EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Dunhill	v	**Robinson Contract Services Limited**

Heard at: **Hull** **On:** **20th and 21st August 2019**

Before: **Employment Judge Lancaster**

Members: **Mr M Weller, JP**
Mr K Smith

Appearance:

For the Claimant: **Mr T Skillen**

For the Respondent: **Mr K McNerney, counsel**

JUDGMENT having been sent to the parties on 2 September 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, taken from the transcript of the oral decision delivered immediately upon the conclusion of the hearing:

REASONS

The complaints

1. The claimant Mr Dunhill was employed by Robinson Contract Services Limited for just under two years. He was summarily dismissed without notice on 3 August 2018.

2. He claims automatically unfair dismissal, primarily under section 103A of the Employment Rights Act 1996, where he asserts that the reason, or the principle reason for termination was he made a protected qualifying disclosure and we shall deal with the case on that basis. There is an alternative and subsidiary claim that he had made allegations in respect of health and safety but nothing turns upon the difference.

3. Because he does not have 2 years' qualifying service he must prove that the reason for termination was one that makes the dismissal automatically unfair.

4. He also alleges that he was subjected to a detriment for having made the same disclosures: that is not being given a reference.

5. And there is further a claim for breach of contract because he was dismissed without notice. He claims this did not warrant summary dismissal.

Unfair dismissal

Summary

6. The short answer to this claim of unfair dismissal is that the claimant has, we are afraid, got nowhere near establishing that the principle reason was anything other than that stated in the termination letter. He was dismissed by his manager Mr Craig Stainforth who handed him a letter drafted by Mrs Robinson, they had discussed the circumstances. Mrs Robinson expressed a view that she thought the claimant should be dismissed, Mr Stainforth had agreed with that and he was who ultimately delivered the decision.

7. The letter of dismissal has three parts. The first is an assertion that the claimant was already subject to a final written warning for having disregarded high wind warning signs on the Humber Bridge and driven across in circumstances where either on the bridge itself , or shortly afterwards, the cover on his wagon came loose. He had to pull into the car park on the north bank of the Humber, called the fitters and it resulted in his vehicle being off the road for some three days whilst it was repaired, at not insignificant cost to the company. That warning had been issued on 9 March 2018.

8. The second reason was that on 31 July, there had been a conversation with the health and safety consultant engaged by the respondents, Mr Smith, and as a result of that almost contemporaneously on 1 August, Mr Smith had emailed Mrs Robinson and set out his concerns that the claimant had evinced a somewhat blasé attitude towards health and safety issues generally. That coincided with a report by Mr Stainforth on the same day, 1 August, that at around 9:3 to 9:40 on that morning he had witnessed the claimant driving on the Beverley By-pass without the protected cover on his wagon, contrary to company policy. That is the third reason.

9. For those three cumulative reasons a decision was taken to dismiss him. No meeting was convened, he was simply told of the outcome. But because he does not have two years' employment this is not an ordinary case of unfair dismissal, the respondent does not have to show what the reason was, nor that it acted fairly in all the circumstances.

The protected disclosure

10. The claimant must establish that the principle reason was in fact that he had made a protected disclosure and he relies primarily upon the same conversation of 31 July, reported by Mr Smith, though his version is somewhat different. He alleges that in the course of that conversation he had asserted to Mr Smith that the company was in breach of health and safety requirements in not providing respiratory masks to drivers who were collecting loads of chicken muck for transportation leading to a problem with dust. He also relies on an alleged further conversation with Mr Smith at a training session on 19 January 2018. On that occasion refresher training had been given by Mr Smith and the claimant also alleges in the course of that training, which included how to deal with field-stuck-incidents (that is when vehicles need to be towed out) he made assertions that the equipment provided, tow straps and the towing eyes was inadequate. But that was several months before and it is unclear how that actually amounts to an allegation that the health and safety of any person was endangered. It may have been inconvenient if the straps snapped and it was

not possible to actually tow a vehicle or if the eyes were damaged and it meant there was no towing leverage point on the wagons.

11. In respect of the primary allegation of a disclosure, that is in relation to the lack of provision of respiratory masks, Mrs Robinson and Mr Stainforth did not know that any such allegation had been made by the claimant, if indeed it was. The only record they had of that discussion between the claimant and Mr Smith on 31 July was that communicated to them in the email of 1 August by Mr Smith and within that email he certainly makes no reference whatsoever to Mr Dunhill having made a complaint in those terms. And frankly we do not accept the assertion by Mr Skillen on behalf of the claimant that on the balance of probabilities there must have been some further discussion where Mr Smith corrected that deliberate misrepresentation in his email and in fact told Mrs Robinson that it was Mr Dunhill who made this complaint about the masks and that as a result of that Mrs Robinson must have passed that on to Mr Stainforth so that together, because of the claimant having made that complaint, they decided to dismiss him. That is frankly a somewhat ludicrous suggestion with no evidential basis whatsoever.

