



EMPLOYMENT TRIBUNALS

Claimant: Stephen Gardner

Respondent: LKM Recycling Ltd

Heard at: London South (by cvp)

On: 04 January 2021

Before: Employment Judge Housego

Representation

Claimant: Tracey Simler (Claimant's mother)

Respondent: Not in attendance, not represented and sent no submissions or documents.

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant was entitled to a contractual period of notice.
3. The Respondent made unlawful deductions from the wages of the Claimant.
4. The claim for unlawful age discrimination is dismissed.
5. The Respondent is ordered to pay to the Claimant the sum of £10,545.76.

REASONS

Summary

1. Mr Gardner was employed by LKM from July 2015, when he was 16 years old, until summarily dismissed by them on 21st May 2019. He had no other employment, as he had gone to work there straight from school. He worked in LKM's recycling centre. They employed some 46 people. He agrees that on 21st May 2019 he threw a bottle from a working platform 4m high into a waste collection area at ground level about 10m away, because it should not have been there and was a hazard. The Respondent says that this narrowly missed a senior manager, and was gross misconduct in any event, because they say it is plainly unsafe to throw a glass bottle from a platform 4m up. The Claimant

denies that the manager (or anyone else) was nearby. He says this was a pretext to get rid of him after he had been given a warning by his manager for accidentally damaging a new machine a couple of weeks before, because after the company owner heard of it he wanted rid of him, but could not as he had already been disciplined. Also, there were redundancies in the offing, so it was an excuse to shed someone. He was picked on as an easy target, he says, being young, and unlikely to do anything about it. The Respondent says this had nothing to do with it, and this was an act of gross misconduct for which summary dismissal was reasonable.

2. In addition, Mr Gardner claims that when he was promoted to supervisor in September 2018 his salary did not increase in line with his promoted grade after a 3 month probation period, as he had been told would happen. LKM say that Mr Gardner was not given the grade because he failed to complete his probationary period in the role, and so was never entitled to an increase. Mr Gardner says that it was 3 months' probation, and that he was never told that he had not passed it until after he was dismissed, and that after 3 months he asked for his pay rise but was fobbed off.
3. Whether the dismissal was fair or unfair, Mr Gardner says that he was entitled to notice pay.

What the Tribunal has to do, and how it has to go about it

4. The first task of the Tribunal is to find facts. It does this after considering the evidence, both oral and documentary. It is up to Mr Gardner to prove that it was more likely than not to be as he says.
5. For discrimination, the dismissal must not in any sense whatsoever be to do with Mr Gardner's age. He has to show facts from which the Tribunal might think it was to do with his age, and if he does so then it is for LKM to show that it was not.
6. The Tribunal then has to consider what the reason for the dismissal was. LKM says it was conduct, which is a potentially fair reason for dismissal. If the Tribunal agrees that it was conduct, then the Tribunal has to decide whether it was fair or not. No one has to prove anything for this part of the decision, and it is for the Tribunal to assess whether it was fair or not, looking at the size and resources of LKM and all the circumstances. What the Tribunal cannot do is decide what it would have done – it decides whether or not a reasonable employer could have come to the same conclusion as LKM did. If the Tribunal does not find that it was a reason connected with conduct it follows that Mr Gardner was unfairly dismissed.
7. If the reason was conduct but the procedure was unfair the Tribunal has to work out what would probably have happened if a fair procedure had been followed, and apply a percentage chance of a fair dismissal (from 0 to 100).
8. If the Tribunal decides that the dismissal was unfair it also has to decide whether what happened was in part the result of blameworthy conduct by Mr Gardner which caused or contributed to his dismissal. If so, the Tribunal must consider reducing any compensation (by up to 100%).

9. For the claim for unpaid wages, it is for Mr Gardner to provide evidence to show that he was entitled to the pay rate he claims, as a matter of contract: in short that it is more likely than not that he is owed wages, and why, and to show how much he would be owed if he succeeded in his claim for unpaid wages.

The evidence considered by the Tribunal

10. Mr Gardner gave oral evidence and answered questions. The Tribunal read the claim form and the response. There was no file of documents, which, at the hearing on 24th April 2020 the Tribunal had ordered the Respondent to prepare. Mr Gardner provided copies from Luke Richards of LKM, the dismissal letter of 21st May 2019, and another of 31st May 2019 after Mr Gardner had appealed that dismissal. Mr Gardner had not heard from the Respondent since the case management hearing of 24th April 2020, which was held by telephone, when Luke Richards appeared for LKM. On 24th April 2020 there were various orders made (the same day and set out during the hearing) about documents and witness statements. These were uncontentious and largely made by consent: the Order says so.

