EMPLOYMENT TRIBUNALS

Claimant: **Mr B Abbott**

Respondent: **Metrow Foods Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **Tuesday 9 March 2021**

Before: **Employment Judge A Cheunviratsakul**

Representation:

Claimant: In person

Respondent: Did not attend

JUDGMENT having been sent to the parties on 18 March 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant, Mr Barry Abbott, was employed by the Respondent, Metrow Foods Limited, as a Restaurant Supply Driver from 14 November 2016 until his dismissal without notice on 11 August 2020.

2. The Claimant claims that his dismissal was unfair within Section 98 of the Employment Rights Act 1996. The Respondent has not contested the claim today.

3. The Claimant represented himself and gave sworn evidence. I considered the documents submitted to the Tribunal in advance by the Claimant.

Preliminary Matters

4. The Respondent did not attend the hearing. The claim form and ACAS documentation were sent to the correspondence address of the Company Secretary. Further Tribunal correspondence as regards the final hearing was sent to the registered company address. The company is still active.

5. I am satisfied that proper steps were taken to inform the Respondent of this claim and therefore proceeded in the Respondent's absence today.

Issues for the Tribunal to decide

6. Having dealt with the preliminary matters, I agreed with Mr Abbott the issues for me to decide, namely in relation to unfair dismissal, (1) what was the principal reason for the dismissal and was it a potentially fair one. (2) If so, was the dismissal unfair within the meaning of Section 98(4) of the Employment Rights Act and whether the Respondent acted reasonably or unreasonably in treating it as sufficient reason for dismissal and whether the procedure followed was fair. (3) If the dismissal was procedurally unfair, what adjustment if any should be made to reflect the possibility that the Claimant would have been dismissed if a fair and reasonable procedure had been followed, and (4) whether there should be any increase in compensation for failure to comply with ACAS codes.

7. As regards the issues in relation to wrongful dismissal, whether the dismissal was wrongful and if so, what is the Claimant entitled to for failure to give required notice on termination of employment. In relation to holiday pay, (1) what is the Claimant entitled to under his contract for holiday pay accruing in the leave year proceeding the termination and (2) what is the Claimant entitled to for holiday pay carried over from the previous leave year.

Findings of Fact

8. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point, references to page numbers are to the agreed bundle of documents.

9. The Claimant Mr Abbott was employed by Metrow Foods Limited as a Restaurant Supply Driver from 14 November 2016 until 11 August 2020.

10. Between March 2020 and August 2020, communications between the Claimant and the Respondent were as follows:

11. On 20 March 2020, two days before national lockdown measures came into place, the Claimant received a text message from one of his managers, Bruce Hodges, instructing him not to come into a pre-organised meeting to discuss trading in light of the coronavirus pandemic. The Respondent is a company supplying the restaurant industry, whose trade was significantly affected at the time. The text message from Mr Hodges indicated that they would reconvene when the situation was clearer. The Claimant replied to this message two days later, thanking Mr Hodges for the update. On 2 June, the Claimant received a text from Mr Hodges touching base and asking for recipients to acknowledge receipt of the message that indicated employees were to be given notice of a gradual phasing back into work on an individual basis. The Claimant replied to this text message on the same day roughly one hour later.

12. On 31 July, the Claimant received a text message from Stuart, the Respondent's Transport Manager. The message asked if the Claimant was still working for them or whether he had found other employment. The message indicated that work was starting

to pick up and that the Respondent did not know if the Claimant wanted work. The Claimant replied the same day and stated that he was still about as and when needed.

13. On 11 August Mr Hodges sent a text message to the Claimant stating, "We are finishing you from Friday 7 August, despite several attempts to reach you and recall you off of furlough we have been unable to reach you, we can therefore only assume you have employment elsewhere or no longer want to work at Metrow". The Claimant immediately replied to this message indicating that he had received only the 2 June and 31 July texts and asked for evidence of previous attempts to contact him.

