EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Brinklow**
Respondent:	**The Titsey Estate Company Limited** **T/a Moorhouse Sandpits**
Heard at:	**Ashford**
On:	**25 June 2019**
Before:	**Employment Judge Pritchard** **Mr S Sheath** **Mr P Adkins**

Representation

Claimant:	Mr M Mensah, counsel
Respondent:	Mr T Cordrey, counsel

WRITTEN REASONS FOR THE JUDGMENT DATED 25th JUNE 2019 PROVIDED AT THE PARTIES' REQUEST

1. The Claimant claimed he had been "automatically" unfairly dismissed under section 100(1)(c) of the Employment Rights Act 1996. The Respondent resisted the claim.

Issues

2. The issues were identified and set out in the case management order issued by Employment Judge Wallis following preliminary hearing held on 18 April 2018. Those issues were described as follows:

    2.1. Did the Claimant report two issues to Mr Rolfe the health and safety officer (the failure to provide a hard hat on various dates, and the overloading of a vehicle on 14 August 2017 – the Respondent accepts that these matters were raised but not necessarily as health and safety matters);

    2.2. In doing so, did the Claimant bring those matters to the attention of his employer by reasonable means and did he reasonably believe that the circumstances were harmful or potentially harmful to health and safety;

    2.3. If so, was that the reason (or, if more than one, the principal reason) for his dismissal;

2.4. If the claim is successful, what is the appropriate remedy?

3. The parties agreed at the commencement of this hearing they remained the issues for consideration by the Tribunal. The Tribunal hearing proceeded to consider liability only with a further hearing to consider remedy if the Claimant were to succeed in his claim.

4. The parties agreed that burden of proof is on the Claimant to show on the balance of probabilities that he was dismissed for the automatically unfair reason.

5. Both parties also agreed that if the Tribunal were to find that it was Mr Greene who took the decision to dismiss the Claimant and that he did not know of the Health and Safety matters which the Claimant says he raised, that would be the end of the matter.

Findings of fact

6. The Claimant commenced employment with the Respondent on 18 April 2017 as a quarry operative. His main duties involved the operation of a loading shovel. His line manager was Terry Rolfe, the quarry foreman.

7. The Company Secretary and de facto CEO of the Respondent is Nick Greene. Mr Rolfe and Mr Greene held regular meetings to discuss significant issues and management of the site.

8. On 14 August 2017 Mr Rolfe told the Claimant to accede to the demand of a customer to overload a lorry with sand.

9. Without attributing blame to the Claimant, the Tribunal finds that he did not have a good working relationship with some of his colleagues. On the Claimant's case, it appears that swearing and abusive behaviour was demonstrated towards him by several individuals on site. During the course of his employment, the Claimant took photographs of the site and covertly recorded conversations he had with others.

10. The Claimant raised a written grievance on 27 September 2017 with Mr Rolfe complaining of two incidents of threatening and abusive behaviour by a work colleague. Mr Rolfe spoke to the Claimant's colleague and concluded that there had been a heated discussion over production issues and that he had informed the colleague that such behaviour would not be tolerated and that the colleague had been issued with a written warning.

11. By letter dated 17 October 2017, the Claimant raised a further grievance against the same colleague alleging he had been abusive, aggressive and had sworn at the Claimant. The Claimant had recorded the altercation between him and the colleague. Mr Rolfe responded by letter dated 20 October 2017. He concluded that the swearing could be made out in the recording but he could not clearly make out what was being said and the context in which it was delivered. There were no witnesses to the altercation and decided that no further action would be taken.

12. By letter dated 25 October 2017, the Claimant appealed his grievance outcome to Mr Greene.

13. On 1 November 2017, Mr Rolfe handed the Claimant a letter dated 2 November 2017 giving him notice of dismissal to take effect from 2 November. The Claimant was to be paid his notice pay in lieu. The letter states: "You have been unable to properly settle into the workplace and various issues have arisen". The Claimant's employment ended on 2 November 2017.

14. By letter dated 8 November, the Claimant appealed against his dismissal, addressing his letter to one of the Respondent's company directors. The Claimant complained that it is a breach of contract and victimisation for raising a formal grievance or raising health and safety issues. With regard to the health and safety issues, the Claimant raised the issue of the overloading which had taken place on 14 August 2017 and complained that he had not been provided with a hard hat and that no-one else working on site wore a hard hat.