What Mr Gardner says

11. Mr Gardner agrees that he got a disciplinary warning on 09th May 2019. He says that this was after he had caused damage to a new piece of machinery on 07th May 2019. He says this was accidental, and he wasn't allowed representation at that disciplinary meeting, and that there wasn't proper investigation into what happened, and he wasn't given the opportunity to set out his explanation properly.
12. His claim form says that on 21st May 2019 he was at work, and that he threw a bottle, but not at a manager, or anyone else. He says that he threw the bottle down to ground level from the picking platform to the bay where it should have ended up, because it was obstructing the walkway and should not have been there. He says he was not trying to hit anyone, and no one was in range, or in the building other than the colleague who was with him on the picking line 4m up. He thought the manager was not in the building, and he had been talking to him shortly before and it was a normal conversation so there was no reason for him to do such a thing. He says that (only) a colleague, Luke Butler, was present, but his colleague was never asked about it. Nor, he says, was he shown any cctv, although he asked for it 3 times.
13. Luke Richards dismissed him, and Mr Gardner says that he had made his mind up in advance of the disciplinary hearing (the dismissal letter was on the desk at the meeting which was only a couple of hours later). He says that when he wrote in to appeal Luke Richards asked him to write in to confirm this, but his first letter made it clear that he wanted to appeal, so he felt he was going to be denied a proper appeal and so started this action.
14. Mr Gardner says that he thinks that as there were several employees made redundant soon afterwards, and others put "*at risk*" of redundancy this was used as a pretext to get rid of him, particularly as he was young and so he thinks they assumed that he would not query his dismissal.

15. There was no documentary evidence about the pay claim, other than Mr Gardner's oral evidence.

What LKM say

16. Mr Gardner threw a glass bottle off a 4m platform which nearly hit a manager, and that is gross misconduct whether aimed or not. They have cctv footage of it, which they have looked at. He was taken to the office on the same day and dismissed and asked to sign a letter about it, but he refused to do so. They say in their ET3 that they have a witness, but do not say who, or what that witness might say. The ET3 offers sight of the cctv, but it has never been provided.

17. They say that Mr Gardner has always been paid in accordance with his contract, and that there was never any contractual right to a pay increase for what he was doing for them. He was given a trial as a supervisor but did not perform, they say, and so he was not actually promoted at all.

The Hearing

18. Given the present situation this was a virtual hearing. There was no attendance by LKM, which had failed to comply with any of the directions made on 24th April 2020, and had not contacted the Tribunal since then. Mr Gardner and Ms Simler had some difficulty with getting access to the virtual hearing. While this was being resolved I telephoned (at 10:30) the mobile phone number given on the response (ET3). It went to voicemail. I did not consider it appropriate to leave a message. I emailed the email address given in the ET3 (of Luke Richards). That email stated that I was the Judge in this hearing, which was now taking place, and that if there was difficulty with accessing the hearing he should contact the Tribunal clerk, whose direct telephone number and email address I supplied. There was an automatic acknowledgement response from Luke Richard's email address so that email was received. The technical issues took until about 12:30 to resolve. There was no contact from the Respondent. The Tribunal decided to proceed. As the claim was lodged on 20th August 2019, LKM ought, even if they did not know of the hearing, to have enquired. They had not complied with the directions of Judge Sage made on 24th April 2020, of which they knew, as they were made during that hearing, which Luke Richards attended as their representative. The Tribunal's view was that it was unlikely that it was technical difficulty which was the reason for non-attendance, and so decided to proceed in the absence of LKM. This did not reduce the requirement of Mr Gardner to prove his claim.

19. Mr Gardner's evidence was given candidly and straightforwardly. The Tribunal asked him to explain many details of his claim and he did so clearly and without prevarication or evasion. He gave straightforward answers to the Tribunal's questions, whether or not those answers assisted his case. His account was consistent over time, credible, plausible, and consistent with the little documentary evidence that was before the Tribunal (for the paucity of which Mr Gardner bore no responsibility).

