EMPLOYMENT TRIBUNALS

Heard at:	Southampton (by video)	**On:** 2 July 2021
Claimant:	Mr James Dalton	
Respondent:	Sapphire Vehicle Services Limited	
Before:	Employment Judge Fowell	
Representation:		
Claimant:	In person	
Respondent:	Mr S Doherty of counsel	

JUDGMENT

1. The complaint of automatically unfair dismissal under section 100 Employment Rights Act 1996 is dismissed.
2. The complaint under Regulation 13 Working Time Regulations 1998 in respect of annual holiday pay is upheld but has been conceded and compensation paid by the respondent.

REASONS

Introduction

1. The basic facts of this case are not disputed and so I will set them out fairly fully at the outset. Mr Dalton worked for the company as a HGV Technician until his dismissal on 4 March 2020. He says that he had an accident at work in January or 2019. It was an injury to the rotator cuff, which is the group of muscles and tendons that surround the shoulder joint, keeping the arm bone in the shoulder socket. This happened, he says, when he was using a hammer on a stubborn part of a lorry's suspension. He did not think much of it at the time but later it got worse and he went to the doctors. From there he was sent for an ultrasound scan and then an MRI scan. These appointments needed some time off work, so he kept his foreman, Mr Taylor, informed. He had not put it in the accident book at the time, he says, because he was working on his own, it was a night shift and he did not know where the book was. Later on he realised that this is what he should have done, so he spoke to Mr Taylor about it. Mr Taylor got approval from the Health and Safety Manager, and on 4 July 2019 they added it to the accident book, setting out what Mr Dalton could recall of the incident.

2. But Mr Taylor was suspicious about this. He thought that Mr Dalton was looking to bring a bogus personal injury claim against the company. For a long time nothing was done about it, but in January 2020 Mr Dalton was invited to an investigation meeting. From about that time Mr Dalton was off sick as a result of the injury. At the meeting the records of the day and job in question were produced, but Mr Dalton said they were not the right ones. That was taken as evidence that his account of the accident was made up, as he was then invited to a disciplinary hearing. Mr Wright, the Depot Manager, took the same view, and he was dismissed. Shortly afterwards the first lockdown began and there was an appeal on the papers, after a phone call with the managing director, Mr Perry. The company say that they followed the usual disciplinary process and were satisfied that Mr Dalton had falsified the accident book. Mr Dalton says that he has since found the correct job card, which was for a different day, and that the circumstances of the job were exactly as he described.

3. Mr Dalton only started work for the company in July 2018 and so did not have the two years' service necessary for a complaint of unfair dismissal. Originally his claim was just for accrued holiday pay, something the company conceded at the outset. He then he added a complaint of automatically unfair dismissal for raising a health and safety concern.

4. These facts are drawn from the documents and witness statements provided. The statements including one from Mr Dalton, and on behalf of the company from:
   a. Mr Russell Taylor, the workshop foreman;
   b. Mr Steve Wright, Depot Manager, who carried out the investigation;
   c. Mr David Williams, Group Operations Manager, who took the decision to dismiss; and
   d. Mr Perry Reeves, Managing Director, who held the appeal.

5. At the outset of this hearing I raised a concern about whether section 100 of the Employment Rights Act 1996 (ERA) could apply in these circumstances. It requires, at section 100(1)(c), that the employee:

   > "brought to the employer's attention, by reasonable means, circumstances connected with his or her work which he or she reasonably believed were harmful or potentially harmful to health or safety.

6. In short, the employee has to point out some risk to health and safety, and that requirement raised an obvious question as to whether Mr Dalton did so. I therefore dealt with it as a preliminary issue, taking Mr Dalton's case, as set out in his witness statement, at its highest. The key passages of that statement are as follows:

   2.2 Because the workshop had no power tools, such as hydraulic presses, I had to use manual tools. As per standard working practices, I used an oxy-acetylene burner and a 14 pound 28 inch sledgehammer to remove the spring eye bushes.

   2.3 In order to access the spring bushes on the axle, I had to kneel down underneath

the trailer. McDonald's trailers have a limited area to work, due to the way they are constructed with storage boxes in front and behind the axles.

2.4 When the pin did not move with the hammer I used oxy-acetylene to help movement. Due to the confined space, I had to take another swipe at the axle with the hammer. The hammer glanced off the chassis, causing my arm and shoulder to be thrown to one side, causing instant pain. I rested for a short while, and then carried on to complete the job.

2.5 I was alone in the workshop at the time, and was not aware of anyone else in the area I was working. There was no health and safety representative present on that nightshift; I was acting up as the nightshift supervisor. This was the last nightshift of my 4 day rota, and I was due to be off for 4 days before returning to work on Thursday 31st January.

