



EMPLOYMENT TRIBUNALS

Claimant **Mr P Giles**
Respondent **Never Despair Recycling Ltd**

Heard at: Bristol On: 22 October 2020 (by telephone)

Before Employment Judge Street

Representation

Claimant: In person
Respondent: Mr PW Morse, Director

JUDGMENT having been sent to the parties on 11 November 2020 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.

REASONS

Evidence

1. The Tribunal heard from Mr Giles, the claimant, and from Mr Morse, managing director of the respondent and read the documents provided.

Issues

2. Mr Giles claimed unfair dismissal. The claim included a claim in respect of breach of contract on which a separate judgment has already been given.
3. The issues in respect of unfair dismissal were identified at the case management hearing conducted by Judge Gray on 24/01/20:
 - 3.1. What was the reason for dismissal?
 - 3.2. Was it a potentially fair reason within section 98(2) of the Employment Rights Act 1996?

- 3.3. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer when faced with the facts
- 3.4. Did the respondent adopt a fair procedure?
- 3.5. If it did not adopt a fair procedure would the claimant have been fairly dismissed in any event, and/or, to what extent and when?

Findings of Fact

4. The Respondent is a company engaged in vehicle service and repair, including buying and selling cars and recycling.
5. Mr Giles was employed from November 2011 as a mechanic in the workshop working in the vehicle repair business. He drove a Beavertail recovery vehicle for collection of vehicles.
6. The business had first been run by Mr Morse's wife, with Mr Morse as yard manager.
7. The original sole trader business passed to Mr Morse in 2015 when his wife's health demanded that she withdraw, and then to a private limited company. The goodwill, assets and staff transferred without any change. Mr Giles' employment was continuous from 2011.
8. At the time concerned, Mr Morse remained in a managerial role. The employees included Mr Giles, Mr Cook and a yard boy. HGV driving was done in part by Mr Cook and in part by part-time or casual workers. Mr Cook was in the scrap yard,
9. Mr Giles was considered by Mr Morse to be excellent at his work when first taken on. Mr Morse wasn't troubled by the absence of qualifications, saw Mr Giles as hardworking, a good mechanic and good at collecting and selling cars, someone who, "did a good job, no complaints." (oral evidence and post dismissal letter page one).
10. The business had had its ups and downs.
11. Mr Giles' hours were reduced to 3 days per week in August 2018, although he was later offered more hours.
12. In July 2019, the business, having picked up in the meantime, was again in financial difficulties, making losses.
13. On 5/07/19, Mr Morse offered Mr Giles the chance to get his HGV licence. That would have gone with a return to full-time work,

"Rather than make him redundant, I offered to employ him as an HGV driver for which he would need an HGV licence. That way he could drive the HGV loads of scrap to Swindon once or twice a week, thus saving me the cost of the part-time drivers I used to fulfill that function, and continue to work 3 days a week in the workshop." (Respondent witness statement ("ws")).
14. Mr Giles is dyslexic. He knew he would have difficulty with the written work involved in obtaining an HGV licence.
15. He had been warned by Mr Morse that there might be a problem in relation to his work if he did not take that opportunity but only in general terms,

“I thought he would come to an arrangement for me to stay on for the three days.”

16. On 12/07/19, talking in the yard, Mr Morse asked Mr Giles if he would get the HGV license.

17. Mr Giles declined. He said he didn't think he could do it. He was not asked his reasons.

18. When Mr Giles turned down the chance to do the HGV Mr Morse dismissed him. He said,

“I asked him in the yard, outside the workshop. He said “All right as we are”. I took it as someone not interested in the job at all.

I was left with no alternative other than to make him redundant which I did on 12 July 2019 with two week's notice. (ws para 4.10)”

19. The dismissal was confirmed in writing that day,

“Due to downturn in business almost collapsing, beginning this week we realise the only way to recover is to employ a HGV driver. This will relieve Mike (Cook) and he will spend his time running the yard buying and selling. I offered you the opportunity to gain your HGV license on 5th July 2019. 1 week later I asked you for your decision and you turned it down. We are not looking for anyone to replace you but will have to look for someone to cover both yards which involves HGV driving and some mechanical knowledge for repairs. Thank you for your service and I serve you two weeks notice from this date. 12/07/19” (dismissal letter).

20. There was no discussion as to the reasons for Mr Giles' refusal. Mr Morse did not know of his dyslexia and at the time, didn't understand what that the implication was.

“I did not know about his dyslexia until after he had left and did not consider it to be any problem at all. He never showed any signs, he was fit and strong and did everything he was expected to do.” (Response)

21. In the post dismissal letter, Mr Morse expresses concern about the overdraft limit being reached and fears of liquidation, having seen the bank statements on Monday 8/07/19,

“I offered him 5 days a week instead of 3 days, and take Michael off his HGV so he can stay in the yard where he has shown his best potential where as it has already improved. As Phil would drive the HGV once or twice a week not too many hours leaving him enough time in the day to fix cars for us and customers....

