EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103173/2019

Held in Edinburgh on 1 November 2021

Employment Judge A Jones
Tribunal Member R Duguid
Tribunal Member S Gray

Mr A Mackenzie	**Claimant** **In person**
E&M Horsburgh Ltd	**Respondent** **Represented by** **Mr S Maguire** **Employment Law Specialist**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's claims should be dismissed.

REASONS

Introduction

1. The claimant lodged a claim of unlawful deduction from wages and alleged that he was automatically unfairly dismissed either for health and safety reasons in terms of section 100 of the Employment Rights Act 1996 ('ERA')

or for having made a protected disclosure in terms of section 103A ERA. The claimant did not have two years continuous service. Despite a number of attempts to clarify the detail of his claims prior to the final hearing, his claims remained unspecified. The claimant had received advice through the Stirling CAB in relation to his claim in the past but represented himself at the hearing on the merits.

2. It had been agreed previously that evidence in chief of the claimant and the respondent's witness would be given by way of written witness statement. It was therefore surprising that the claimant did not bring either his witness statement or that of the respondent's witness with him to the Tribunal. Further, he did not bring the joint bundle of documents which had been agreed between the parties.

3. The Tribunal established that the claimant claimed he had not been paid all sums due to him by the respondent although he had not specified in advance what sums were said to remain outstanding. No further specification was provided during the hearing. He also claimed that he had been dismissed for raising health and safety issues which appeared to relate to the condition of the buses he was required to drive. Finally he claimed he had made a protected disclosure. The claimant confirmed at the hearing that the protected disclosure he relied on was that on 24 January 2019 he told parents of children for whom he was responsible for driving to school on buses operated by the respondent, that they should complain about the buses as they were not adequate and that on that day the ABS warning light had gone on in the bus he was driving.

Issues

4. Therefore the Tribunal was required to determine the following issues:-

    a. Had the claimant received notice pay and holiday pay to which he was entitled on termination of his employment?

b. Had the claimant been dismissed contrary to the terms of section 100 ERA?

c. Had the claimant made a protected disclosure in terms of section 43B of ERA and if so, was this the reason or principal reason for his dismissal?

Findings in fact

5. The Tribunal makes the following findings in fact:

6. The claimant was employed as a bus driver by the respondent for around 5 months. He was responsible for driving school buses which took primary and secondary school children to and from their schools in the Falkirk area.

7. Prior to commencing his duties, the claimant was required to complete a driver vehicle checklist, the purpose of which was to identify any faults in the bus prior to taking it out and determining whether it was safe to take it out.

8. The claimant did not highlight any faults with his allocated vehicle until January 2019 when, during very cold weather, he highlighted on a number of occasions that the screen wash wasn't working. The claimant took the view on these occasions that it was the weather which was causing the issue and that it would be remedied once the vehicle's engine heated up. The claimant did not raise concerns with anyone regarding the vehicle prior to taking it out on these or any other occasions.

9. It was the responsibility of drivers to ensure that their vehicles had adequate screen wash and this was available in the sub-depot where the claimant was based.

10. The claimant did not at any stage raise with the respondent that he had concerns about the safety of any bus he was required to drive, other than recording issues about screen wash on the relevant form.

11. On 24 January 2019, when driving the bus to pick up school children, the ABS warning light on the vehicle the claimant was driving came on. The claimant

turned the engine on and off again and the warning light was still on. The claimant established that the brakes were still functioning on the vehicle and took the decision to proceed without contacting his control room.

12. At the first stop at which he was to pick up children, the claimant told some of the parents who were accompanying their children that there was a warning light on in the bus, but that the brakes were still functioning. He asked some of the parents whether they were comfortable with him still taking their children to school. He also told the parents who were there that they ought to complain to the local authority and/or the school about the buses operated by the respondent as in his view they were old and not reliable. The claimant also made disparaging comments about the respondent's directors who he said spent money on themselves rather than their fleet of vehicles.

13. The claimant completed his duties without further incident that morning. The claimant then attended the respondent's Livingston Depot prior to his afternoon work. Mr Andy Finlay, who at the time was the respondent's depot manager asked to see the claimant when he became aware of the claimant's presence.

14. A meeting then took place between the claimant and Mr Finlay. Mr Finlay's intention was to find out from the claimant what had happened that morning, as he had received a call from Falkirk Council's Transport Department and been advised that the claimant had made disparaging comments regarding the bus he was driving, the respondent's fleet of buses more generally and the respondent's directors.

15. During the meeting with Mr Finlay, the claimant repeated the comments he had made to parents that morning, to the effect that the respondent's directors were more concerned about spending money on themselves than their fleet of buses. The claimant also mentioned that the ABS warning light had gone on in his bus that morning.

