



EMPLOYMENT TRIBUNALS

Claimant: Mr G Shannon

Respondent: Williams Haulage Limited

Heard at: Cardiff (by video)

On: 23 November 2020

Before: Employment Judge S Moore

Representation

Claimant: Mr S Walkerdine (Solicitor)

Respondent: Mr N Henry (Consultant)

RESERVED JUDGMENT

1. The Claimant's claim for wrongful dismissal succeeds.
2. The Respondent is ordered to pay the Claimant the gross sum of £25,000.00.

REASONS

Background and Introduction

1. The ET1 was presented on 22 June 2020. The Claimant brought claims of wrongful dismissal. There was an agreed bundle of 251 pages. The tribunal heard evidence from the Claimant and Mr Huw Williams, managing director and part owner of the Respondent. Judgement was reserved.
2. The issues in the claim were as follows:
3. The claim was for breach of contract (contractual notice pay of six months). The Respondent concedes there was a contractual notice pay clause but defends the claim on the basis that the Claimant was dismissed for gross misconduct.

Findings of fact

4. I make the following findings of fact on the balance of probabilities.
5. The Respondent provides logistics and warehouse solutions and employs approximately 70 employees across three sites. These were the main office based in Corwen, and two depots at Deeside and Sandycroft. The Respondent's main customer is a well know manufacturer of horse boxes and trailers. The Respondent receives goods from the manufacturer and is responsible for transporting them on to the manufacturer's customers who may be UK based or internationally based. Sometimes this process involves removing some parts so as to enable the goods to be appropriately stacked and packaged for onward transport.
6. The Claimant commenced employment as the Operations Director on 3 December 2018. His normal place of work was the main office in Corwen. It was common ground that he had a contractual notice period of six months. The contract provided that the Respondent had the right to terminate the employment without notice or payment in lieu of notice in the case of gross misconduct. The Claimant's job description included an extensive list of areas of responsibility. The key aspects of which were to ensure a safe and legally compliant operation, control of strategic and operational aspects of the business, and ensuring all methods and procedures were compliant with legislation health and safety guidelines and best practice.
7. Under the heading "Drivers Administration", the Claimant was responsible for ensuring driver records were kept and made available upon request. The Claimant was not the statutory person (CPC – Certificate of Professional Competence) holder named on the Respondent's licence. This was the responsibility of the Transport Manager Mr Speed. The role of the Transport Manager is required by statute to have continuous and effective responsibility for the management of transport operations of the business insofar as they relate to the carriage of goods. Mr Speed was primarily responsible for operator compliance (including ensuring drivers complied with driver's hours and working time roles).
8. The Respondent's employee handbook contained a list of the types of behaviour that would be considered gross misconduct. The list was extensive and I do not reproduce it here but it contained the usual behaviours such as fighting, stealing. In relation to management instructions it listed "deliberate refusal or willful failure to carry out a reasonable management instruction".
9. The Respondent has a statutory obligation to monitor the number of hours worked by their drivers so as to ensure they do not exceed 48 hours per week. The driver routes are were planned by three members of staff titled Route Planners. The driver records are recorded on the tachograph reports which in turn are input into a spreadsheet which was collated by Ms Wotton, Compliance and Sales coordinator. The tribunal had sight of one of the spreadsheets from July to December 2019. Ms Wootton had emailed the spreadsheet to the Claimant, Mr Speed and Mr Williams on 2 July 2019