Unfortunately it only gave me one option to find someone with a HGV or someone to train up to drive the lorry and to do mechanical work. ...If it wasn't for the change in circumstances of this business this would not of changed and

so Phil is not being made redundant, I would have preferred him to carry on the same with his HGV to be used when it was necessary.”

22. In his witness statement, Mr Morse explained the plan as – “saving me the cost of the part-time drivers I used to fulfil that function (HGV driving) , and continue to work 3 days a week in the workshop” (ws 4.8)

23. He did not in fact employ anyone else.

“No I didn’t employ anyone. I didn’t need to at that moment. We just used part-time drivers.”

24. He moved Mr Cook in to cover Mr Giles’s work.

25. The business continues.

“We were better off after he finished. We got part-time drivers maybe twice a week. We cut the wage down.”

Law

26. Section 98(1) of the Employment Rights Act 1996 (“ERA 1996”) sets out:

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

27. It is for the employer to satisfy the Tribunal as to the reason for the dismissal.

28. The reasons that are potentially fair under section 98(2) are capability, misconduct, redundancy or some other substantial reason.

29. If the employer fails to establish that the reason for the dismissal was an acceptable one, the tribunal must find the dismissal unfair.

30. Where the employer establishes that the reason for the dismissal was within section 98(2), then the next question is whether it was fair and equitable including as to the procedure adopted.

31. By section 98(4),

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case.”

32. First, therefore the employer must establish the reason or principal reason for the dismissal and that it is a potentially fair reason.
33. Then the Tribunal must be satisfied that the employer has acted reasonably in treating the ground as a sufficient reason for dismissal.
34. Redundancy is a potentially fair reason for dismissal, but it may be unfair in all the circumstances. The position was summarised by Lord Bridge in *Polkey v A E Dayton Services Ltd* [1988] ICR 142 at 162 – 163

“in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organisation. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with.”

35. “Some other substantial reason” may include the necessary re-organisation of the business. Employees may be dismissed for refusing to agree to changes arising out of a business re-organisation or because their services are no longer required, for example, because of new technology. The employer only needs to show clear advantages to the change. The tribunal is not authorised to make its own assessment of the proposals. However, the changes must not be for arbitrary reasons and must be genuine and rational.

Reasons

36. This was a telephone hearing, using BT MeetMe, with the consent of the parties, because the proposed in-person hearing could not take place as listed or within a reasonable time. The parties did not have access to resources to permit a virtual hearing using video technology. It was not in the interests of justice to delay.
37. The parties were not legally represented, Mr Morse representing the respondent in his capacity as managing director.
38. The first question for the tribunal was to establish the reason for the dismissal and whether it was a potentially fair reason.
39. Mr Morse for the respondent explained the reason for the dismissal but did not attach a label in terms of the legislation.

40. It was not competence, that is, capability. Mr Morse had no concerns about Mr Giles' ability to do his job.
41. It was not misconduct. There is no suggestion of that.
42. Mr Morse says that he believed that if Mr Giles had an HGV licence, he and Mr Cook could cover for each other, handle the work and undertake the HGV driving without bringing in part-time or subcontract drivers. That would involve Mr Giles increasing his hours from 3 days to 5 days per week.
43. Mr Morse dismissed Mr Giles because he would not apply for an HGV licence.
44. There are two possible potentially fair reasons for the dismissal to consider, redundancy or "some other substantial reason".

Redundancy

45. The background was of financial difficulty. Mr Giles was not replaced. The company has survived.
46. On the face of it, that points to a redundancy dismissal, even though Mr Morse has denied that Mr Giles was redundant.
47. Redundancy requires that rather than simply identifying serious financial pressures, the tribunal has to make specific findings about a diminution in the business need for employees to do work of a particular kind.
48. The contemporary and immediately post dismissal evidence is that there was no such diminution. Mr Giles would have continued to do his job but add two days a week and the ability to cover HGV work or someone would be taken on in his place, with the additional HGV qualification.
49. His own work was still there, he was being asked to undertake an additional role in additional hours.
50. Mr Morse was clear that Mr Giles was not being made redundant. The problem was that he would not do the HGV training. The proposal he made instead was therefore to employ someone else to do Mr Giles' work and more.
51. Mr Giles' work was not diminishing. His role was not redundant.

Some other substantial reason

52. A necessary business re-organisation might justify a dismissal and might qualify as a potentially fair reason for dismissal subject to considerations of fairness and equity.
53. The proposed arrangement here might be seen as a business re-organisation.
54. This is a very small business, and one with some scope for re-organisation both of roles and of business priorities and approaches.
55. As the dismissal letter said, the idea that Mr Giles should increase his hours and get his HGV licence was new, "Beginning this week, we realise...".
56. This was a matter that was dealt with swiftly and without formality, prompted by the bank statement received that week.
57. The dismissal was sudden and unexpected, with short notice, without the formality of an indoor discussion, and without warning or consultation.
58. It was done without consideration of the requirements of employment law.
59. That does not necessarily accord well with a genuine and rational re-organisation, well thought through.