16. Mr Finlay expressed concern at the comments made by the claimant regarding the respondent's directors. He also asked the claimant why if a

warning light had gone off in the claimant's vehicle, he had not contacted the depot for advice. The claimant did not provide any satisfactory answer to Mr Finlay in that regard and repeated his derogatory comments about the respondent's directors.

17. Mr Finlay formed the view that the claimant's comments to parents and then again to him that day had resulted in a break down in trust and confidence between the respondent and the claimant. He informed the claimant that in the circumstances, the claimant would be dismissed with immediate effect. The claimant was then escorted back to his vehicle.

18. After the claimant lodged his claim form, the respondent paid the claimant a week's notice pay and a day and a half holiday pay. The sum of £260 was paid into the claimant's bank account on 17 July 2019.

19. The claimant has not obtained any permanent employment since his dismissal.

Observations on the evidence

20. The claimant's evidence was vague. The Tribunal was surprised that the claimant had not brought the productions he had been provided with or the written statements of himself and the respondent's witness with him to the Tribunal. It seemed to the Tribunal that the claimant had made little in the way of preparations for the hearing. While the Tribunal appreciated that the claimant was not represented and was anxious during the hearing, it was nonetheless concerned that the claimant did not appear to grasp that it was his responsibility to establish his case. While the Tribunal accepted that the claimant genuinely believed that he had been dismissed for raising issues regarding the bus he drove for the respondent, he did not produce any evidence to substantiate this position. He said he had not been paid all sums due to him but did not state what sums were still outstanding. The Tribunal did not accept the claimant's evidence that he had not been aware of the payment made into what he accepted was his bank account by the respondent in July 2019.

21. Further, when the claimant was invited to cross examine the respondent's witness, despite the Tribunal explaining to him prior to the lunch break what that might involve, the claimant appeared unable or unwilling to ask the respondent's witness questions. After encouragement from the Tribunal to put his version of events of the meeting on 24 January 2019 to Mr Finlay, and allow comment from Mr Finlay, the claimant did put to Mr Finlay that he was lying in his version of the meeting. However, the claimant did not challenge any other aspect of Mr Finlay's evidence despite being informed by the Tribunal that if Mr Finlay's evidence was not challenged, the Tribunal may simply accept that evidence.

22. Mr Finlay himself was generally credible and reliable. While the Tribunal had some concerns that his witness statement simply repeated the allegations the claimant had made in his claim form, nonetheless, the Tribunal accepted that his version of the meeting of 24 January 2019 was generally accurate.

Relevant law

Unlawful deductions from wages

23. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless such deduction is required to be made by virtue of a statutory provision, or the worker has previously signified his agreement in writing to the making of the deduction.

24. Section 23 ERA provides that a worker may present a complaint to an employment Tribunal that his employer has made an unlawful deduction before the end of the period of three months from the deduction.

Health and Safety dismissal

25. Section 100 ERA provides that an employee who is dismissed shall be regarded for the purposes of Part X of ERA as automatically unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is one of the grounds set out from section 100(1)(a-e) of ERA. This

includes at section 100 (1) (c) where an employee at a place where there was no representative or safety committee, or where there was such representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

Whistleblowing claim

26. Section 103A ERA provides that an employee who is dismissed shall be regarded for the purposes of Part X ERA as automatically unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

27. Sections 43A-H ERA set out what will constitute a protected disclosure. In summary, there must be a disclosure of information, that disclosure must in the reasonable opinion of the worker making it be in the public interest and the type of information disclosed must come within one of the types set out in section 43B(1)(a)-(f), which includes at section 43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered. The disclosure must be made to the employer or other responsible person, other prescribed person or where in terms of section 43G it is made where the worker believes that the information disclosed and any allegation contained in it, are substantially true, it is not made for personal gain and where one of the conditions of section 43G(2)(a) – (c) are satisfied. This includes where a worker believes he might be subject to a detriment for making the disclosure or he has previously made a disclosure of substantially the same information to the employer. Section 43G (3) sets out the matters to be taken into account when determining whether it is reasonable for the worker to make the disclosure in these circumstances.

28. Section 43H deals with a situation where the disclosure is of an exceptionally serious nature.

Submissions

29. The claimant made very brief submissions, indicating that he had told the truth, that it had meant so much to him to get the children to school each day and that he believed he had been dismissed because he made a protected disclosure to parents. He said he had a strong moral compass and that the loss of his job had been catastrophic for him.