10. For the first 26-week period of 2019, the Claimant had monitored the data and issued internal memos to each driver who had exceeded the 48-hour maximum average working week. The drivers were instructed to reduce their time to ensure compliance. The Claimant emailed Mr Williams on 2 July 2019 and informed him that he would be monitoring and managing the working time from there on. He also informed Mr Williams that it would be managed weekly and all issues would be actioned in real-time. Mr Williams relied on this email and assurances contained therein that Mr Shannon would be monitoring the driver records to ensure there was no breach of the Working Time Regulations. At this time this was a reasonable reliance given the Claimant's seniority and responsibilities within his role.
11. In October 2019 the Claimant had undertaken a further review of the driver records and drafted memos to for drivers who at that time were in excess of the 48-hour rule however the Claimant accepted that he had not sent the memos. His explanation was he was too busy.
12. It was common ground that up until October 2019 there were no issues with the Claimant's conduct or performance.
13. In October 2019 the Respondent was experiencing major issues with the level of quarantine stock at the Sandycroft depot. This was in relation to horseboxes and trainers which were manufactured by one of the Respondent's main customers. Mr Williams instructed the Claimant to base himself at Sandycroft to coordinate the quarantine stock and keep the yard area in a controlled state. There was a limited amount of space available with a large amount of stock and limited staff. The Claimant began to work long hours physically moving the stock around the yard. He also began to work weekends. Mr Williams accepted when asked during his giving evidence that the Claimant's operational and strategic duties were not reallocated to any other members of the management team.
14. The Claimant was also instructed to try and resolve other issues that had arisen in the Deeside depot as trailers were being dispatched to customers with pieces missing. On or around 16 December 2019 the site manager of the Deeside depot went off on long-term sick and the Claimant was instructed by Mr Williams to also run the Deeside site that from that time.
15. It was evident from emails during November 2019 that there were issues about missing parts but that these had been long running and had arisen prior to the absence of the Deeside manager on long term sick. On 11 December 2019 Mr Williams instructed the Claimant to review the loading procedure at Deeside and ensure the next container loaded was fully audited to ensure dispatched parts were on board. It appears that someone from the Respondent's main customer had observed and taken photographs of a large pile of material parts at Deeside that had been removed from trailers when stacking or dispatching. The customer queried with Mr Williams whether or not these parts could explain the queries that were being received about items being delivered with parts missing.
16. The combination of these new responsibilities meant that the Claimant was rarely able to attend the office in Corwen. The Claimant maintained that he was unable to access the Respondents systems and records. Mr Williams evidence which I accepted was that there were offices at the different sites

and from which the Claimant could access all of the Respondents systems. There was also Wi-Fi connectivity to the systems and the Claimant had been provided with a mobile phone and laptop. The reason that the Claimant was not accessing the Respondent's systems and undertaking the usual monitoring and strategic management was that he had been instructed by Mr Williams to take on the additional duties as described above at two depots.

17. Over the Christmas period of 2019 some of the Respondent employees arranged a Christmas social event. The Claimant did not attend this event and it was not an organised company party. It was reported subsequently that one of the employees, who shall be referred to as employee A, assaulted another employee who shall be referred to as employee B on this night out. This came to the attention of Mr Williams who instructed the Claimant to conduct an investigation. Claimant spoke to both employees and they refused to provide witness statements as they had resolved matters between themselves. The Claimant sought advice from the Respondents HR advisers, Croner. The Claimant sent an email to an adviser on 3 February 2020 seeking guidance. The Claimant informed the adviser that despite various requests for statements they had both refused stating it had happened outside work and was nothing to do with the Respondent. The adviser replied the same day. He advised the Claimant that it would only be an issue if it had 'spilt over into the workplace'. The advice was if they had had a fight outside of work and it was 'not really anything for the company to get involved in'. The Claimant forwarded this advice to Mr Williams who accepted he had received this email. Mr Williams did not follow up on that email and inform the Claimant he was dissatisfied with this state of affairs or that he wanted him to issue a sternly worded memo.
18. It later transpired, although it was not clear when, that Employee A had been charged with assault in April 2019. This came to light when he had to attend community service. The Claimant had discussed this with Mr Williams and the manager of Deeside and it was agreed he should be given a chance.
19. The Claimant was not responsible for processing new starter packs which contained a question about criminal records disclosures. This was the responsibility of Ms Smith. The Claimant had not at any point had sight of Employee A's starter pack as this was processed by HR.
20. On 7 January 2020 Mr Williams sent the Claimant an email in which he informed him he had several matters of grave concern which he would detail when he had caught up on the day. Somewhat surprisingly, given the description of the matters being of "grave concern" Mr Williams did not follow this up until almost one month later.
21. 24 January 2020 when Mr Williams sent the Claimant an email setting out proposed site running and roles moving forward. This included making Employee A the team leader at Deeside.
22. On 4 February 2020 Mr Williams sent to the Claimant an email setting out matters of concern as referenced in his email of 7 January 2020 and asked

