did not manage to reply to the Claimant's appeal letter until 21 May 2018 by which time the Claimant was reasonably seeking alternative employment opportunities.

Law

25 Section 98 of the Employment Rights Act 1996 states:

98 General

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
 - (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it –*
 - (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
 - (b) *relates to the conduct of the employee,*
 - (c) *is that the employee was redundant, or*
 - (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (3) *In subsection (2)(a)-*
 - (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

- (b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case.*

26 I have also considered the guidance provided by Arnold J in the case of *British Home Stores Ltd v Burchell* [1978] ICR 303 relating to conduct dismissals.

Conclusions

27 I conclude that the Claimant has established a potentially fair reason for dismissal, namely conduct. Specifically, I conclude that the Respondent has established that the Claimant was dismissed on grounds that he had tampered with the tracker in his vehicle.

28 On the face of the evidence it seems that Mr Cadmore had reasonable grounds to believe in misconduct, after a reasonable investigation, and in view of the Respondent’s disciplinary procedure, that dismissal was in the band of reasonable responses open to the Respondent.

29 However, in considering whether the dismissal was fair and reasonable in all the circumstances, I spent some time assessing the evidence relating to the background of the allegation the Claimant faced. Specifically, I have found that there was a trap set for the Claimant on the basis of suspicions that were not put to him and for which he had no opportunity to address. Further, Mr Cadmore, the dismissal officer had a predetermined negative view of the Claimant’s trustworthiness which was not communicated to the Claimant but which was communicated to key disciplinary witnesses, namely Mr Duda and Mr Davis, and also to the Director of Patient Transport Services Mr Graydon.

30 I therefore carefully considered whether there was evidence of collusion between the disciplinary witnesses and Mr Cadmore to construct a basis for dismissal. Given his prior views and involvement in the trap setting for the Claimant, Mr Cadmore could not be said to be an independent manager and should not have undertaken the disciplinary hearing. This was a very serious procedural shortcoming.

31 I conclude that there was no collusion in respect of the evidence presented for the disciplinary allegation relating to the tampering of the tracker. This was the allegation the Claimant faced. The tracker event report was self evident and I accepted the evidence of Mr Duda about how the tracker transmits and that it cannot be remotely managed away from the vehicle. The source of the problem was the vehicle or who was

in control of the vehicle. The photograph of the tracker console indicating that the tracker had been forcibly removed was also relevant.

32 Further, Ms Natasha Vukic was an independent investigator who had no knowledge or involvement of the trap set or the reasons for it and, on the information before her, concluded that on the balance of probabilities the Claimant had tampered with the tracker. This was a reasonable conclusion. I also conclude that the Claimant's position that he did not know what a tracker was is inherently implausible given clause 4.5 of the driver responsibility policy, the previous management discrepancies with his movements against a tracker during early 2017 and his statement made to Ms Vukic during the disciplinary that he had not had a problem with a tracker for 5 years of working.

33 The Claimant was set a trap. However, he fell into it by disconnecting the tracker. Whilst there was a serious procedural shortcoming in having Mr Cadmore, who was not independent, as dismissal officer, I conclude that the Respondent had reasonable evidence to conclude that it was the Claimant that disconnected the tracker. In these circumstances I conclude that an independent disciplinary officer would have found, similar to Ms Vukic, that on balance the Claimant disconnected the tracker and that the Claimant would have been dismissed. As such, I find that the Claimant was not unfairly dismissed. His claim therefore fails.

Employment Judge Burgher

31 January 2019