60. The solutions proposed even in Mr Morse's own accounts varied as to whether the future emphasis would be on trading or vehicle repair, and using in-house or casual drivers.
61. The proposed reorganisation was not the outcome adopted. What was described by Mr Morse as the only option was not the option taken forward.
62. While that is evidence arising after the dismissal, it casts doubt on whether the reorganisation described was a settled plan at the time of the dismissal.
63. This does not have the hallmarks of a necessary business reorganisation. It was a quick response to financial difficulties. It did not follow full consideration of alternatives and rational evaluation.
64. In my judgment, it was not a dismissal that is potentially fair as an "other substantial reason" within section 98(2) of the ERA 1996.
65. In my judgment, the respondent has not shown a fair reason for the dismissal.
66. If I am wrong on that, this was a dismissal without a fair procedure or consideration of alternatives.
67. In respect of redundancy, there was no fair selection for redundancy as between the non-management employees.
68. There was no warning about the situation. Mr Giles was not aware that he was likely to face dismissal. There was no consultation.
69. There was no consideration of alternatives to include other cost or wage reductions or work re-organisation to focus on the most profitable areas of the business.
70. Even the basis on which Mr Giles was dismissed suggests that there were other options. Mr Morse was prepared to invest – there would be the HGV fees, the loss of Mr Giles' time during training, and some delay inevitably before he had the licence, together with the increase in his working hours by 40%. That does not point to a dismissal being either the only option or so urgent as to override other considerations.
71. This was a very hasty response to the financial situation. It is not clear that dismissal was inevitable.
72. Having regard to all of that, in my judgment, no reasonable employer would have dismissed in these circumstances.
73. In summary, and by reference to the issues, the respondent has not shown a fair reason for dismissal within section 98(2) of the Employment Rights Act 1996. In any event, the decision to dismiss was not within the range of reasonable responses open to a reasonable employer when faced with the facts, there was no fair procedure used in relation to the decision to dismiss. The claimant would not have been dismissed within the short period of loss at issue, had a fair procedure been adopted.

Unfair Dismissal Remedy

74. Mr Giles did not seek reinstatement or re-engagement.
75. His date of birth is 2/01/72 and his age at dismissal 47.
76. He was 42 in January 2014.
77. He had seven complete years of service, four after the age of 42.

78. The effective date of termination was 29/08/19, based on the fact that he was given two weeks notice and was expected to work his notice.
79. The period of loss starts ends with the start of the new job on 27/01/20.
80. For the basic award, gross pay is £252 per week. For the compensatory award, net pay is £233.38.
81. There was no failure to mitigate his loss. Given his age, dyslexia and lack of qualifications, Mr Giles did exceptionally well to obtain employment by January 2020.
82. There can be no criticism of him for not claiming unemployment benefit. That was abolished a good many years ago, replaced by jobseeker's allowance and then by universal credit. Universal credit is a less generous allowance and on claiming it, tax credits end automatically. Universal credit is less generous in many situations, so the termination of tax credits leaves many claimants worse off.
83. Given that Mr Giles was on child tax credit, it cannot easily be concluded that there was a failure to mitigate his loss by not pursuing a claim for universal credit even if he had met the other qualifying conditions, which cannot be known.
84. The question arises as to whether Mr Giles would have been dismissed anyway over the months after his dismissal, so that his losses attributable to this unfair dismissal would cease. That would be on the basis that once the date was reached when a fair dismissal could have taken place and would have been more probable, the losses would no longer be attributable to the unfair dismissal.
85. That consideration is prompted by the employer's financial difficulties.
86. Given that the thinking at the time involved a substantial increase in Mr Giles' working hours and so an increase in wage outgoings, together with the other costs associated with him training for and applying for his HGV licence, it is not possible to say that a fair dismissal was the likely outcome for Mr Giles such that the period of immediate loss is reduced.
87. The only evidence of financial stringency is the reference to the very recent bank statements showing figures close to the overdraft limit. Mr Morse also referred to the previous year's annual figures, but while that includes the period when Mr Giles was put on reduced working hours, three days per week, it is Mr Morse's evidence that the business picked up again quickly and he offered Mr Giles more hours.
88. There are not grounds in the evidence accepted to project that a fair dismissal was likely within the short period of loss, sufficient to reduce the compensation even on a proportionate basis.
89. There was no written grievance raised in respect of breach of the ACAS Code of Practice, Disciplinary and Grievance Procedures 2015, so no uplift applies.
90. Recoupment does not apply because there was no claim for a relevant benefit.
91. The award was calculated as follows:

Basic award

4 years x 1.5 gross weekly pay at £252 = £1512
3 years x 1 gross weekly pay = £756

Total basic award £2,268.00

Compensatory award

From 30 August to 27 January is 21.5 weeks

Loss of earnings £233.38 x 21.5 = £5017.67

Loss of pension contributions £6.70 x 21.5 = £144.05

Loss of Statutory Rights £250.00

Total losses £5,411.72

Total Award £7,679.72

92. Mr Giles was unfairly dismissed and the tribunal awarded £7,679.72 in respect of the unfair dismissal.

Employment Judge Street

Date 21 December 2020

REASONS SENT TO THE PARTIES ON

.....29 December 2020.....

FOR THE TRIBUNAL OFFICE