



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

PANEL:

BETWEEN:

Mr G Calderon Sabogal

Claimant

AND

Zing Environments Limited

Respondent

ON: 2 October 2019 &
4 October 2019 (In Chambers)

APPEARANCES:

For the Claimant: Miss E Colebatch, Pro Bono Rep

For the Respondent: Mr J Townsend, Solicitor

Spanish Interpreter: Miss Fabiola Berta

RESERVED JUDGMENT

1. The claim of automatic unfair dismissal pursuant to section 100(1)(c) of the Employment Rights Act 1996 succeeds.
2. The claim of detriment pursuant to section 44 Employment Rights Act 1996 fails.
3. The Claimant is awarded a basic award of £478.13 and a compensatory award of £1127.08.
4. The Respondent is ordered to pay the Claimant a total sum of **£1605.21**.

REASONS

1. By a claim form presented on 17 February 2018, the Claimant complains that he was automatically unfairly dismissed pursuant to section 100 of the Employment Rights Act 1996 (ERA). At the hearing, the Claimant was granted leave to amend his claim to include one of detriment pursuant to section 44 ERA. The Respondent denies the claims and contends that the Claimant was dismissed on grounds of conduct/performance.
2. We heard oral evidence from the Claimant, through a Spanish interpreter. On behalf of the Respondent, we heard from Caroline Ramirez (CR), HR Manager; Stefan Donovan (SD), Relationship Manager; and Iwona Nejman (IN), Area Manager. The parties presented a joint bundle of documents. We also viewed some video footage taken by the Claimant at work.

The Issues

3. The issues in the case are as follows:
 - a. Was the Claimant required by his supervisor to stand on a table to manually roll broken blinds and if so;
 - b. Did the Claimant reasonably believe that this was harmful or potentially harmful to health and safety.
 - c. Did the Claimant complain about this to both his supervisors, Pavel and IN and if so;
 - d. Was this the reason, or if more than one, the principal reason for his dismissal
 - e. Did the Respondent subject the Claimant to a detriment because of his complaint

The Law

4. Section 100 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is thatc)....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 or safety.
5. Section 44 ERA provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the grounds thatc) 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 or safety.

Submissions

6. Written submissions were sent in by the parties after the hearing. These have been taken into account.

Findings and Conclusions

7. The Respondent is a cleaning business and employed the Claimant as a cleaner from 6 September 2016 until his dismissal on 19 October 2017.
8. The Claimant was latterly based at the Net-a-Porter site in Charlton, London, and was managed on a day to day basis by Pawel Suwala-Suwalski (PSS), the on-site supervisor. PSS reported to IN, the Area Manager.
9. The Claimant's first language is Spanish and he has limited English. There were other Spanish speakers within the business, who were able to give instructions in Spanish. Some of the Respondent's policy documents were in both English and Spanish. For example, the Health and Safety training policy, which the Claimant was fully aware of and had received training on. The policy contains instructions on how to clean safely in all areas. On cleaning things at height, the policy says: "**Never stand on a chair using a cloth to dust these places,**" [101J] and "**Do not climb onto the sink or counter to reach high areas**" [101V]
10. As part of his role, the Claimant was required to roll up the window blinds, and this was done using the attached pulling chain. There were 22 blinds in total but the Claimant told us that most of the chains on them were damaged so the blinds had to be rolled up manually. At paragraph 13 of her statement, IN says that she was not aware that most of the blinds were broken and that if that were the case, she would have expected the Claimant to report it. Yet in cross examination, IN accepted that the blinds had been broken when she returned from maternity leave in September 2017 and that she had reported this to facilities who had fixed some but not others. We therefore prefer the Claimant's evidence on this.

Was the Claimant instructed to stand on tables to unroll the blind

11. It is clear from the video that we were shown that the height of the windows in the canteen where the Claimant cleaned meant that it would not have been possible to roll the broken blinds manually without standing on something. The Claimant told us that in order to roll the blinds by hand, PSS required him to climb from a chair onto a table. He said he did this consistently until 2 October 2017, when, he almost fell whilst climbing down from the table onto the chair. From that point onwards, he did not roll the damaged blinds and only did the ones with properly functioning chains.
12. The Claimant told us that when PSS saw that the broken blinds were not rolled, he told him that it was not his job to climb on tables, that it was not safe and that he could fall. PSS' response was that it was his job to do so.
13. The Respondent denies that the Claimant was instructed to climb onto tables to carry out his job. None of the Respondent's witnesses at the hearing were able to positively confirm that no such instruction was given. The Respondent did not call PSS to give evidence. PSS has since left their employment and we were told that they did not have a forwarding address for him. There is therefore no direct evidence challenging the Claimant's account of their discussion. What we do have is a copy of a statement dated 3.11.17, made by PSS for the Claimant's appeal hearing against dismissal. In that document, PSS denies asking the Claimant to stand on the canteen table and claims that other cleaning staff did the work correctly by using a small step ladder. This document was not shown to

the Claimant at the time so he had no opportunity to challenge its contents. Further, it appears that it was accepted by the appeal manager on face value. We are conscious of the fact that it would have been in PSS' interest to deny giving the instruction as any other response would have exposed him to disciplinary action for acting contrary to the health and safety policy which expressly forbids the standing on furniture. For these reasons, we are not able to attach much weight to the document.

14. IN said in evidence that the Claimant was not required to roll the broken blinds, only those with chains. This seems to be contradicted by PSS' statement, which refers to other cleaners using a step ladder. Clearly, there would be no need for such a ladder for the correctly working blinds and must therefore relate to the broken ones. For this, and other reasons, we did not consider IN to be a credible witness and the explanation she gave for the apparent inconsistency was unconvincing.
15. The Claimant said that he was never advised to use a step ladder. The Respondent does not say that the Claimant was expressly told to use a ladder neither is this said in PSS' statement. We accept the Claimant's evidence.
16. In all the circumstances, we find that the Claimant was told to climb on the tables to manually roll the broken blinds.