him to attend a meeting the following day. The areas of concern were working time, drivers working over 60 hours, employee A criminal record nondisclosure and assault at the Christmas party, missing items at Deeside, and damage claims. This meeting did not go ahead as the Claimant had asked Mr Williams whether he should stay in Deeside to carry out the load audit or attend the meeting and he was instructed to stay at Deeside.

23. Nothing further happened to progress that meeting until later in February 2020. Prior to this, Mr Williams sent the claimant a long email on 12 February 2020. This was concerning customer complaints regarding missing items. Mr Williams also raised concerns about 84 items at Deeside which he had been asked to be identified. The Claimant replied in an email timed at 21:15PM later that evening. He explained that he had only just got home and that it was difficult to concentrate in Deeside where there are constant interruptions. The Claimant told Mr Williams that the reason he had not responded to the 84 items missing items issue was due to lack of time. He stated that managing Deeside was “constant” and now even more so with the focus on inspections and audits as well as ensuring staff were adhering to the changes listed above.
24. In October 2019 the Claimant had gone through the holiday records and issued memos to staff reminding them how much leave they had outstanding and that it had to be taken by the end of the year.
25. A further issue arose in February 2020 in respect of some holiday leave outstanding from 2019 with an employee I shall refer to as employee C. This particular employee had not taken all of his holiday entitlement in 2019. There was a dispute of fact between the parties about the instruction given from Mr Williams to the Claimant in relation to this matter. The Claimant's evidence was that Mr Williams instructed the Claimant to inform him that he was only going to be permitted to take three days carry over into 2020. Mr William's evidence was that he had told the Claimant to 'start by offering to carry over three days holiday and see how he got on' and it was for the Claimant to reach an agreement. I have preferred the Claimant's account of this incident as the Claimant sent a contemporaneous email on 18 February 2020 which cited his understanding of the instruction and Mr William's did not at that time challenge the Claimant or disabuse him of his understanding. Instead Mr Williams issued a memo to all staff advising they could carry over 8 days leave which was contrary to what he had told the Claimant only a few days earlier.
26. Employee C took umbrage to this and decided to resign however after discussions with Mr Williams and the Claimant retracted his resignation.
27. Prior to the Claimant's suspension he received a telephone call from a recruitment consultant who was trying to reach Mr Williams. The recruitment consultant told the Claimant she had found a candidate for the role of a Transport Manager which Mr Williams had asked her to place confidentially. At that time the Claimant did not think this was a role intended to replace his role. Mr Speed had also seen the advert and jokingly stated he would apply. The Claimant obtained a copy of the advert after his dismissal directly from the consultant. It advertised the role of Transport Manager with a salary of £30,000 - £40,000 pa. Mr William's denied that he had instructed the recruitment consultant to place such an advertisement. He accepted under

cross examination he had requested speculative CVC's as the site manager at Deeside was on long term sick and he knew by early January 2020 it was very unlikely he would be well enough to return to his role. Mr Williams told the Tribunal it was to 'backfill' this role and he was not aware an advert had been posted. He also accepted he had given some thought to swapping Mr Speed away from Transport Manager to run the Deeside site and recruit the new person into the new Transport Manger role

28. I find this was an advertisement placed at the behest of the Respondent as I find it to be implausible that the consultant would have constructed an advert with the level of detail without authority or instruction from the Respondent. However I also accepted Mr William's evidence that the purpose was not to replace the Claimant.

29. On 19 February 2020 the Claimant was called to a meeting with Mr Williams where he was suspended. On 20 February 2020 he was informed of the allegations. These were:

- Employee C holidays. The Claimant's conduct was alleged to amount to a failure to follow a reasonable management request;
- WTD – 10 drivers had exceeded the 48 hours per week;
- Drivers working over 60 hours – numerous drivers were said to be over this number;
- Employee A criminal record non-disclosure and further assault; a failure to take statements or conduct an investigation;
- Missing items – at Deeside;
- Damage claims generally – no improvement in claims frequency.

