Case Number: V 2305102/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON (sitting alone)**

BETWEEN:

Mr Urbas **Claimant**

AND

EHD London No.1 Bond Limited **Respondent**

ON: **16 and 17 November 2020**

Appearances:

For the Claimant: **In person, by a Polish interpreter, Mr T Gierasimiuk**

For the Respondent: **Mr A Griffiths, Counsel**

Judgment on reconsideration

1. The Claimant's claim of automatically unfair dismissal under ss100 and 103A Employment Rights Act 1996 fail.
2. The Claimant's claim of breach of contract succeeds and the Respondent must pay the Claimant four days' net pay amounting to £424.
3. The Claimant's claim of unlawful deduction from wages succeeds. Remedy in respect of that element of his claim, if not agreed between the parties, will need to be decided at a separate hearing.

Written reasons following a request by the Claimant

Introduction

1. In the course of writing these written reasons I have reconsidered under Rule 70 two aspects of the oral decision I made at the end of the hearing on 17 November. I have decided that the breach of contract and unlawful deductions claims should be decided in the Claimant's favour. My reasons are explained fully below.

2. By a claim form presented on 10 November 2019 the Claimant brought claims of automatic unfair dismissal under ss100 and 103A Employment Rights Act 1996 ("ERA"). As he had less than two years' service at the time of his dismissal, he was unable to bring a complaint under s 98 ERA. He also brought claims in relation to notice pay and unpaid wages in the form of a night shift premium, which were advanced as claims of breach of contract and unlawful deductions from wages.

3. A telephone case management hearing took place before Judge Corrigan on 20 April 2020, following which the Claimant withdrew a claim under s104 ERA.

4. The full hearing took place via CVP over two days and the Claimant gave his evidence with the assistance of Mr Gierasimiuk, a Polish interpreter. The Claimant had no additional witnesses. The Respondent's evidence was given by Bianka Kamarics-Ungvari, the Respondent's transport manager at the time of the Claimant's dismissal, Stuart Phelps, Operations Director and Michael Phelps, Managing Director. All the witnesses had prepared written statements, which I read before the hearing commenced. There was a bundle of documents containing 96 pages and any references to page numbers in these reasons are references to page numbers in that bundle. During the course of the hearing, I was sent a number of other documents including a copy of the Respondent's staff handbook.

The relevant law

5. The relevant law is set out in sections 13, 100(1)(c) and 103 ERA, which provide as follows:

S13

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

S 100

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

……

(c) being an employee at a place where—

(i) there was no [such] representative or safety committee, or

(ii) there was such a 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 or safety….

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

6. A breach of contract claim can be made on termination of an employee's employment by virtue of the Employment Tribunals (Extension of Jurisdiction) Order 1994.

The issues to be decided by the Tribunal

7. There was an agreed list of issues in the case as follows:

Unfair dismissal

a. The Respondent accepts that the Claimant raised a health and safety concern in respect of the load on 9 July 2019 that would meet the requirements of s100(1) (c) Employment Rights Act 1996 and that would meet the definition of a protected disclosure. However, the Respondent does not accept that this is the reason for the Claimant's dismissal.
b. Was the Claimant's protected disclosure the reason or principal reason for his dismissal?
c. Or was the Claimant dismissed for reasons of capability and conduct put forward by the Respondent e.g. after 9 July 2019 the Claimant took unauthorised leave and that this was not the first time he had done so? The Respondent therefore dismissed the Claimant for various reasons and because he was unsuitable for the role.

Wrongful Dismissal

d. The Claimant accepts that he received his one month's notice pay. However, the Respondent deducted 5 days' pay for the Claimant's disputed unauthorised absence from work.

e. Was the Respondent entitled to deduct 5 days' pay from the Claimant's notice pay due to the Claimant's disputed unauthorised absence from work?

f. If not, how much notice pay is the Claimant entitled to?

Unlawful Deductions from Wages

g. What was the agreement between the Respondent and the Claimant regarding a night shift allowance?

h. The Claimant's case is that his contract of employment provided that he should receive an additional £2 per hour for hours worked after 8pm and before 6am, and that save for the first three months of his employment with the Respondent he did not receive this. The Respondent accepts that the Claimant was not paid the additional £2 an hour but contends that this was because the additional sum was only paid when the entire shift fell between 8pm and 6am. In addition, the Respondent contends that it withdrew the night shift allowance payments from all its members of staff in January 2018.

i. If the Claimant is entitled to any further night shift allowance payments, how much is he entitled to?

Findings of fact

8. Based on the claim and response forms, the bundle of documents and the witness evidence I make the following findings of fact.

