EMPLOYMENT TRIBUNALS

Claimant: Mr C Sallis

Respondent: Wienerberger UK

Heard at: **Hull Combined Court** **On:** **24 June 2019**

Before: **Employment Judge Buckley**

Representation
Claimant: In person
Respondent: Mr Crowe (solicitor)

JUDGMENT having been sent to the parties on 25 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brings claims of automatically unfair dismissal under s 100 and s 103A of the Employment Rights Act 1996.

Issues

2. The issues for me to determine are:

2.1 Did the claimant make a protected disclosure i.e.

2.1.1 Did the claimant disclose information to his employer?

2.1.2 Did the claimant reasonably believe that it tended to show either

2.1.2.1 That Jason Eyre had failed to comply with the legal obligation to have due regard for the health and safety of an employee by leaving the claimant unattended after seeing him passed out in extreme heat?

2.1.2.2 That the health and safety of an individual had been put at risk?

2.1.3 Did the claimant reasonably believe that the disclosure was made in the public interest?

2.2 If so, was that protected disclosure the reason or principal reason for dismissal?

2.3 Did the claimant, being an employee at a place where there was a health and safety committee, bring 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, and

2.4 Was it not reasonably practicable to raise the matter by means of the health and safety committee?

2.5 If so, was that the reason or principal reason for dismissal?

The law

3. Section 100(1) provides:

> An employee …shall be regarded as unfairly dismissed if the reason … or principal reason for the dismissal is that-
> …
> (c) being an employee at a place where-
> (i)…
> (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 and safety.

4. Section 103A provides:

> 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.

5. A protected disclosure is defined by the ERA as:

> 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—
> …
> (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,
>
> …

Evidence

6. I heard evidence from the claimant, and on behalf of the respondent from Paul Spencer, Production Team Leader at the Company's Broomfleet site, Jason Eyre, Production Manager at the same site and Fallon Hutchinson, HR business partner – North. I was referred to and read a number of documents in the bundle.

Findings of Fact

7. The claimant was employed by the respondent as a production operative (spray booth operator). He was engaged via an agency from 12 January 2018 until 6 May 2018. He then commenced a 6 month probationary period of employment with the respondent, during which, it is agreed, the company was entitled to terminate his employment with a week's notice.

8. It is agreed that the respondent issued the claimant with what is known as 'a quiet word' in July 2018. The claimant states that he was told that this was not an issue with performance, and that this was 'water under the bridge'. The respondent's record of the 'quiet word' appears at p79-80 of the bundle.

9. The claimant asserted in his witness statement that this version of the quiet word was fabricated by MrJason Eyre on the basis that (a) it is inaccurate and (b) it looks like it is in the same handwriting as Mr Eyre uses in the probationary review.

10. I do not accept that the document is fabricated. Neither Mr Eyre nor Mr Spencer were asked about this in cross-examination, and Mr Sallis's assertion that, from a non-expert point of view, the handwriting looks the same does not go anywhere near the level of evidence I would need to support a finding that Mr Eyre and Mr Spencer were complicit in the fraudulent creation of a document for the purposes of this claim.

11. I find that the claimant was spoken to about quality issues and as a result a 'quiet word' was issued for the reasons set out in that document.

12. On 26 July 2018, I accept that it was extremely hot in the workplace. It is clear from the evidence that Mr Spencer and Mr Eyre formed the view that the claimant was asleep. It may be that they were wrong and that he had passed out. I do not need to determine this. They both gave evidence that it did not occur to them that he might have passed out. Maybe it should have occurred to them, but I accept that it did not.

13. A conversation subsequently took place between the claimant and Mr Spencer. During that conversation the parties agree on the gist of what Mr Spencer told the claimant, i.e. that the matter would be taken more seriously because it was Jason Eyre who found the claimant rather than Mr Spencer. Although Mr Spencer's witness statement says that it is untrue that he said that 'there will be a price to pay' Mr Spencer accepted in evidence that that was probably what he said to the claimant and I find that this is the case. Even on the claimant's case this occurred before the claimant made any disclosure or complaint and this clearly refers to a price to pay for falling asleep rather than a price to pay for proposing to make or for making any complaint.

14. Thereafter the claimant's and Mr Spencer's recollection of the conversation differs. When I asked Mr Spence if the claimant had then gone on in that conversation to say that he would make a complaint against Mr Eyre, Mr Spencer said that he did not remember, although he did later state that he was not aware of the claimant's intention to make a complaint.