30. On 26 February 2020 the Claimant received a text message from Employee A in which he informed the Claimant he had learned from Mr Speed that the Claimant's suspension was "permanent" and that several drivers were aware.

31. The Claimant sent Mr Williams some detailed notes prior to the investigation meeting which set out his explanation and version of events. An investigation meeting took place on 26 February 2020 conducted by Mr Williams. On 5 March 2020 the Claimant was sent an invitation to a disciplinary hearing which set out the allegations against him. These were as above except the issue about criminal non-disclosure had been dropped. The allegations were described as potentially amounting to gross misconduct.

32. On 9 March 2020 the Claimant's solicitors wrote a detailed letter to the Respondent addressing the allegations and alleging the process was a sham to avoid paying the Claimant's notice pay.

33. The disciplinary hearing took place on 11 March 2020. It was conducted by Mr Williams who adjourned the hearing to reach a decision. On 23 March 2020 the Respondent sent the Claimant a letter dismissing him for gross misconduct. The findings in summary were as follows:

- In relation to Employee C the claimant had failed to follow a reasonable management request namely not coming to an agreement with the driver over his holiday roll over.
 - In relation to drivers exceeding 48 hours per week, a finding the Claimant had failed to carry out legal undertakings of the business and take action to acceptably reduce the working hours.
 - In relation to drivers working over 60 hours per week between July and August 2019 6 instances of drivers working over 60 hours with 3 thereafter. This led to a finding of a failure to effectively manage and control the legal scope of working time regulations.
 - In relation to Employee A a finding the Claimant had failed to investigate the matter and failed to eliminate or minimise any reoccurrence of this behaviour. (Mr Williams had suggested during the investigation hearing that the Claimant should have sent a strongly worded memo to staff advising such behaviour was not acceptable to company values but there was no evidence of any prior instruction to this effect).
 - In relation to missing items a failure to take action to identify items.
34. The Claimant appealed his dismissal on 27 March 2020. An appeal was arranged with a consultant from the Respondent's HR advisors, Croner. This took place on 3 April 2020. The appeal was not upheld and this was confirmed in a report and letter dated 16 April 2020.
35. The Claimant has applied for in excess of 50 jobs since his dismissal but has been unable to find work to date.

The Law

36. Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

Extension of jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

- (a) **the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
 - (b) **the claim is not one to which article 5 applies; and**
 - (c) **the claim arises or is outstanding on the termination of the employee's employment.**
37. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrongdoing or gross negligence. In the case of deliberate wrongdoing it must amount for willful repudiation of the express or implied term of the contract (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood UKEAT 0032/09**).

38. S207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

39. Schedule A2 provides that a breach of contract claim brought under the Extension of Jurisdiction Order is one which S207A will apply to.

Conclusions

40. I now turn to consider whether the Claimant's conduct individually or cumulatively amounted to gross misconduct thereby entitling the Respondent to summarily dismiss the Claimant without notice.

41. In doing so I have considered the guidance in respect of gross misconduct in the Sandwell decision and had particular regard to the requirement for the behaviour to be deliberate wrongdoing.

In relation to Employee C the claimant had failed to follow a reasonable management request namely not coming to an agreement with the driver over his holiday roll over.

42. I first of all consider whether there had been a management request to come to an agreement with the driver over his holiday roll over. I found above that the Claimant had followed the instruction that was given namely to inform the driver he was limited to three days carry over. Furthermore, the driver in question retraced his resignation and an agreement was reached in relation to his holiday. Therefore in my judgment there was no failure. Even if there had been a failure there is no basis to conclude that the Claimant's conduct in this incident was deliberate or wilful.

In relation to drivers exceeding 48 hours per week, a finding the Claimant had failed to carry out legal undertakings of the business and take action to acceptably reduce the working hours and drivers working over 60 hours per week between July and August 2019 6 instances of drivers working over 60 hours with 3 thereafter. This led to a finding of a failure to effectively manage and control the legal scope of working time regulations.