9. The Respondent is a warehousing, transportation and logistics company. It distributes and transports fine wines and spirits nationally to private individuals and companies. The Claimant was employed as a driver from 23 August 2017 until 5 August 2019, when he was dismissed with immediate effect and given a payment in lieu of notice. The reason for dismissal given by the Respondent in the letter of termination at page 89 was that he was unsuitable for the role.

10. On his appointment the Claimant was issued with the contract at pages 38-45. Clause 4 of that contract stated that the Claimant's working hours were 8.00am to 6.00pm. Clause 6 went on to say that he would receive a shift premium of £2 per hour for hours worked between 8.00pm and 6.00am. The Claimant's case was that this conferred on him an entitlement to be paid an additional £2 per hour for any hour that he worked past 8.00pm. There was no mention of overtime in that contract.

11. It was the Respondent's case that that contract was intended for night shift workers and had been issued to the Claimant by mistake. In its response to the Tribunal claim the Respondent stated that the Claimant usually started his shifts at around 5.00pm, although that does not appear to be borne out by the tachograph records at pages 71-87, which cover the period 1 July to 4 August 2019. I was not shown any records for any period earlier than that.

12. As regards what he was paid, on the basis of the payslips at pages 46-69 I find that the Claimant was paid basic salary only for the first two pay periods of his employment (August and September). In the third month (October) he was paid salary plus overtime, despite the fact that overtimes were not mentioned in his contract. In the next three months, until the end of January 2018, he was paid salary plus overtime plus a night shift premium and one on occasion a bonus. From February 2018 onwards he was paid salary plus overtime, but no night shift premium.

13. There was a meeting between the Claimant, Stuart Phelps and a representative from the Respondent's HR provider, on 7 November 2017, at which it was explained to the Claimant that he had been issued with the wrong contractual terms and was not entitled to a night shift premium, which was a payment only made to night shift workers. The Claimant said in cross examination that this meeting had taken place and that he had been given a new contract to sign, but that he had not agreed to the change. Mr Phelps' recollection of what happened at that meeting was somewhat vague and he was not sure that any revised contract had been given to the Claimant. It was in fact the Claimant and not the Respondent who produced a copy of the revised contract (it was not in the bundle), but neither party had signed it. The revised contract contained a right to overtime, but no right to a night shift premium. I find as a fact that the Claimant did not sign and return a copy of the revised contract.

14. The Claimant was cross-examined about his working hours and I find as a fact based on that cross examination that although the Claimant sometimes worked past 8.00pm, he normally worked shifts that consisted of predominantly daytime hours. He did not start shifts on or after 8.00pm or work the majority of his hours after 8.00pm. He was not therefore a night shift worker in the ordinary meaning of that term, although I note that the term was not defined in the Claimant's contract of employment. I accepted the evidence of Stuart Phelps that the Claimant was paid for an eight hour shift irrespective of whether he worked fewer hours than eight during the shift, but that he was paid overtime if he worked in excess of 8 hours.

15. Having considered the drafting of the contract originally issued to the Claimant I find as a fact that it was a term of the contract issued to him when he began his employment that for hours worked between 8.00pm and 6.00am he would receive a night shift premium of £2 per hour. I do not think there is any ambiguity about that in the first paragraph of clause 6 of the contract. There is nothing in the contract that indicates that the premium was dependent on him being designated a 'night shift worker'.

16. The question therefore is whether that contract was validly varied to remove the right to the premium. Having reconsidered the evidence I find that it was not. When I gave my oral judgment, I was persuaded that the Claimant had agreed to the variation of his contract because he had accepted overtime payments after the meeting on 7 November 2017. However, on revisiting the documents I have noted that overtime payments were being paid to the Claimant before that meeting, as noted above. I am also perplexed by the fact that three-night shift premium payments were made to the Claimant after the meeting.

17. It is for the Respondent to show that it validly varied the Claimant's contract to remove an entitlement to the £2 per hour night shift premium and I am not satisfied that the Respondent has shown that. The picture is confused, and I accept the Claimant's evidence that he did not agree to the change. He did not, I find, start to accept overtime payments only after the 7 November meeting took place, and I have therefore reconsidered my previous finding that he had accepted overtime in lieu of the night shift premium. As noted, the Claimant did not sign or return the new contract and there is no evidence that the Respondent had followed this up. I therefore find as a fact that the Claimant's contract was not validly varied to remove the entitlement to night shift premiums.