Did the Claimant report to IN on 12 October 2017 that he was being told by PSS to stand on the tables and that it was dangerous for him to do so.

17. The Claimant says that on 12 October 2017, IN visited Netaporter and that they spoke about the blinds issue, PSS having reported that he was refusing to complete his tasks. The Claimant said that he explained to IN that PSS had instructed him to stand on the table to fix the blinds and that he refused to do so anymore because it was dangerous. IN told us that she only became aware of this when the Claimant mentioned it at his dismissal meeting on 19 October 2017. The decision to dismiss had been taken beforehand.
18. IN's evidence was that after PSS had reported the Claimant's refusal to undertake his tasks, she followed it up with him. However, she does not set out in her statement the contents of their discussion. This omission is highly surprising. Given that the Claimant relies on his account of the conversation as the reason for his dismissal, I would have expected IN to provide specific details of her account of the discussion. That she has not done so is telling.
19. At page 115 of the bundle is a document described as a Management Report by IN. The report sets out the reason for deciding to dismiss the Claimant. That note was said to have been taken at 11.00am on the 19 October, the day of the dismissal meeting with the Claimant, which took place later that afternoon. However, while the day and month on the document are correct, the year is 2019 instead of 2017. At paragraph 24 of her statement, IN says that the report was erroneously dated (although she refers to the erroneous date as 19.12.19). As the Claimant accepts that this was a mistake, we say no more about it.

20. In the middle of the document is the following statement:
- “I understand that the method recommended by the OSS to do the blinds is not the right one (my emphasis) and that Gustavo needs training and a helper to do this, however Gustavo did not giving us the opportunity to do this and is only saying this is not part of his work, instead of talking about the problem he decided to make the video which in my opinion he is looking into building a H&S case against the company”.***
21. IN told us that the reference highlighted in bold was to the use of a ladder to roll the blinds and that it should not be used without a helper holding the ladder. (OSS is On-site supervisor – PSS). We do not accept that evidence. There is no reference to this in her witness statement. In fact, at paragraph 14 of her statement, IN endorses what is said by PSS about the use of a step ladder. We consider it more likely that the reference is to the instruction from PSS to the Claimant to stand on the table to fix the blinds. Given that the Management report was prepared before the Claimant raised the issue at the meeting, IN must have been aware of the instruction before the 19 October. The conclusion we have reached is that she became aware on the 12 October from the Claimant. In support of this, we also find that the reference in the note of the 19/10 to the Claimant looking to build a H&S case against the company was based on the Claimant having brought to the Respondent’s attention the risk associated with him having to stand on the table. IN’s explanation that it was a reference to information from other employees that the Claimant had taken previous employers to court and claimed a lot of money was not plausible.
22. We therefore accept the Claimants account of his conversation with IN on 12 October 2017. We are also satisfied that the matters reported fell within section 100(1)(c) ERA.

Was the reporting of these matters the reason or principal reason for dismissal

23. The Claimant’s dismissal letter states the reason as “*a perceived lack of flexibility on your part and our inability to agree on working arrangements*”. No explanation beyond that is provided [118]. The notes of the dismissal meeting show that the Claimant’s refusal to roll the blinds was one of the first matters raised. The other performance matters referred to are in our view subordinate to the blinds issue. A number of performance issues are raised in the evidence presented by the Respondent. However, we believe that those matters have been given more prominence than they were at the time.
24. The proximity of the reporting of the health and safety risk and the dismissal is also something that we have taken into account. The Claimant had been employed by the Respondent since September 2016 yet according to PSS’ appeal statement, all of the performance issues leading to the dismissal happened in the space of a working week, between Monday, 16 October 2017 and Friday 20 October 2017. The speed in which this resulted in dismissal, without any investigation or disciplinary procedure leads us to conclude that the proximity of timing was contrived rather than coincidental.
25. Taking all of the above matters into account, we conclude that the principal reason for the Claimant’s dismissal was his reporting to the Respondent health and safety risks associated with his work.

26. The automatic unfair dismissal claim succeeds.

Detriment Claim

27. In his further and better particulars of claim, the Claimant says that the detriment was that IN tried to force him to do his job in an unsafe manner and asked him to sign an inaccurate statement.

28. At paragraph 35 of the submissions on behalf of the Claimant, it is said that IN told the Claimant to continue carrying out the unsafe working practices. We take this to mean that he was told to continue standing on tables to fix the blinds. However, this was not the evidence given by the Claimant, either orally or in his witness statement.

29. At 114A of the bundle is a copy of a statement signed by both IN and PSS purporting to be a record of the Claimant's refusal to carry out his tasks on the 12 October 2017. The Claimant was asked to sign this but refused. That request was not repeated. It seems to us that the only harm the Claimant suffered from that refusal was his dismissal and dismissal cannot amount to a detriment for the purposes of section 44 ERA.

30. The detriment claim is not made out and is dismissed.

Remedy

31. The Claimant accepted in evidence that he had taken no steps to mitigate his loss and that he found an alternative job through a friend at the end of January 2018, albeit earning less. Given that he was employed by the Respondent on minimum wage in an unskilled office cleaning role, we consider that he should have been able to find comparable work within 4 weeks of dismissal. We have therefore made the following award of compensation:

Basic Award: $1 \times 1.5 @ 318.75 = 478.13$

Compensatory Award: $4 \text{ weeks' pay } @ 281.77\text{pw} = 1127.08$

Total award = **£1605.21**

Employment Judge Balogun
Date: 11 December 2019