



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Gornall

Respondent: Horwich Private Hire Ltd

Heard at: Manchester

On: 2 December 2019

Before: Employment Judge Dunlop

REPRESENTATION:

Claimant: Mr N Mellor

Respondent: Did not attend

JUDGMENT

1. The judgment of the Tribunal is that the claimant's claim of unfair dismissal is well-founded.
2. A further hearing will be held to determine the appropriate remedy. Directions are given at paragraph on 23 below.

REASONS

Today's Hearing

1. This is a claim of unfair dismissal under s98 Employment Rights Act 1996 ("ERA") and in respect of failure to provide a written statement of particulars of employment under s1(1) ERA and s38 Employment Act 2002.
2. The hearing was listed for one day for liability and remedy and standard directions were sent out by the tribunal. By an email dated 12 October 2019 the respondent (acting without representation, although seemingly having taken legal advice) applied to vacate today's hearing and replace it with a hearing of three days' duration on the basis that they wished to call up to seven witnesses.
3. By an email dated 18 October 2019 the claimant's representative opposed that application. They pointed out that the witnesses the respondent wished to rely

on were not relevant to liability and were mainly relevant to remedy, in particular a potential '**Polkey**' argument.

4. From the ET3 response form itself it does appear to me that the thrust of the matters put forward by the respondent in its defence would be more relevant to the question of whether any compensation should be reduced (whether by way of a successful '**Polkey**' argument or by way of a contributory fault argument) rather than the issues which will be relevant in determining liability.

5. On 6 November 2019 the Employment Tribunal agreed to the claimant's request to convert this hearing to a liability only hearing with the potential to list a further remedy hearing in due course if necessary. From around that time, however, the respondent appears to have stopped engaging with the claimant's representative. I have seen correspondence relating to attempts to agree the bundle and attempts to exchange witness statements in accordance with the tribunal's directions, and it seems that the respondent has ignored those requests. Mr Mellor also tells me today of further attempts that he has made to contact the respondent without success.

6. The respondent did not attend the hearing this morning. I delayed the start of the hearing until 10.20am, partly to give the respondent some time to come to the hearing if in fact they were delayed. However, given the procedural history described above, it appears likely that the respondent has chosen not to attend today's hearing rather than been detained through transport difficulties or some similar circumstances.

7. Rule 47 of the Employment Tribunals Rules of Procedure 2013 permits the Tribunal to proceed with a hearing in the absence of any party. In the circumstances of this case I determined that it would be just to proceed with the hearing. Mr Mellor urged me to strike out the response and make a full determination of the claimant's claim, including matters of remedy.

8. However, I consider that such an approach would be unjust to the respondent. The hearing today was convened to deal with liability only and the respondent will have received correspondence and been aware that that is the matter which today's hearing will consider. I also take into account the fact that the respondent is an unrepresented party. It would be unjust to strike out the response and disbar the respondent from taking part in relation to remedy, particularly where it seems that that is the aspect of the case where their evidence is focussed.

9. I heard evidence from the claimant who confirmed the statement that she had provided to the Tribunal. I was provided with a bundle of documents and have read only a small number of those documents which were referred to directly in Mrs Gornall's statement. I was also handed up a statement from Mr Alan Lowe who did not appear to give evidence. Given that the case is in effect uncontested, I have not found it necessary to have regard to Mr Lowe's statement. I also thank the claimant's representative, Mr Mellor, for his full and helpful submissions handed up at the outset of the hearing.

10. Given that the matter may well proceed to a contested remedy hearing, I make only limited findings necessary to determine liability.

Findings of Fact

11. The respondent is business providing taxi services. It was set up by Mr Allan Lowe and Mrs Gornall began to work for him in around 2001. She started off as “book staff” but then her job title changed to “Manageress”. Essentially, her role was to take customer phone calls and dispatch cars to jobs. In around 2009 the business was taken over by Mr and Mrs Vincent, Mr Lowe’s daughter and son in law. Mr Lowe continued to work as a driver.

12. On 28th August 2018 Mrs Gornall was given a six-month written warning for alleged misconduct. She did not appeal against that warning, although she makes the point that as it had been issued by the owners of the business she believed an appeal would have been futile. In any event, the warning would have expired on 28th February 2019. The warning is not entirely clear in its terms but, broadly, it related to how Mrs Gornall conducted herself in distributing work, spending too much time on phone calls and her manner towards drivers and customers. I make no findings as to whether this warning was justified or not, which may be a matter for consideration at the remedy hearing.

13. The claimant’s dismissal was triggered by events which took place on 13 March 2019. In the morning, she allocated a particular job to Mr Lowe. I understand it is the Respondent’s case that this job should have been classed as a “trunker”. That was the name given to more valuable jobs, and there was a particular procedure to ensure that they were distributed fairly amongst drivers. Mrs Gornall says that this job was not a trunker and also says that, even if it was, it would have been appropriate to give it to Mr Lowe and the jobs were still distributed fairly over the course of the day. Again, I make no finding on those points.

14. There was a dispute between Mrs Gornall and Mr Vincent that afternoon about the allocation of work, following which she left work and did not return on the following day. She did return on Friday 15th March when she was suspended pending “a meeting to discuss your misconduct at work”.