20. The hearing ended at about 4:30pm, and there was no contact from LKM during the day.

What happened (facts found)

21. The summary sets out matters. In a little more detail, LKM takes in waste, for which it pays, to segregate and process and then sell on for recycling (principally) aluminium and uPVC. The materials arriving are sorted into waste, uPVC and aluminium. The uPVC and aluminium are shredded, baled and sold on. The rest is waste which goes to landfill. Much of the uPVC is old double glazing and so there is waste glass. People also get rid of other things like mattresses in loads (which affects the price paid for the load) and so there can be quite a lot of waste. On arrival the loads are piled up in an external open fronted bin, and an industrial grab is used to take the material up and into a platform inside the facility, which leads to a shredder. This sorting platform is about 4m above ground level, and is where the external grab deposits the waste, through an aperture in the wall. The material moves along the sorting belt before it goes to the shredder, and that was where Mr Gardner was working on 21st May 2019. After sorting, the uPVC, or aluminium – they are processed separately – is shredded, the valuable material going to one ground level concrete floored open fronted bin, the waste to another. This is an outline only, and doubtless the Tribunal has not got all the details entirely accurate. It is enough that there is a sorting process, carried out 4m up, and that the aim is to process irregular shaped waste into shredded material which can be baled and taken off on lorries to be reprocessed, including to Germany.
22. This is a noisy and dusty environment, with masks and ear defenders needed. It is inevitably messy, with Bobcats used to shovel the stuff about, and grab cranes used to move the unprocessed material.
23. Mr Gardner had been with LKM from the age of 16. In September 2018 he was promoted to supervisor on a 3 month trial, with the promise that his pay would rise by £0.90 an hour if he was satisfactory in the role. After 3 months he asked for his pay rise, but was fobbed off. He was never told that he had not performed well, and he was never told that his 3 month probation had been extended, or failed, or that he was no longer a supervisor. He received no formal appraisal after September 2018 (the Tribunal did not explore whether he was given appraisals before September 2018).
24. On 07th May 2019 Mr Gardner was using the grab to move material. He moved the grab over a new machine, another shredder, bought to try to speed up processing of material inside by making the material which was to be put inside the processing centre smaller. It had only been there a couple of weeks. Mr Gardner inadvertently lowered the grab, so that it landed on top of this machine, damaging its rams. On 09th May 2019 Luke Richards gave him a warning at a meeting. There was no discussion at that meeting, and no prior investigation, and this was to communicate a decision.
25. On 21st May 2019 Mr Gardner was working as he described and threw the bottle – a large one, a 2 litre one perhaps - into the waste bin some 10 m away. The waste bin had been emptied by the bobcat, and so the bottle hit the ground and smashed. He did not see anyone else in the facility and there was only one other person working in it at the time, on the picking platform with him. It is not said that anyone shouted at Mr Gardner, and at no time has

LKM said how it became aware that Mr Gardner had thrown the bottle into the waste bin area.

26. We find as a fact that the bottle did not “*narrowly miss*” anyone.
27. Within 2 hours Mr Gardner was visited in the facility by Luke Richards, who told him to come with him to the office. He did not say why. He said only words to the effect of “*What have you done now?*” with what Mr Gardner thought to be a sarcastic laugh.
28. There was a letter on the table. Mr Richards spoke to Mr Gardner, who thought he was being given another warning. He was not allowed to speak. He was told to sign the letter which had been prepared in advance. It stated:

“On Tuesday 21st May, you threw a glass bottle towards a senior manager. This had the potential to cause serious harm or injury to the person in question.

Please note that this total disregard for personal safety and the aggressive intent that has been shown towards a senior manager is unacceptable and will not be tolerated. This act is less than two weeks after a written warning has been given to you for damaging plant.

I have decided that your conduct constitutes gross misconduct is being treated as gross misconduct.

Your employment has been terminated as of immediate effect, you will be paid up until the end of 21st May and any holiday owed will be taken into consideration.

A signature is required by all parties involved as recognition of this.

In line with company procedures, you have the right to appeal against this decision. If you wish to appeal, please write to Luke Richard at the below address within five working days of receiving this letter, stating the grounds from your appeal

Regards,

Luke Richards

(sic)

29. Mr Gardner wrote in, to appeal, in the manner indicated.
30. By letter of 31st May 2020, Mr Richards wrote to Mr Gardner. He said that on 21st May 2019 Mr Gardner was not called to a disciplinary meeting, but was called to a meeting at which he was to be dismissed. He stated that the employee handbook had a section on gross misconduct which was not exhaustive. It said that LKM expected “*the highest standards of self control and abide by Health and Safety.*” It bullet pointed two matters, physical aggression, including threatening behaviour or abusive language, and negligence which causes, or might cause, serious unacceptable loss, damage

or injury. It stated that the bottle landed 6 feet behind another member of staff. It stated:

“We have no choice but to uphold our original decision of gross misconduct.”

