EMPLOYMENT TRIBUNALS

Claimant: Mr V Caetano

Respondent: Houghtons of London Ltd

Heard at: London South Employment Tribunal **On:** 29 March 2021

Before: Employment Judge Keogh

Representation
Claimant: Mr Abu, Solicitor
Respondent: Ms D Houghton

JUDGMENT having been sent to the parties on 10 April 2021 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

1. This is a claim for unfair dismissal brought by Mr Vitor Caetano against Houghtons of London Ltd.

2. In advance of the hearing I received a bundle of documents and a witness statement of Ms Debbie Houghton for the Respondent. I heard oral evidence from both the Claimant and Ms Houghton. The Claimant was represented by Mr Abu, solicitor, and the Respondent was represented by Ms Houghton.

Facts

3. The Claimant worked for the Respondent's predecessor from 19 January 2004 and for the Respondent from 2017 following a TUPE transfer. Although there was some attempt to provide the Claimant with a written contract of employment at this time, that would not have affected the Claimant's continuous employment which ran from 19 January 2004.

4. An incident occurred on 6 December 2019. A client of the Respondent complained about the Claimant's conduct during the course of a delivery. The client stated that they had a good relationship with the Respondent and

didn't want it to be spoiled by one individual, however if they saw him at any of their sites again they would take it very seriously.

5. The Respondent wrote to the Claimant about the complaint by letter dated 9 December 2019. It was decided that as he could not deliver to any of the client's sites there was no option but to suspend him. The Claimant was advised that the Respondent would contact the client to discuss the situation with a view to persuading them to allow the Claimant to continue to work on their premises. He was warned that it they could not persuade the client to change his mind and there was no alternative employment which could be considered, then his contract might be terminated.

6. On 10 December 2019 the Claimant wrote back contending that the procedures being followed were unfair. He also raised a grievance about pay.

7. An investigation meeting was held on 20 December 2019. The Claimant denied the majority of the allegations against him.

8. After the investigation meeting the Respondent spoke to the client twice and wrote to the client to see if he would agree to the Claimant delivering to the client's sites. The response was, 'Absolutely not.'

9. The Claimant was invited to attend a disciplinary hearing on 7 February 2020. The grievance hearing was held on the same day. The Claimant was due to have a solicitor present, but they could not attend. The Claimant declined to reschedule the hearing.

10. By letter dated 12 February 2020 the Respondent informed the Claimant that it was not possible for the Claimant to continue as a driver. At least one of the client's sites was always on one of the runs operated by their drivers. Alternative employment was offered in a role loading vans. The Claimant was given until 14 February 2020 to decide whether to accept the alternative role, otherwise his employment would be terminated.

11. The Claimant wrote on 13 February 2020 appealing the decision. He noted that the alternative role offered would change his shifts which impacted on his child care commitments.

12. By email dated 19 February 2020 the Respondent asked the Claimant to confirm whether he was declining the job offer, in which case he would be given notice of termination. The Claimant responded that he was not declining, however there was a duty to reply to the points raised in his email.

13. The Claimant altered his witness statement and contended in evidence that his email of 19 February 2020 was accepting the job offered. I find that he was not accepting the job by sending this email. The email does not say that it is accepting the role, it says that it is not declined and the Respondent had to respond to the points raised in the email of 13 February 2020, which included issue taken with the days and hours offered. There was no

subsequent correspondence confirming that the Claimant would like to accept the role.

14. By letter dated 21 February 2020 the Respondent wrote to the Claimant stating that as he had failed to respond to the offer of alternative employment by the deadline given, there was no choice but to terminate his employment. The Claimant was given 12 weeks' notice and he was to be paid in lieu of notice. The request for an appeal was noted and it was stated that an appeal person would be appointed.

15. Due to Covid the appeal was not progressed.

16. There was no further correspondence from the Claimant and in particular he did not write to the Respondent at any point seeking to accept the role offered.

17. Some time was spent during the Claimant's evidence establishing what his weekly net and gross pay were. Eventually an agreed position was reached that the net pay was £196.15 and the gross pay was £199.62 (or £10,380 per year). The two are very similar because the Claimant worked part time and was on a zero tax code, paying only national insurance each month.

18. The Claimant has not obtained alternative work due to Covid.

Issues and Law

19. The following issues arise:

    (i) What was the principal reason for the dismissal? Was it a potentially fair reason within the meaning of section 98 Employment Rights Act 1996? The Respondent contends the reason for dismissal was 'some other substantial reason' (*SOSR*)
    (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and in particular, taking into account the size and administrative resources of the Respondent, did the Respondent in all respects act within the so-called 'band of reasonable responses'?
    (iii) If the Claimant is successful, what compensation should be awarded?
    (iv) Should there be any reduction in compensation as a result of the Claimant's contributory fault or under *Polkey* principles?
    (v) Should there be any uplift in award as a result of the Respondent unreasonably failing to comply with the ACAS Code of Conduct?

20. In a case where a client procures the dismissal of an employee, in deciding whether or not the employer has acted reasonably or unreasonably, the injustice to the employee and the extent of that injustice is an important factor (*Dobie v Burns International Security Services (UK) Ltd* [1985] 1 WLR 43). One question is whether the employer has done everything he can to avoid or mitigate any injustice brought about by the stance of the client. This includes trying to get the client to change his mind, and seeking alternative

work for the employee (*Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 468; *Bancroft v Interserve (Facilities Management) Ltd* UKEAT/0329/12/KN).