43. The Claimant held a very senior role and was responsible for ensuring the Respondent ran a legally compliant operation.
44. The Claimant had taken steps to reduce the driver hours in July and August 2019 as can be seen by the memos that were issued at that time. This was evidence that prior to the additional duties imposed on the Claimant he was effectively undertaking this task.
45. The Claimant did not deny that there had been further breaches by drivers. Therefore the Respondent reasonably concluded that there had been a failure to effectively manage and control the scope of the Working Time Regulations. However this failure did not amount to gross misconduct in my judgment. The failure must be judged within the context of the situation the Claimant found himself in. It can only be reasonable and fair to hold the Claimant to this expectation of responsibility if he had sufficient time to dedicate himself to his duties. Not only did the Respondent reallocate the Claimant away from the head office to undertake physical work at the depot in Sandycroft they then required him to cover the role of a full-time depot manager at Deeside when that individual went off sick.
46. Further, the fact that the Claimant had taken steps to draft the memos to the drivers in October 2019 but not had time to issue them is not conduct that reflects a wilful or deliberate refusal to carry out these duties.
47. The Claimant was criticised for failing to manage and control the situation. There were three route planners responsible for planning the driver routes and a Transport Manager who had the statutory responsibility. None of these individuals had been taken out of their substantive role and asked to cover two other roles in addition to their own. It was in my judgment unreasonable to expect the Claimant to maintain all of his duties in addition to these other roles.

In relation to Employee A, a finding the Claimant had failed to investigate the matter and failed to eliminate or minimise any reoccurrence of this behaviour

48. The Claimant had not failed to investigate the incident. The Claimant had attempted to investigate and both employees refused to provide statements. The Claimant followed this up and sought advice from the Respondent's HR advisors who themselves advised there was nothing further the Claimant could do. Mr Williams was on direct notice that this was the advice that had been given. I found the upholding of this allegation to be extremely surprising and wholly at odds with the advice Croner had given the Respondent. Further, Mr Williams was seeking to promote Employee A despite knowing about the incident. If Mr Williams had been so concerned about this behaviour and sought to send a message it was unacceptable then promotion of the individual involved is entirely at odds with the stance taken by Mr Williams when concluding the Claimant had committed gross misconduct.
49. In relation to missing items a failure to take action to identify items. There had indeed been failure for which the Claimant, under normal circumstances would have had overall culpability. However this must be considered again in the context of the situation the Claimant had been

placed in by the Respondent. I also do not find that the failure was deliberate wrongdoing or gross negligence.

50. I further find that the Respondent sought to artificially augment the seriousness of the conduct in order to avoid paying the Claimant his contractual notice pay. My reasons are the delay in progressing these matters if they were of such concern and the implausible conclusions reached in relation to the allegations surrounding the driver holiday issue and Christmas party issue. These incidents can in no way have sensibly be regarded as matters of gross misconduct and by relying on them as such I have concluded the purpose was to try and paint the Claimant's conduct in a much more serious light that it can sensibly have been viewed. This undermined the Respondent's credibility.

51. In conclusion, none of the allegations either individually or cumulatively amounted to gross misconduct. The Respondent was not entitled to withhold notice pay.

52. The Claimant has demonstrated he has tried to mitigate his loss.

53. The Claimant's notice pay amounts to £26,070.00. I apply the statutory cap and order the Respondent to pay the Claimant the gross sum of £25,000.00.

54. In relation to the claim for a 25% uplift for failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. I decline to make any such uplift. The Respondent conducted an investigation and held a meeting with the Claimant. He was given the right to be accompanied and was also afforded the right to an appeal. I do not consider the delay to be unreasonable in terms of the fairness of the procedure, albeit I have found above it to be relevant to the question of whether the conduct was deemed to be gross misconduct.

Employment Judge S Moore

Date 9 December 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 10 December 2020

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FOR EMPLOYMENT TRIBUNALS