15. Mrs Gornall was invited to a disciplinary meeting by way of a telephone call on 10th April 2019. The meeting was to take place the following day.

16. Following the meeting, Mrs Gornall was dismissed by letter dated 16th April 2019. The letter referred to a failure to carry out the correct procedure relating to trunkers, but also referred to other matters, including historical matters, as being part of the reason for dismissal. She was informed that her last day of employment would be Monday 8th July 2019 and that she would be placed on garden leave until that date.

Conclusions

17. The claimant brings a claim of unfair dismissal under section 94 of the Employment Rights Act 1996 (“ERA”).

18. Under section 98 ERA the respondent must show a potentially fair reason for dismissal. This means, in a case such as this, showing what conduct it was that led to the dismissal, not simply showing that the reason for dismissal was the claimant’s conduct. It may be inferred from the response to the claim that the respondent relies

on a reason related to the claimant's conduct, although exactly what it was about the claimant's conduct that led to the dismissal is impossible to determine without evidence from those responsible for the dismissal. I cannot find that they have shown a fair reason and the dismissal therefore unfair.

19. Alternatively, if I assume, in the respondent's favour, that they had established that the reason for dismissal was the claimant's conduct in allocating the trunker to Mr Lowe, I would have to consider whether the dismissal was fair under the well-known test set out in **BHS v Burchell [1980] ICR 303**. It is for the respondent to demonstrate that they held a genuine belief that misconduct had occurred; that that belief was reasonable; and that it was based on a reasonable investigation. Taking into account the limited evidence I have heard, there is considerable doubt as to whether Mr and Mrs Vincent did have a genuine belief that misconduct had occurred or whether the dispute over the "trunker" was simply part of a wider struggle for control within the business. Even if the belief was genuine, it was not held on reasonable grounds as there appears to have been no real investigation done or any consideration given to the arguments that Mrs Gornall put forward as to why it wasn't misconduct. The dismissal is therefore also unfair on that basis.

20. Finally, Mrs Gornall points to procedural irregularities which do not seem to be disputed from the material available on the face of the response form, for example she was not given a written invitation to the disciplinary hearing, nor formally informed of her right to be accompanied, nor warned that dismissal was possible outcome. It also appears to be the case that the respondent relied on an expired disciplinary warning. For these reasons I would also find that the dismissal was procedurally unfair.

21. I make no findings in relation to the substance of the alleged misconduct which the respondent was concerned with (either in respect of the trunker or other matters) and it will remain open to the respondent to raise arguments in relation to both the effect that any potential contributory fault and any **Polkey** deduction should have on any compensation ultimately awarded.

22. The claimant also brings a claim under section 38 of the Employment Act 2002 in relation to a failure to provide a section 1 statement. I find as a matter of fact that no section 1 statement was provided. That therefore opens the door to the claimant to claim a potential uplift to her compensatory award for unfair dismissal, the amount of which will be a matter to be addressed at the subsequent remedy hearing.

Remedy

23. A remedy hearing will take place on **12 and 13 March 2020** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing each day at **10.00am** before Employment Judge Dunlop. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30am on the first day. The following Orders are made pursuant to the Employment Tribunal Rules of Procedure.

1. Documents

1.1 The document bundle for use at the remedy hearing will be the bundle prepared by the claimant's solicitors for use at the liability hearing. Each party has an on-going duty to disclose any relevant additional documents (including those relevant to mitigation of loss). The parties shall liaise to agree any necessary additions to the bundle and the claimant shall be responsible for bringing three copies of the updated bundle to the Remedy Hearing for the use of the tribunal.

2. Witness Statements

2.1 By 4.00pm on **20 February 2020** each party must have provided to the other a written statement from every person (including a claimant or an individual respondent) that it is proposed will give evidence at the remedy hearing. The witness statements must be typed in numbered paragraphs, dated and signed.

2.2 Legal arguments or submissions to the Tribunal should not be included. There should be no reference to "without prejudice" discussions or exchanges without the agreement of the other side. Where reference is made to a document the page number from the hearing bundle must be included. There is no need to reproduce lengthy passages from documents in the bundle which the Tribunal will read.

2.3 The claimant's witness statement must confirm whether the schedule of loss which appears in the bundle is correct. If there are any changes to the amounts claimed, an updated schedule of loss must be served on the same date.

2.4 Generally, the Tribunal will only have regard to witness evidence where the witness attends the hearing in person. If the respondent wishes to present statements from witness that are not going to attend then it must notify the claimant of this, in order to avoid unnecessary time spent preparing to cross examine those witnesses. The Tribunal will determine as part of the hearing what weight (if any) should be given to statements from witnesses who are not attending the hearing.

2.5 The witness statements will be read by the Tribunal and stand as the evidence of each witness before that witness is questioned by the other parties. It is important that the statements contain all the facts which the witness can provide which are relevant to the case.

2.6 Further information about witness statements can be found in Guidance Note 3 attached to the Presidential Guidance on General Case Management.

Date: 11.12.19

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 December 2019

FOR THE TRIBUNAL OFFICE

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