It continued:

“If you would still like to proceed with a formal hearing now you have this information, please provide confirmation in writing.”

31. It also stated:

“After speaking with your line manager regarding the supervisor position I have discovered the following. There has been no promotion to supervisor, you were given a trial at the role and it was discussed that if you could prove and complete all supervisory tasks, we would look to make you a full-time supervisor.”

32. Mr Gardner, having spelled out why he wanted to appeal in his first letter decided that he was not going to have a meaningful appeal and started this case.

33. After his dismissal, other colleagues told Mr Gardner that the man who owned LKM told them that he wanted Mr Gardner dismissed, but that it was too late as he had already been given a warning.

34. LKM later said that Mr Gardner could see the cctv if he came to the office to watch it. Mr Gardner did not do so, feeling intimidated by the prospect, and during the Covid pandemic felt this inadvisable.

35. In making its findings of fact the Tribunal has given full weight to the contents of the ET3: which states that the probation period as supervisor was extended as Mr Gardner's manager was, it is claimed, not happy with his progress into the role, that cctv evidence can be provided, and that LKM had a witness (unnamed) to the incident, and that they were happy to provide a witness statement. No evidence of any sort has been provided by LKM.

36. Mr Gardner did not claim any state benefits before getting a new job 8 weeks later, which was paid at £115 a week less than with LKM. After 19 weeks he then succeeded in getting different job, in which he earns more than when he was at LKM.

37. Mr Gardner was a member of a pension scheme for LKM, with an employer contribution of £9.23 weekly.

Conclusions

38. The decision to dismiss Mr Gardner was made before he was called to a meeting on 21st May 2019: Mr Richards' letter of 31st May 2019 says this was the case. The dismissal letter was prepared before the meeting started. That meeting was within a very short time of the bottle being thrown to the bin. Mr Gardner did not know what the meeting was to be about until Mr Richards

spoke to him. Mr Gardner was not given his right to be accompanied. No one spoke to the colleague who was working with him.

39. The letter of 31st May 2019, in response to an appeal letter states, in terms, that the decision that it was gross misconduct was upheld. There was no possibility of a proper appeal. Mr Richards, having dismissed Mr Gardner then, after receiving an appeal and without a hearing, told Mr Gardner that the decision that it was gross misconduct was upheld – the appeal was as predetermined as the dismissal.
40. LKM has never provided a disciplinary policy, and Mr Gardner says that he has never been provided with one, evidence the Tribunal accepted as true.
41. The cctv has never been shown to Mr Gardner, or to the Tribunal. If it showed what LKM claimed it would have been easy to send a video file, or even some stills from it. The identity of the senior manager said to have been endangered has not been disclosed by LKM in these proceedings, although presumably it was David Martin. No witness statement has been provided by Luke Richards, the senior manager said to have been endangered, or by anyone else.
42. The letter of dismissal makes reference to the warning 2 weeks beforehand. The Tribunal finds that Mr Gardner's deduction (based on the evidence to him of his colleagues, who he had not asked to give evidence, reasonably in the Tribunal's view, expecting that they would suffer retribution if they did so) is correct. The bottle incident was a pretext to get rid of Mr Gardner after the accidental damage to the new shredder.
43. The Tribunal has taken full note of the fact that usually throwing a big glass bottle from 4m up a distance of about 10m to smash on a concrete floor would be misconduct at some level. However this is not an Astra-Zeneca laboratory. It is a noisy dusty factory workplace where things like old uPVC windows and old car wheels are taken in and mechanically dismantled, their plastic and aluminium shredded into small bits to be baled and recycled. The source material is waste, mixed in with all sorts of other non-recyclable waste, even to the extent of mattresses. The picking belt is moving. The bottle should not have been on the walkway. It was round and plainly would be a dangerous thing to have underfoot 4m up. LKM has not said what Mr Gardner should have done with it. It is fanciful to suggest that he should have stopped the person outside loading more with the grab up into the building and onto the belt, stopped the belt and walked to the steps, down them, placed the bottle in the bin and walked back up and then told the grab operator to resume and then restart the line. There is no evidence of anyone being in danger at any time. An allegation is not evidence. The whole thing was a trumped-up pretext to get rid of Mr Gardner for causing (no doubt expensive) damage accidentally to the new external shredding machine.
44. As Mr Gardner suggests, it may also have been coloured by the fact that people were going to be made redundant, so that to dismiss Mr Gardner would remove the need to make someone redundant, and to pay a redundancy payment.