18. I turn now to the events occurring in the run up to the Claimant's dismissal. The Respondent stores intermediate bulk containers (IBC) for several clients. These are large format plastic containers used in the industry to store alcohol prior to bottling. On 9 July 2019 the Claimant was required to transport nine "CASL, 1000 1 containers" filled with 96% ethanol, labelled as explosive material, to one of the Respondent's clients. The Respondent was accustomed transporting these containers for clients but generally the

contents are of a lower alcohol by volume ("ABV"). On this occasion the ABV contained in the IBC was over a certain level and should have been distributed by an approved transporter. Upon arrival at the client's address the Claimant was told by the client that he could not unload the load because the vehicle he had used was unsuitable, he did not possess the necessary qualification to transport the load, and the material itself was unsecured. This caused the Claimant a great deal of concern, for his own safety and that of other road users, and a concern that the law had been violated.

19. The containers were eventually unloaded after intervention by the Respondent and thereafter the Respondent found a third party to transport loads of that nature.

20. The following day a meeting was held between the Claimant, Stuart Phelps and Bianka Kamarics-Ungvari. It was the Claimant's case that the Respondent was hostile to the fact that he was raising concerns about the load and that he was laughed at during the meeting, It was the Respondent's case that Stuart Phelps apologised to the Claimant for the situation that had arisen, explained that this was a regulation the company was unaware of and assured the Claimant that now they were aware of the issue it would not happen again.

21. I find as a fact that the Respondent did take this situation seriously. It engaged a third party with a suitable vehicle to transport such loads in future. That is not indicative of a cavalier attitude to safety requirements and would have involved the Respondent in extra expense. I find on the basis of the evidence I heard that Mr Phelps apologised for putting the Claimant in an awkward position and confirmed that it would not happen again. The Claimant resumed work straight away and confirmed in his evidence that there were no further issues or discussions regarding the incident.

22. As regards the Claimant's evidence that he was ridiculed at the meeting, in my judgment on a balance of probabilities that perception arose from a misunderstanding on the Claimant's part. I find that Stuart Phelps expressed the view that it was laughable that the Hayward employees would have reported the incident to the DVSA. It was a matter of genuine and legitimate concern to the Claimant that such a report might be made. I can see that the Claimant might have construed Mr Phelps' reaction as indicating that he thought the whole incident was a laughing matter, but I do not think that is what Mr Phelps intended. There is no evidence that the Respondent thought that the potential impact of carrying illegal loads on the Claimant was a trivial matter. If it had thought so it would not have proffered an apology, conducted the meeting in the way that it did or gone to the expense of identifying the third party to carry the high ethanol loads.

23. A few weeks later, on Monday 5 August the Claimant did not attend work. It was the Claimant's case that his absence was necessary because he needed to attend a course in order to keep his driving qualification up to date, and without an up-to-date qualification he would not have been able to work. The Respondent did not dispute that the Claimant needed to attend such courses, but it maintained that the Claimant had not booked the time off correctly. In

fact, he had not told anyone of his plan to attend the course and he simply sent a message (page 87A-B) to an unmanned telephone at 18.47 the night before the course began. I accepted Ms Kamarics-Ungvari's evidence that the Claimant had arranged his attendance on the course without the knowledge or consent of any of his managers and that although she texted him during the day on 5 August (page 88) to see whether he could cover a delivery, he replied to say that as he was at the course he would be unable to do so. Whilst there did seem to be some urgency about the Claimant attending the course so that his qualification did not expire, his unilateral decision to book and attend the course left the Respondent having to find cover for the Claimant's work at very short notice. The Claimant took the view that attendance at the course was for the Respondent's benefit and he was surprised that the Respondent did not therefore agree to his attendance and instead terminated his contract. He argued that the text messages from Bianca implied that she had agreed to his attendance because she did not expressly tell him to return to work or tell him that his attendance was not agreed. But in my judgement that is not a reasonable approach. At 9.52 on 5 August he told Bianca that he was already on the course and would not be able to do a delivery later that day. In my judgment that was clearly acting without prior authority and brought his actions within the scope of the Handbook provision that entitled the employer to regard his absence as unauthorised.

24. The Respondent decided to terminate the Claimant's employment that day and Mr Phelps wrote the letter at page 89, informing the Claimant that his employment would be terminated with immediate effect because of his unsuitability for the role. The letter stated that he would be paid in lieu of a one-month notice period, but that a week's pay would be deducted in light of his unauthorised absence on the course. He would receive any applicable accrued holiday pay.