30. The respondent's agent took the Tribunal through the relevant statutory provisions, and recognised that it might have been possible for the claimant to have been unfairly dismissed for having raised questions about the ABS system on his bus either with his employer or with parents but that Mr Finlay had dismissed the claimant solely because of the claimant's attitude towards the respondent's directors. It was highlighted that despite the ABS warning light being on, the claimant had continued to drive children to school and therefore this could not genuinely have been such a potentially harmful matter in the claimant's mind. It was also the respondent's position that raising this matter with parents was not an appropriate way in which to raise such a matter.

31. In terms of the claimant's claim that he had made a protected disclosure, it was said that this was lacking particularity. It had not been made clear in what way the health or safety of the children would have been impacted.

32. Moreover it was said that Mr Finlay had no knowledge of the claimant having raised any safety concerns in the past as the checklist documents went to the engineering department. The raising of the ABS warning light with Mr Finlay was done no more than in passing because Mr Finlay had asked for a meeting with the claimant. It could not be said that the claimant had made any allegations of an exceptionally serious nature and the claimant was not entitled to raise these matters with parents.

33. It was also said that if the Tribunal found in favour of the claimant, the claimant's actions in continuing to drive the bus without taking advice from the

respondent amounted to contributory conduct and that any compensation should be reduced by 100%.

Discussion and decision

34. The Tribunal had no hesitation in dismissing the claimant's claim of unlawful deduction in wages. The claimant had not specified what sums he said he was due and the Tribunal accepted the respondent's position that they had paid the claimant a week's notice and accrued holiday pay once they realised that the claimant did not believe that he had received such payments. The claimant did not thereafter set out what further payments might be due to him.

35. The Tribunal found that the reason the claimant was dismissed was because he continued to make disparaging and derogatory comments about the respondent's directors in the meeting with Mr Finlay. The Tribunal accepted that Mr Finlay had not decided to dismiss the claimant before calling him into a meeting. However, during that meeting Mr Finlay formed the view that the claimant would continue to make allegations against the respondent's directors if he remained in employment and that this could bring the respondent and its directors into disrepute. Therefore the Tribunal was satisfied that the claimant's dismissal was not because he had raised health and safety concerns or had made a protected disclosure to parents regarding the bus he was driving.

36. In any event, the Tribunal found that the claimant had not brought to his employer's attention by reasonable means circumstances connected with work which he reasonably believed were harmful or potentially harmful to health and safety in line with section 100 (1)(c) ERA. The reasonable way in which the issue of the ABS system should have been addressed was either by phoning the depot to seek advice or by completing the relevant paperwork. All the claimant did was mention in passing to Mr Finlay that a warning light had come on when he was driving his bus. If he had thought that this warning light was potentially harmful, the Tribunal was of the view that he would have refused to drive the bus any further and would have sought advice as to his next steps. His failure to do so, which was surprising to the Tribunal, resulted

in the Tribunal forming the view that the claimant did not reasonably believe that there was a risk to the health or safety of the children.

37. Further, the Tribunal concluded that the claimant had not made a protected disclosure. In the first instance, he had not disclosed information to the parents of the children. He had rather disclosed his opinion that the bus he was driving and the respondent's fleet more generally were too old. While the Tribunal accepted that the bus the claimant was driving on 24 January 2019 and which he usually drove was an older vehicle, there was no suggestion that it was not properly maintained or fit for purpose. The Tribunal formed the view that the claimant's previous employment with other larger bus companies which had newer fleets of buses influenced his view that the bus the respondent required him to drive was not up to the standard he would expect. However, there is a significant difference with an employee voicing an opinion that he is being required to drive an older bus and disclosing information that the bus might pose a risk to the health or safety of the children the claimant was required to transport.

38. In addition, even if it could be said that the claimant had disclosed information to the parents, disclosing that information to parents was not a protected disclosure. The claimant said he disclosed the information to parents as nothing had been done about the concerns he had raised previously. However, the claimant did not provide any evidence that he had raised concerns previously. Therefore, the claimant's belief that there was a risk to health or safety of the children was not reasonable, there was no evidence that the claimant reasonably believed that he would be subject to a detriment by the respondent if he made the disclosure to his employer. Therefore it was not reasonable to make any such disclosure, had what the claimant said amounted to a protected disclosure, to parents of children who were being transported on the respondent's buses.

39. In all of these circumstances, the Tribunal concluded that the claimant's dismissal was not unfair, and that he had not suffered an unlawful deduction from wages. Therefore, his claims fall to be dismissed.

Employment Judge: Amanda Jones
Date of Judgment: 05 November 2021
Entered in register: 11 November 2021
and copied to parties