45. The Tribunal looked first at the age discrimination claim. Mr Gardner felt that the bottle was a pretext to get rid of him for the accident 2 weeks before. That is unconnected with his age. He thought it might be to reduce the staff by 1 to avoid a redundancy payment. That is not to do with his age (and at 20 his redundancy payment would be less than if he was over 21 or over 40). He thought it might be that LKM thought that being younger he might not object as someone older might. The Tribunal considered that to be speculation not founded on any evidence, and so not a reason why LKM should be called on to explain. Accordingly, the claim for age discrimination fails.
46. The reason for dismissal was not the conduct of Mr Gardner on 21st May 2019. LKM have not shown a potentially fair reason for dismissal. The dismissal is therefore unfair. The procedure was unfair also: no notification of the reason for the meeting, not allowed to be accompanied, no evidence provided, a predetermined decision, no reference to any policy or Acas code. Mr Gardner had no opportunity to say anything (because it was decided that he was to be dismissed before he was called to the meeting on 21st May 2019. An appeal was dismissed without consideration.
47. Had a fair procedure been followed there would have been no dismissal: there was a predetermined decision to dismiss Mr Gardner for another reason: this was a pretext, not a genuine reason.
48. Mr Gardner's conduct did not cause or contribute to his dismissal, because the reason for the dismissal was not the bottle at all, but the accidental damage 2 weeks before, for which he had already received a warning, or was to avoid dismissing someone and paying that person a redundancy payment.
49. For these reasons there is no deduction from the compensatory award.
50. The Tribunal considered whether there should be an uplift to the compensatory award for failure to follow the Acas Code. There was but one meeting, on 21st May 2019, and that was only to tell Mr Gardner that he was being dismissed. There could not be a more egregious failure to follow the Acas Code, and the Tribunal could do no other than increase the compensatory award by 25%.
51. The claim under S13 of the Employment Rights Act 1996 succeeds. The Tribunal accepts Mr Gardner's evidence as truthful. After his 3 month probationary period he should have been paid more. That was a contractual right, whether or not documented. Mr Gardner was never told that he was not performing satisfactorily, or that he had failed and reverted to his previous role. The ET3 accepts that Mr Gardner was promoted: *"With regard to Stephens pay, this was never increased as his probation period was increased due to his line manager not being happy with his progress into his potential role."* (sic). The dismissal was in May 2019, the promotion September 2018, 9 months beforehand.
52. Mr Gardner was entitled to a notice period (because he was not guilty of gross misconduct) but no award is made for that period as it is within the period of loss of earnings from the date of dismissal.

Awards

53. The basic award is for 3 years' service (even with 3 weeks' notice he would not reach 4 years' service). He was under 21 for all his service at LKM, and so gets $\frac{1}{2}$ a week's pay for each of those years. He was paid £578 weekly, gross (and £460 net). $3 \times \frac{1}{2} \times £578 = \underline{\underline{£867}}$.

54. The compensatory award comprises:

54.1. Loss of pay 8 weeks until new job: £460 x 8 =	£3,680.00
54.2. Loss of pay 19 weeks at lower rate of pay: £115 x 19 =	£2,185.00
54.3. Pension loss: 27 weeks (19+8) at £9.23 week =	£249.21
54.4. Loss of statutory industrial rights -	£500.00
54.5. Costs of seeking employment (fuel for car) -	£20.00

55. These total **£6,634.21**. 25% of that sum is **£1,658.55**. Adding the two gives a compensatory award of **£8,292.76**.

56. The S13 claim is for £0.90 an hour for 55 hours a week, for 28 weeks (December 2018, 3 months after promotion in September 2018, to 21 May 2019). $£0.90 \times 55 \times 28 = \underline{\underline{£1,386.00}}$.

57. Accordingly the total the Respondent is ordered to pay to the Claimant is $£867.00 + £8,292.76 + £1,386.00 = \underline{\underline{£10,545.76}}$.

Employment Judge Housego
Date: 06 January 2021