12. In actual fact Mr Smith does record the conversation on the 31st about the lack of respiratory masks but he says that was conducted not with the claimant but with Mr Shaw, another driver. And as a result of that conversation which was reported also on the same email on 1 August Mrs Robinson in fact took a decision to purchase additional respiratory masks and she did that within an hour of receiving Mr Smith's communication. Furthermore Mr Shaw was subsequently then invited also to participate on the health and safety committee. We frankly do not accept the assertion that Mr Smith was somehow creating a smokescreen by attributing these complaints, not to the person who genuinely made them, Mr Dunhill but to Mr Shaw, with a view to somehow seeking to manipulate the state of affairs whereby the Claimant would be dismissed. This has no correlation in any event with the fact the claimant had been issued with a final written warning in relation to the travelling over the Humber Bridge and the fact that he was seen in breach of company policy driving without the sheets up.

The reasons for dismissal

13. The reason for dismissal must be a set of facts known to the person who actually makes that decision and the facts known to Mr Stainforth and Mrs Robinson do not therefore include any knowledge whatsoever of any alleged disclosure. This is not, nor can it be, a situation of the very rare type envisaged in the case of **Royal Mail v Jhuti** where ill motive on the part of another person may be attributed to the decision maker. Mr Smith, as we pointed out was not in fact even an employee of the respondents and although in many areas he would act as their agent with their authority. His position therefore is the equivalent of that envisaged in **Jhuti** where it is another employee who makes a false accusation and the falsity of that is unknown to the manager who takes action in consequence. Alternatively, Mr Smith might be more equated to the second type of person envisaged in **Jhuti**, that is a line manager who again makes a false representation for improper motives but has no actual part in the investigation of the matters which he complains. It is certainly not the case that Mr Smith was a line manager partially responsible for the investigation, the decision making was taken solely by the Directors of the company, Mr Stainforth and Mrs Robinson in conjunction. And certainly Mr Smith cannot be

equated with the more senior manager such as the CEO whose knowledge may be attributed to the company in any event.

14. The claimant has not established any reason other than that ostensibly recorded in the letter of termination. We are quite satisfied that the claimant did disregard 'High Wind Warnings' to cross the Humber Bridge at a time when two other employees considered it only safe to travel via the longer route vial Goole, that as a consequence of that the covering did become loose, that was potentially dangerous and that he was told that he was to be issued with a final written warning accordingly. Although on balance it is not entirely clear, we accept the respondent's position that he was in fact given notice of that written warning. There was certainly a meeting on 9 March, a week after the incident, on the 2nd and a letter was certainly drafted. What is conspicuous on the evidence is that when we come to the claim form in this case, the ET1, and although the claimant at that stage knew full well that the first alleged reason of the termination was that he was in breach of his final written warning he makes no reference to not having received that. Also in his witness statement it reads that he did receive the written warning on 9 March and it is only in supplemental answers in the course of his evidence before this hearing that he has alleged for the very first time that he never actually received the letter. So, on balance taking that absence of any complaint until a very late stage we consider he did receive the letter although Mr Stainforth himself cannot vouchsafe that he clearly did. It was certainly drafted and intended to be used. It is largely irrelevant because the letter remained on the claimant's personnel file, it was accessible to Mrs Robinson and Mr Stainforth who both knew it had been drafted and was certainly intended to be given to the claimant and they relied upon that as of 3 August when he was dismissed. The claimant's assertion in his witness statement that he was not in fact driving over the Humber Bridge or could not recall the incident is frankly incredible. He un questionably knew of this incident, he knew he had had to call the fitters out and he knew that he had been formally reprimanded by Mr Stainforth, was or at the very least told that he was to receive a final warning.

15. We also accept on balance the evidence of Mr Smith as to the content of the conversation with the claimant on the 31st .As we have already observed he did create an almost contemporaneous record of that in his email of the following morning so it is likely we have a good recollection of what had been said. He recalls the claimant being abusive particularly to him personally, claiming that he was useless as a health and safety manager, but the substance of the conversation indicated that the claimant had not paid attention to the training on 19 January in relation to the correct use of tow straps on field-stuck-situations and claimed he had been asleep during that.