15. By letter dated 20 November 2017, Mr Greene responded to the Claimant's appeal. Mr Greene informed the Claimant that the reasons for his dismissal were:

    - Negative behaviour and attitude
    - Failure to successfully interact with customers and team members
    - Inability to settle into the workplace and fit into the team

Applicable law

16. Section 100(1)(3) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded an unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that being an employee at a place where:

    16.1. there was no representative of workers on matters of health and safety; or

    16.2. there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means;

    16.3. 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.

17. Where an employee brings an automatic unfair dismissal claim but does not have sufficient continuity of service to bring and ordinary unfair dismissal claim under section 98 of the Employment Rights Act 1996, and the legislation placing no burden on the employer to show the reason for the dismissal, the burden of proof is on the employee to show on the balance of probabilities that he was dismissed for an automatically unfair reason; see Smith v Hayle Town Council 1978 996 CA; Tedeschi v Hosiden Besson Ltd EAT 959/95; and Ross v Eddie Stobart Ltd EAT 0068/13.

18. In Balfour Kilpatrick v Acheson [2002] IRLR 683 the EAT identified three requirements that have to be made out to satisfy a claim under section 100(1)(c):

    18.1. It was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee;

    18.2. The employee must have brought to the employer's attention by reasonable means the circumstances that he reasonably believes are harmful or potentially harmful to health or safety; and

    18.3. The reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

Conclusion

19. The Tribunal addresses what the Claimant describes as the primary battle ground, namely the reason for the dismissal.

20. As to whether Mr Greene took the decision to dismiss the Claimant, the Tribunal has had regard to the fact that Mr Rolfe's signature appears on the dismissal letter. The Tribunal has also had regard to the Respondent's grounds of resistance which states that Mr Greene's only involvement with the Claimant was to respond to his appeal against dismissal. However, Mr Greene gave clear evidence that he was the decision maker and that Mr Rolfe did not have the power to hire and fire, no access to the company's legal advisors, and did not have access even to company headed notepaper. Despite robust challenge in cross examination, Mr Greene did not move his position. The Respondent appears heavily reliant upon its legal advisors to prepare documents, in this case the most relevant documents being the grounds of resistance and the dismissal letter. The Tribunal accepts Mr Greene's evidence that the grounds of resistance is wrong if it is saying that he did not make the decision to dismiss the Claimant. As for the dismissal letter, it is signed by Mr Rolfe on behalf of the Respondent but that does not displace Mr Greene's evidence that he took the decision to dismiss.

21. The Claimant admitted to the Tribunal during cross examination that he could not say what was discussed between Mr Rolfe and Mr Greene during their discussions before the Claimant was dismissed. Mr Greene and Mr Rolfe would regularly discuss matters of significance, including significant matter of health and safety, not least so that Mr Greene could report to the board. Mr Greene did not have regular contact with the workforce on site except for his regular meetings and communication with Mr Rolfe. Unless Mr Greene was informed by Mr Rolfe about an issue arising on site, it was unlikely Mr Greene would know about it. Mr Greene's evidence that he had no knowledge of the health and safety matters said to have been brought to Mr Rolfe's attention, the hard hat matter and the overloading matter, was not successfully challenged in cross examination. The Tribunal has no reason to doubt the credible evidence of Mr Greene that he knew nothing of the health and safety matters upon which the Claimant relies. The Tribunal accepts Mr Greene's evidence in this regard.

22. As to the reason for the Claimant's dismissal, the grievances raised by the Claimant, the covert recordings, and the number of incidents referred to by the Claimant himself in his evidence, strongly suggest that he was dismissed for the reasons given in Mr Greene's letter of 20 November 2017 responding to the Claimant's appeal against dismissal.

23. Further, contrary to the Claimant's submission that the matters said to have been raised were temporally proximate to the decision to dismiss, if the Tribunal were to accept the Claimant's evidence that he complained about the hard hat matter in June 2017, and given that the overloading took place 14 August 2017, it might be thought surprising that the Respondent did not take the decision to dismiss sooner if the prohibited reasons were the effective cause.

24. The Tribunal finds that the reasons, or the principal reason, for the Claimant's dismissal were not those he asserts.

25. In light of these conclusions, the Tribunal has no need to consider the other issues in the case.

26. The Tribunal concludes that the Claimant was not unfairly dismissed as alleged and his claim is dismissed.

Note

Employment Judge Pritchard

Date: 9 September 2019