15. Given that Mr Spencer changed a significant part of his evidence about what was said in that conversation (whether or not he said 'there will be a price to pay'), and that he initially stated that he could not remember if the claimant had said that he was going to make a complaint, I accept the claimant's version of what was said on the balance of probabilities.

16. I find that on hearing that 'there would be a price to pay' for falling asleep, the claimant understood that he was going to be subject to disciplinary action for falling asleep. He therefore said to Mr Spencer 'I hope Jason Eyre does take this further as I will be making a complaint about being left alone when I was found'.

17. I do accept that Mr Spencer was an honest witness, as demonstrated by his willingness to concede that he probably said 'there will be a price to pay' and I find that he genuinely does not remember that this was said.

18. Mr Eyre, however, was not present at this conversation and there is no evidence to support a finding that Mr Spencer reported this conversation to Mr Eyre – neither Mr Spencer nor Mr Eyre were asked about this by the claimant and when asked by me Mr Eyre said that he was unaware that the Claimant intended to make a complaint. The claimant has inferred that Mr Eyre must have been told, because, in his view, there is no other explanation for his dismissal. I refuse to make an inference on that basis. In my view it is more probable that the trigger for Mr Eyre deciding to dismiss the claimant was because he thought he had found him asleep on the job. This is consistent with Mr Spencer's warning that there would be a price to pay and it is consistent with the email to HR referred to in para 20 below. I find as a fact, on the balance of probabilities, that Mr Eyre was not aware of what the claimant said.

19. Mr Eyre, as predicted by Mr Spencer, did decide to take action. His email to HR shows that he decided to dismiss the claimant for falling asleep, against the background of the quiet word and various other issues set out in the email of 6 August 2018 to HR and that decision was communicated to the claimant in a meeting on 10 August 2018. I accept that that was the genuine reason for dismissal.

20. The respondent has a health and safety committee. Details of its members and the minutes of its meetings are displayed on a noticeboard.

21. There was a conflict of evidence about whether the claimant had raised the issue of excessive heat in the hazard book. This is not relevant to the issues I have to determine.

Application of the law to the facts

22. If this was an ordinary unfair dismissal it would be unfair. The decision to dismiss was taken before the meeting with the claimant and without giving the claimant a proper opportunity to give his version of events. The claimant does not have sufficient service to claim ordinary unfair dismissal.

23. The words which the claimant asserts caused his dismissal are:
'I hope Jason Eyre does take this further as I will be making a complaint about being left alone when I was found'.

Protected disclosure

24. Did the claimant disclose information to his employer? Yes. It is a disclosure of information even if the person being told the information already knows it. The claimant disclosed the information that Jason Eyre had left him alone when he found him. The fact that he also indicated that he was going to make a complaint about this does not mean that he did not disclose information.

25. I accept that the claimant reasonably believed that this information tended to show both
    i. That Jason Eyre had failed to comply with the legal obligation to have due regard for the health and safety of an employee by leaving the claimant unattended after seeing him passed out in extreme heat, and
    ii. That the health and safety of an individual had been put at risk.

26. I do not accept that the claimant reasonably believed that the disclosure was made in the public interest. This is not a case of mixed motives. The reason the claimant said this was because of what Mr Spencer had said about there being a price to pay. There is no evidence of any belief by the claimant that the disclosure was made in the public interest.

27. This is not, therefore a protected disclosure and this part of the claim must fail. It would have failed in any event for the reasons set out below, because I have found that the claimant was not dismissed for making this statement.

Health and safety complaint

28. Did the claimant, being an employee at a place where there was a health and safety committee,
    a. bring 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, and
    b. was it not reasonably practicable to raise the matter by means of the health and safety committee?

29. At the time the circumstances were brought to Mr Spencer's attention, there is no evidence that there was anything preventing him from raising it with the health and safety committee. The claimant argued that it was not reasonably practicable to raise it with the committee, because he was dismissed before he could do so. I do not accept this. There was nothing to prevent him from drawing this matter to the attention of the committee either on the 26th July or at any point thereafter before his dismissal. This part of the claim therefore fails because it was reasonably practicable to raise the matter by means of the Health and Safety committee and the claimant did not do so.

30. In light of above it is not necessary to determine whether what the claimant said was that the reason or principal reason for dismissal. However, I have found as a fact that Mr Eyre was not aware of what the claimant said to Mr

Spencer and that there were other reasons for dismissal. The claims would also therefore have failed on this basis.

Employment Judge Buckley

28 June 2019