16. Even if the claimant did say something to Mr Smith about a further issue about the poultry dust it was clearly not of any great significance and that is why it was not registered by Mr Smith. The primary complaint in that regard clearly came from Mr Shaw and indeed also from a third person Matt Corcoran. So, although in his statement some seven and a half months later Mr Shaw recalls categorically that he remembers the claimant using a particular form of words and that he complained about a lack of respiratory masks and a breach of health and safety we do not accept that that is indeed an accurate recollection on the part of Mr Shaw. He accepted in his evidence that it was he who had the conversation with Mr Smith recounting how it was that Mr Corcoran had

researched the matter on-line and discovered that there was an obligation to provide respiratory masks and of course it was Mr Shaw and Mr Corcoran who had the direct experience of having breathed in the offensive dust on this particular occasion. So, whatever the claimant may have said was only by way of second or third hand hearsay and at the most we consider would have been an introduction to Mr Shaw to invite Mr Smith to take further details from him. We certainly do not accept that the claimant stated in the precise terms now recorded by Mr Shaw that he raised a particular objection asking "why are drivers not being provided with respirators when handling chicken shit we have looked on line and have the right to be provided with them". The conversation as reported by Mr Smith to Mr Stainforth and relied upon by him as the reason for dismissal, is what was in fact said.

17. As far as the third incident is concerned we are quite satisfied on Mr Stainforth's evidence (corroborated by the vehicle's tracker records, as properly intepreted) that he did indeed see the claimant driving without a protective cover. Also we are quite satisfied that that was indeed contrary to what was the communicated company policy, in accordance with the Respondent's interpretation of its contract with Yorkshire Water. Although the specific provision of that agreement provides for the use of covers in carrying product we are quite satisfied that the company interpreted that as applying to full or empty loads because you can never eliminate the total effect of carrying noxious substances. he requirement of Yorkshire Water is to prevent obnoxious smells emanating from the vehicles acting on their behalf.

Detriment claims

18. The claim of unfair dismissal necessarily fails as it has not been established that any qualifying disclosure was in fact made, similarly the claim of being subjected to a detriment. On balance we prefer Mr Stainforth's evidence that nothing was said in any event about a reference. Even if it was mentioned in passing the reason why it was not followed up was not because the claimant had made a protected disclosure (even if he had done so). That is because Mr Stainforth still not know that the Claimant had said anything about the respirators or, notwithstanding Mr Smith's report of the conversation having been only with Mr Shaw, was alleging that he had done so.

19. In any event the claimant's own evidence on this point is that when he first raised that matter and indeed also on the second occasion when he says he raised with it Mr Stainforth he was not rebuffed but simply told the matter would be addressed. It then appears to have been overlooked, but we are quite satisfied that even if that did happen the reason why the request was overlooked was not because of having made a disclosure it simply seemed to have gone by the by. The claimant was of course dismissed for purportedly gross misconduct any reference that had given the reason for termination would not have been helpful to him. It is hard to see how he actually suffered any detriment in any event.

Breach of contract

20. That leaves the third complaint which is a breach of contract and it is here for the respondent to satisfy us that the conduct complained of did warrant summary dismissal. As observed in the course of the hearing no disciplinary procedure has been provided giving examples of what is or is not gross misconduct. In this instance though there are three reasons given for

termination the first of those had led to the issue of a final written warning, not to termination of itself, and ordinarily even when someone reoffends during the currency of a warning it would not justify immediate dismissal. The second matter, the conversation with Mr Shaw, although no doubt unpleasant in as much as he records the way he was first sworn at by the claimant, indicates that he did not pay too much attention to that. Perhaps it is a common place to observe that it is the haulage industry who do not expect the highest standards of propriety in the language of those working there. That conversation, even if Mr Smith considered that that and indeed Mr Shaw's attitude too as reported exhibited a lack of concern for health and safety, is not of itself gross misconduct. There was no actual evidence of a wilful breach of health and safety requirement that led to any actual danger or damage. As to the third part of the reason, the driving on the bypass, Mr Stainforth himself accepts that when he initially observed this he did not consider it warranted anything more than a warning, an instruction sent out by the radio that the claimant should put his covers up.

21. So, on balance we are not satisfied that this amounts to gross misconduct. The claimant is entitled to damages for breach of contract which will be one weeks' pay because of the current tax regime that will be taxable and therefore the sum will be gross and we also observe that this therefore potentially gives rise to an uplift of failure to comply with the ACAS code of practice. There was simply no procedure followed in this case so the claimant was not informed of the disciplinary charges against him, he was not invited to a meeting where he could address those charges and a meeting would ordinarily be held under the Code even where the allegations of gross misconduct (paragraph 23 of the Code:: "a fair disciplinary process should always be followed before dismissing for gross misconduct"). Nor of course was the claimant therefore informed in advance of any right to be accompanied at the meeting where he was handed his dismissal letter and nor was he informed of any right of appeal. Those are on the face of it a clear catalogue of non-compliance with the ACAS Code of Practice.

22. The compensatory award by agreement is therefore £875 including any element of uplift.

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Employment Judge Lancaster

17th September 2019

Sent to the parties on:

19 September 2019