14. Later on 11 August, Mr Hodges sent a screenshot of one attempt to call a contact in his phone named 'Work, Barry Abbott' with a further message saying, "straight to voicemail". The Claimant replied to this message indicating there was a link between the text of 31 July asking for availability and the furlough scheme changing in August to include a requirement for employer contributions. The Claimant questioned the fact that the Respondent appear to have taken one unanswered call as demonstrating the Claimant was no longer employed by Metrow. Mr Hodges replied to this message asking where the Claimant's response to Stuart was. The Claimant responded by screen-shotting his text conversation with Stuart which took place on 31 July and sending that to Mr Hodges. Mr Hodges replied by sending a screenshot of five calls to a contact called 'Barry A', three on 5 August at 9:58 lasting two seconds, 10:30am with no time allocated to that call, 10:35am for one second and two on 4 August at 16:40 for three seconds and 16:41 with no time allocated to the call. No voice mails were left on the Claimant's phone on any of these occasions, no emails or text messages was sent to the Claimant post the calls. The calls to Mr Hodges do not accord with the Claimant's incoming calls, a screen shot of which he sent to Mr Hodges on 11 August, when he also indicated he had been on holiday in the first week and questioned why no other method of communication had been attempted. Mr Hodges responded by saying that when the Claimant advised he was on holiday last week, that was the final straw. The Claimant responded asking what holiday had to do with it and reiterated that he had informed Metrow of his availability on 31 July and that the next contact had been a text informing him he was dismissed.

15. On 31 August, one of the Claimant's ex-colleagues, George Charlialou, contacted him on Facebook asking whether the Claimant had been paid for August. The Claimant responded and outlined his position with the Respondent as regards their saying the Claimant had missed calls attempting to get him back from furlough. Mr Charlialou responded on 1 September and indicated that Mr Hodges had said in a message that he had heard Mr Charlialou had quit before furlough ended but that that was not the truth. Mr Charlialou said he had not received no calls, emails or messages.

16. The Respondent company has a policy of paying for any untaken annual leave in the next calendar year as is evidenced by the Claimant's payslips from March 2018 and March 2019. The Claimant was owed nine days from the holiday year 2019 and 13.84 days pro-rata for the annual leave 2020. The Claimant was entitled to 20 days a year leave, which ran from 1 January to 31 December in each year. On average, taking into account overtime, the Claimant was earning £610.83 gross per week, which amounts to £565.30 net. Holiday was paid at £93 gross per day which equates to £76.86 per day net. The Claimant's gross basic weekly rate of pay was £465 which equates to £384.30 net. The Claimant began new employment as an Advanced Driving Instructor on 13 November 2020.

Relevant Law and Conclusions

17. In this case, the fact that the Claimant was dismissed is not in dispute. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for the dismissal within Section 98(2), second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

18. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether, in the circumstances, including the size and administrative resources of the employee's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

19. In misconduct dismissals there is well-established guidance for Tribunals on fairness within Section 98(4) in the decisions in *British Home Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. Burchall helps the Tribunal with a number of matters to consider namely, did the Respondent genuinely believe the Claimant was guilty of misconduct? Did they hold that belief on reasonable grounds? Did the employer carry out an investigation that was reasonable? Did the employer follow a reasonably fair procedure, and if they did was it within the band of reasonable responses to dismiss rather than another sanction such as a warning?

20. The Claimant made oral submissions to me at the conclusion of the hearing which I have considered and refer to where necessary in meeting my conclusions.

20.1 What was the principal reason for the dismissal? On the basis of the Claimant's evidence, I find that the Respondent dismissed the Claimant for purported conduct issues in relation to not answering the telephone whilst on furlough. Conduct is a potentially fair reason under Section 98 of the Employment Rights Act 1996.