Conclusions

25. I will deal with the unfair dismissal claim first. The burden is on the Claimant to show that he was dismissed for a reason related to health and safety or for making a protected disclosure as alleged. He needed to show that this reason was uppermost in the employer's mind when it dismissed. The Respondent has accepted that the Claimant raised issues that could qualify as either a protected disclosure or as the raising of a health and safety concern in circumstances giving rise to protection. It does not deny that there was a problem with a load that the Claimant was given to transport on 9 July 2019 and that the Claimant raised a concern either on the day or at a meeting the following day. There is therefore no dispute about those facts.

26. The key question for me was whether this incident had an influence on the decision to dismiss the Claimant a few weeks later, on 5 August. I find no evidence that it did. The burden of proof is on the Claimant on the facts of this case and I find that he has not shown that the incident had any influence on the decision, let alone being the principal reason for the dismissal. The evidence points to the reason for dismissal being his failure to attend for work

on 5 August 2019, when he was, by his own admission, rostered to attend work. His reason for not attending work was that he had had to book himself onto a course, that was necessary to maintain his entitlement to drive HGVs. However, I have found as a fact that he did not go about this in the right way and caused a problem for the Respondent by leaving it to the last possible minute to tell the Respondent of his plans.

27. The Respondent was justified in taking a dim view of this. It is the Respondent's case that this was in a sense the last straw, and that the Claimant had had an approach to timekeeping that was already causing problems. This issue was not well documented, but I accepted the evidence of Ms Kamarics-Ungvari, that the Claimant was in the habit of turning up late for shifts, causing the Respondent logistical problems. I am satisfied that these are the reasons that the Respondent dismissed the Claimant together with his failure to attend work on 5 August. There is no evidence that the incident on 9 July 2019 had anything to do with it. Furthermore, the chronology does not support the Claimant's case. He was sent back to work straight away once he had met with the Respondent following the incident, and nothing happened between then and his dismissal on 5 August that indicated that the Respondent was aggrieved at his having raised the issue – the evidence suggests otherwise. His claim of automatic unfair dismissal does not therefore succeed.

28. Once the possibility of an illegitimate reason for dismissal is discounted, because the Respondent has produced a plausible explanation for its actions it does not need to follow a fair procedure, because the Claimant did not have an entitlement to bring an ordinary unfair dismissal claim under s 98 ERA – he had insufficient service with the Respondent. If he had had enough service, the dismissal would certainly have been unfair as no procedure was followed. But he cannot complain of that on the facts of this case.

29. Turning next to the question of the deductions made from his final pay, which was put forward by the Claimant as a claim of breach of contract I have reconsidered this aspect of the oral decision I gave at the end of the hearing.

30. I was initially satisfied that the Respondent was entitled to make a deduction of one week’s pay from the Claimant’s final pay on the basis that the evidence shows that the Claimant did not seek his manager's prior authority to attend the course, which ran for the week commencing 5 August 2019. On that basis I found no breach of the Claimant’s contract. However, I now consider that I applied the wrong analysis. The Respondent decided to terminate the Claimant’s contract with immediate effect and to make a payment to him in lieu of notice. His contract therefore ended on 5 August. The days of absence in respect of which the Respondent deducted pay were 5 – 9 August, but four of those days fell after the date of termination and were therefore not days of absence from work. The payment in lieu of notice was intended to compensate the Claimant for not being given the notice to which his contract entitled him, in circumstances where the Respondent was not entitled to dismiss him without notice. The Respondent should not in my judgment have made any deduction in respect of the period falling after the date of

termination but was entitled to deduct one day's pay in respect of the Claimant's unauthorised absence from work on 5 August. The Respondent therefore owes the Claimant four days' pay and I have therefore revised my judgment to reflect this reconsidered point.

31. The issue concerning the night shift allowance was put forward as an unlawful deduction from wages claim. S13 of the ERA prohibits deductions from wages in certain circumstances, including, under s13(3), where the wages paid to the worker are lower than the wages properly payable to him under his contract of employment. Given my findings of fact in this case I find that by withdrawing the night shift premium without validly varying the terms of the Claimant's contract the Respondent made unlawful deductions from his wages under s13(3) ERA. However, I am not able to determine the amount payable to the Claimant by way of compensation because there was a lack of evidence to support the Claimant's claim for the night shift hours set out in his Schedule of Loss. It is for the Claimant to prove the extent of his losses and he has not done so in such a way that will enable me to determine the sum that he is entitled to by way of an unlawful deduction from wages.

32. The parties may be able to resolve this matter without further assistance form the Tribunal but failing that either party may apply for a remedy hearing at which it can be determined with the assistance of the relevant evidence.

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Employment Judge Morton
Date: 12 February 2021