2.6 I was not aware at that time of where the Accident Book was kept, or the accident reporting procedure, as I had not had cause to use them. I have not been able to read my contract and related documents fully due to my dyslexia, and was only given 2 - 3 hours to read all the paperwork and training notes when I started before being asked to sign. My employers were fully aware of my dyslexia, and often had to correct computer and written work I have done.

2.7 I therefore reported the incident on Thursday 31st January, which was the first available shift after my 4 day off period. This was the first time I saw my Manager after the accident.

2.8 Mr Taylor asked how bad the injury was; I replied that it was possibly just a pulled muscle. Mr Taylor queried whether it should be put in the Accident Book if it was a minor injury; I stated that I thought that was his decision as Manager, and I heard nothing more about it from him. I was not sure whether Mr Taylor reported the accident or not.

…

2.13 Following pressure from me, including telling him that I would have to report the accident to management, Mr Taylor eventually contacted the Health & Safety Manager Gary Long in July, and was given approval to record the accident.

7. I heard brief submissions from each side. Mr Doherty for the respondent agreed that there was little guidance on the interpretation of this section, and referred me to a passage from *Harvey on Industrial Law* at section BII, para. 85:

> "… the employee is expected to behave reasonably. He must reasonably believe that his working conditions or other circumstances are harmful or potentially harmful to health or safety. And he must raise his concerns with the employer by reasonable means. These are potentially litigious points. The employment tribunal must hold the balance between cavalier dismissiveness on the part of the employer and undue sensitivity on the part of the employee."

8. This does not however assist on the question of whether Mr Dalton pointed out a health and safety risk; it deals with cases where the risk *is* raised but perhaps in an unreasonable manner.

9. Mr Dalton made no specific points and was content to leave the question to me.

Conclusions

10. The outcome can be briefly stated. An accident book is the normal place to record injuries, and that can alert the employer to health and safety risks, but that is not the issue in this appeal. It centres instead on whether Mr Dalton was genuinely injured as he claimed, and why he did not record it at the time. The company maintain that the information eventually put in the accident book was untrue, and intended to form the basis of a personal injury claim: Mr Dalton says on the other hand that it was true, and that he was unfairly dismissed as a result.

11. But section 100 does not protect against unfair dismissal in all circumstances involving a health and safety issue. Having an accident is not enough either, nor is pointing out that you have had an accident. The employee still has to point to circumstances connected with his work which were harmful or potentially harmful to health or safety. That may be obvious in many cases from the circumstances of the accident, but Mr Dalton has not suggested at any stage that his accident arose because he was working under such circumstances. If someone says, "I have just cut myself on that machine, it really should have a guard over it," the harmful circumstance is obvious. He would not even have to spell it out. But when the injury is caused by a hammer which he was holding and which unfortunately glanced off another surface, there is no obvious step that the employer could then take to remove the risk, and none has been suggested here. There is some hint of poor equipment at para 2.2 above, with the lack of a hydraulic press, but Mr Dalton goes on to say he used a hammer and an oxy-acetylene torch "as per standard working practices".

12. Overall therefore, and looking at the evidence in the round, I cannot see that Mr Dalton has pointed out circumstances connected with his employment that were harmful or potentially harmful to his health and safety.

13. It is not necessary or appropriate to go on to make any further findings of fact. I note however that no personal injury claim has ever been lodged or explored by Mr Dalton, and while that supports his case that there was never any such intention, and so no reason to falsify the accident book, it also supports the conclusion that there were no harmful circumstances to complain of.

14. I have also considered whether Mr Dalton might have an alternative, viable complaint under section 103A ERA as a whistleblower. This was not argued or even addressed in evidence but as Mr Dalton is unrepresented I take the view that it should be considered, even at the final hearing.

15. That section requires him to make a protected disclosure, i.e. an allegation that there has (on the facts of this case) been a breach of health and safety or a breach of some other legal obligation. As already noted, I do not find that there has been a report of a health and safety failure of any sort, but there is a legal requirement to record incidents in the accident book. The failure to do so appears

to have been the fault of Mr Dalton, although there is a suggestion that lack of training and of time to familiarise himself with things was behind it. Even if the failure to complete the accident book can be regarded as a protected disclosure, any such disclosure has to meet the public benefit test, and here the concern related entirely to Mr Dalton. If he had been saying "there is no accident book at the depot" that might give rise to a wider concern. It might affect the others who worked there, and there is a public interest in companies complying with health and safety legislation. But there was an accident book, and the incident concerned only his own injury. In those circumstances I cannot see any wider interest at all, no matter how much of a concern this was to Mr Dalton.

16. Accordingly, I have to conclude that there is no basis for Mr Dalton to succeed in his complaint of automatically unfair dismissal, and so it must be dismissed. As already noted, the holiday pay claim has been conceded and compensation paid.

Employment Judge Fowell
Date: 25 July 2021

Sent to the Parties: 03 August 2021

FOR THE TRIBUNAL OFFICE