20.2 I now have to consider whether the decision to dismiss was fair. In doing so, I have regard to whether the Respondent genuinely believed that the Claimant was guilty of misconduct. I find that the Respondent did not genuinely believe the Claimant to be guilty of misconduct on the basis of failure to answer phone calls. Before the text message indicating dismissal, there had been no communication with the Claimant other than two text messages asking him whether he was available and ready to come back into work when required. The Claimant had responded to these text messages swiftly.

20.3 There was no basis on which the Respondent could have believed in the circumstances that the Claimant was deliberately failing to answer calls recalling him from furlough. No voicemails were left when the calls were made, no emails and no text messages were sent which had previously been the preferred method of communication. Significant doubt is cast on whether calls demonstrated by Mr Hodges were plausible attempts to recall from furlough. On the contrary, in light of the previous communication and

imminent move to employer contributions to furlough it is more likely that the calls were a contrived attempt to allow the Respondent to create an issue in relation to missed calls and construct a conduct reason for dismissal.

20.4 I further have to consider whether the Respondent followed a reasonably fair procedure. The Claimant's evidence is that he was simply informed by text that he was no longer required. If the matter was in relation to conduct, no investigation was carried out. If the issue arose due to a need to reduce staff, no consultation or selection process was followed.

20.5 I heard no evidence as to company procedure in relation to the conduct or redundancy dismissals as it was evident in the circumstances that no such procedure had been followed. There is therefore no evidence on which it is possible to say that if a fair procedure had been followed, the Claimant would have been dismissed. He started his new employment as a Driving Instructor in November 2020. I find that this was a reasonable time period in the circumstances of the pandemic for the Claimant to take to find new employment.

20.6 I find that the Respondent did not follow ACAS guidance in relation to dismissal. Moreover, the Respondent in my judgment, sought to contrive a situation to dismiss the Claimant as quickly as possible without any regard to proper procedure and contrive circumstances in which to do so. In the circumstances, I consider that an uplift of 25% for a failure to comply with ACAS codes should be added to the compensation awards and awards for wrongful dismissal and holiday pay.

20.7 I find that the Respondent did not have a genuine belief in the alleged misconduct relied upon for the Claimant's dismissal and failed to follow a fair procedure in dismissing the Claimant and accordingly that the Claimant was unfairly dismissed.

Notice Pay

21. I find that the Claimant was not given the required notice on termination of his contract. The Claimant had completed three continuous whole years of employment from November 2016 until his termination in August 2020 and was therefore entitled to three weeks' notice which reflects three weeks of his basic pay amount.

Holiday Pay

22. I find that the Claimant was owed nine days contractual holiday pay from the leave year 2019 and 13.84 days pro rata from the leave year 2020. 13.84 reflects the pro-rata amount from 1 January to the end of what would have been the required notice period namely 1 September 2020.

Remedy

23. In relation to the unfair dismissal awards, they are calculated as follows:

Basic Award

£538 (that being the statutory cap) multiplied by 1.5 = £807 multiplied by three weeks which represents three continuous years of service. This is a gross amount and amounts to £2,421.

Compensatory Award

A compensatory award of £538 multiplied by 13 weeks that being the time until Mr Abbott, the Claimant found alternative work as an Advanced Driving Instructor amounting to £6,994. With the ACAS 25% uplift for failure to comply with procedure the total award under this head is £8,742.50.

Notice Pay

In relation to notice, three weeks at the Claimant's basic weekly net rate of £384.30 amounts to £1,152.90. With a 25% uplift for the Respondent's failure to comply with the ACAS codes the total amount for failing to give notice is £1,441.12.

Unpaid Holiday

In relation to holiday pay adding the accrued holiday days from 2019 to the pro rata days of 2020 there is a total of 22.84 days at a net rate of £76.86 per day. That amounts to a total of £1,755.48. With a 25% ACAS uplift the total for holiday pay is £2,194.35.

24. The total amount the Respondent has to pay the Claimant is £14,798.97. Unless otherwise stated, all of these amounts are net.

Employment Judge Cheunviratsakul
Date: 11 May 2021