Conclusions

21. I find that the reason for dismissal was some other substantial reason, namely that a client had indicated the Claimant could not longer deliver to its sites. The Claimant suggested that the reason for dismissal might be because he had raised complaints about his pay, however I find it highly unlikely that the Respondent would have sought to manufacture the dispute which arose with the client and find it much more likely that the dismissal arose from that dispute. Further, although there were allegations of misconduct raised against the Claimant he was not in fact dismissed for conduct reasons. Following an investigation into the Claimant's conduct the Respondent made efforts to continue his employment by speaking to the customer and finding alternative work for him.

22. In considering whether the dismissal was fair or unfair, I start with the questions raised in *Dobie*, *Henderson*, and *Bancroft.* I find that the Respondent did do everything it could to attempt to mitigate the injustice caused by its client refusing to allow the Claimant onto its sites. The client was spoken to more than once and a letter written to see if the client would change his mind. Further, attempts were made to find alternative work which would suit the Claimant, namely a loading role.

23. I find that two factors made the dismissal unfair. First, the Respondent did not progress the Claimant's appeal. Second, the Respondent did not hold open an alternative position until such time as the appeal against dismissal was concluded, and did not revert to the Claimant as to his enquiries about the days and times the alternative role could be worked. In the circumstances I find that the dismissal was procedurally unfair, and the Claimant's claim for unfair dismissal succeeds.

24. I have considered whether a reduction should be made to any award as a result of the Claimant's contributory fault. I have concluded that no reduction should be made in that regard. No conclusion was reached by the Respondent as to whether there was misconduct on the part of the Claimant and he was not dismissed for that reason. I have not been invited to conclude that there was culpable misconduct.

25. I then considered whether, applying *Polkey*, there should be a reduction in any award made taking into account the likelihood that the Claimant would have been dismissed had the procedure been fair. In assessing this I have considered what was likely to have happened had an appeal taken place. It appears likely that the Respondent would not have been able to return the Claimant to his driving role. However, there is some chance that, faced with that conclusion, the Claimant may have accepted the role offered or may have negotiated for a loading role with hours that suited him better. I find

that there was a 25% chance that dismissal might have been avoided. I therefore reduce the compensatory award by 75%.

26. Finally, I have considered whether there should be any increase in the award for an unreasonable failure of the Respondent to follow the ACAS Code of Conduct. I do not consider it relevant to the claim that the Respondent did not progress the Claimant's grievance. That was not to do with his dismissal. The Respondent did however fail to progress the Claimant's appeal against dismissal in breach of the Code. I have considered carefully the reasons given for this by Ms Houghton. The appeal was not progressed due to the lockdown, which led to a dramatic reduction in the Respondent's business. It reduced its staff from 50 to 8, putting the remainder on furlough. It was a struggle to keep the business running. In those circumstances, although the failure to provide an appeal rendered the dismissal procedurally unfair, I do not find that the Respondent acted unreasonably in the circumstances. I therefore do not award an uplift.

27. In calculating the compensation due to the Claimant, I first consider the basic award. No basic award was included in the Claimant's Schedule of Loss however Mr Abu confirmed that the Claimant did intend to claim it. I observe that it would have been of great assistance if this had been included, as it took some time to establish the Claimant's gross pay, and I have not had the benefit of calculations being made in advance which has lengthened the time required to give this judgment.

28. The basic award is 1.5 weeks' gross pay multiplied by the number of years' service over the age of 41, and 1 week's gross pay for the number of years' service less than that age. The Claimant had 10 years' service over the age of 41 and 6 year's service under that age. The calculation is therefore:

    10 x 1.5 x £199.62 = £2,994.30
    6 x 1 x £199.62 = £1,197.72

    Total **£4,192.02**

29. In calculating the compensatory award due to the Claimant I have considered whether the Claimant has mitigated his losses and the date by which he could obtain alternative work. The Claimant seeks compensation for 24 weeks following this hearing.

30. No evidence was given about the Claimant's efforts to mitigate his losses, save that he has not been able to find alternative work due to Covid. Given that the Respondent has had to place the majority of its staff on furlough and similar businesses will no doubt be in the same position I do not find it unreasonable that the Claimant has not managed to find alternative work. However with lockdown due to ease soon it is anticipated that the Claimant should be able to find alternative work soon. I award 12 weeks' compensation from the date of this hearing.

31. The Claimant was given 12 weeks' pay in lieu of notice so there is no compensation due for the first 12 weeks of his unemployment.

32. The period from dismissal on 21 February 2020 to today's date, less 12 weeks, is 45 weeks.

33. The compensatory award is therefore as follows:

    Past loss = 45 weeks x £196.15 = £8,826.75

    Future loss = 12 weeks x £196.15 = £2,353.80

    Total = £11,180.55

    Less 75% *Polkey* deduction = **£2,795.14**

34. In his Schedule of Loss the Claimant seeks legal costs of £350. I do not consider this to be a case where the Respondent has acted unreasonably in defending the proceedings and do not consider it appropriate to award costs.

35. The total award to the Claimant is therefore **£6,987.16**.

Employment Judge Keogh

21 June 2021