EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102534/2018

Held in Glasgow on 11 and 12 June 2018

Employment Judge: Mr P O'Donnell

Mr John Clark	**Claimant** **In Person**
DS Smith Recycling UK	**Respondent** **Represented by:-** **Mr C Edward - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant has brought a complaint of unfair dismissal against his former employer DS Smith Recycling Ltd. The claim is resisted by the respondent.

Preliminary issues

2. The claimant had provided further particulars of his claim dated 30 April 2018. The respondent had no objection to these being accepted and they were added to the joint bundle as pages 12A and 12B.

3. There had been a question as to whether the claimant was pursuing a claim for unlawful discrimination as he had ticked the box for "Recommendation" in the section of the ET1 which asks what remedies are sought. Parties explained that this had been clarified in correspondence and no claim for discrimination was being pursued by the claimant.

Evidence

4. The Tribunal heard evidence from the following witnesses:-

   a. The Claimant

   b. Paul Wilson (PW) who is the respondent's General Manager (Fleet & Plant) and who conducted the investigation into the claimant's conduct.

   c. Matthew Rendall (MR) who is the respondent's General Manager (Operations). He conducted the disciplinary hearing and made the decision to dismiss the claimant.

   d. Andrew Woods (AW) who is the respondent's UK Operations Director and who heard the claimant's appeal against dismissal.

5. There was an agreed bundle of documents prepared by the parties. The claimant produced a schedule of loss which was handed up and the respondent handed up a counter-schedule.

6. This was not a case where there was any particular dispute of fact; the events leading to the claimant's dismissal were, for the most part, a matter of consensus. The central dispute related to the conclusions which the respondent reached from those facts and opinions they formed as to whether the claimant was guilty of the misconduct and whether this warranted dismissal.

7. In these circumstances, the credibility and reliability of the evidence of the various witnesses was not something on which the Tribunal had to form a particular view. In general, all of the witnesses gave evidence in an open and honest manner and the Tribunal did not consider that there was any issue with their evidence.

Findings in Fact

8. The Tribunal makes the following relevant findings in fact:-

a. The claimant commenced employment with the respondent on 20 August 1984. He was originally employed as an HGV mechanic and held a number of jobs with the respondent over the years before taking up the role of transport team leader in or around 2014/2015.

b. The respondent is the recycling division of the DS Smith Group. They have 9 depots across the UK and the claimant worked out of what is described as the Glasgow depot although it is actually in Kilsyth. The respondent has 300 employees across the UK.

c. The respondent deals with the recycling of industrial and commercial waste. They collect waste from customers' sites which is brought to the depot for processing and onward transport to a recycling facility.

The respondent does not itself carry out the recycling but, rather, transports the waste from the customer to a recycling facility.

d. The respondent uses a range of vehicles to operate its business including 44 ton articulated lorries and other large or heavy goods vehicles (LGV/HGV).

e. The respondent requires what is describe as an "O Licence" (Operator's Licence) for each depot. If this licence was withdrawn then the respondent could not carry out its business from that depot. The licence could be withdrawn if the respondent failed to comply with any of the legislative requirements placed on a business such as this.

f. One of those requirements relates to the EU and UK rules on working time for drivers. These rules apply to anyone who works more than 15 driving shifts in a rolling 26 week reference period. The rules require that drivers work no more than an average of 48 hours in total (this includes driving and other work) over the reference period. Unlike other workers, drivers cannot opt out of this requirement. There is also a requirement that drivers do not work more than 60 hours in total (again, this includes driving and other work) in any one week.

g. Part of the claimant's duties as transport team leader is to organise the shifts for drivers and ensure that these rules are met. He also monitors compliance with other working time rules such as rest breaks.

h. The respondent uses digital tachographs to monitor drivers' hours. When a driver takes a rest break or when they finish a break and start driving again then the driver has to switch the tachograph to a break setting or a driving setting. It is accepted within the industry

and by the relevant regulators that drivers can forget to switch between the two settings from time to time.

i. The respondent has a system for monitoring driving hours and rest breaks which involves the use of software known as Tisweb. Drivers upload the data from their tachograph to Tisweb which then analyses this and identifies any breaches of the rules. It would automatically generate a form for the transport team leader to complete with the relevant driver to identify what went wrong and provide coaching in order to avoid this happening in the future. The form would be retained as part of the respondent's audit trail in the event of an inspection by the Health & Safety Executive (HSA) or the Driver & Vehicles Standards Agency (DVSA).

j. The respondent provides training on the working time rules to all drivers on induction. There is also a legal requirement that all drivers are put through training to achieve a Certificate of Professional Competence (CPC). This involves 7 hours of training over 5 years and includes training on the working time rules.

k. In addition, there is also a CPC for transport managers. The claimant had both the driver and manager CPC. He had been on a CPC refresher course in January 2017.

I. In June 2017, the claimant had been subject to disciplinary action in relation to a number of issues. The claimant was initially demoted to the role of driver but, on appeal, he was reinstated to his post of transport team leader and given a final written warning instead. This warning was to stay live for 12 months.

m. In August 2017, PW had a meeting with representatives of a company called AIM. This is a company which the respondent uses to assist them in tachograph analysis and in providing the training for CPCs.

n. The meeting related to the provision of the CPC training but during it the managing director of AIM made a comment about concerns they had with the Glasgow depot. These concerns related to the fact that the depot had a completely clean tachograph record; this is so rare that it raised concerns with AIM. PW asked them to prepare a report on this issues for him.

o. In the middle of September 2017, PW again met with AIM who had produced a report on the concerns about the Glasgow depot. It was their view that manual adjustments appear to have been made to the Tisweb system by the claimant and that he had been working too many hours in breach of the working time rules.

p. PW began his own investigation at this point into both issues; the manual adjustments to Tisweb and the claimant's working hours.

q. Around the same time, by letter dated 11 September 2017, the claimant wrote to his line manager, Eamon Harrington (EH), who was the business manager at the Glasgow depot, asking to step down from the role of transport team leader. The claimant stated that the position had outgrown his expectations and ability. The claimant wanted to spend more time with his family. He indicated that he would stay on until a replacement was found and asked to be considered for a role as an HGV driver.

r. PW started his investigation by obtaining details of the claimant's working hours from the respondent's system for recording working hours known as "Crown".

s. He obtained data for the previous 12 months split into the two previous 26 week reference periods. He put the data into a

spreadsheet which was at p136 of the bundle. This showed the following:-

i. For the period October 2016 to March 2017, the claimant had worked 58 driving shifts, had average working hours of 56.26 and had 7 weeks when he worked over 60 hours

ii. For the period April 2017 to September 2017, the claimant has worked 42 driving shifts, had average working hours of 52.66 and had 4 weeks where he worked over 60 hours

t. PW also obtained reports from Tisweb which were produced at pages 137 to 143 of the bundle. These showed two different records for the same drivers on the same day. The information obtained showed that the claimant had manually altered the records to show drivers taking breaks which were not recorded on the tachograph. PW had not been aware until this point that it was possible to manually adjust Tisweb.

u. PW met with the claimant on 9 October 2017 to discuss these findings with him. Ceri Brown from HR was also present to assist PW and Louise Connor accompanied the claimant. Minutes of the meeting were taken and this appeared in the bundle at p149.

v. PW showed the claimant the spreadsheet with his working hours and the claimant confirmed these were his hours. The claimant stated that he knew about the 48 hour average working week but not the 60 hour maximum.

w. The claimant explained that there had been driver shortages in May and June 2017 and he had to cover the driving to ensure the work was done.

x. The claimant also stated that EH had spoken to him about his working hours in the past and the need to cut these down.

y. In relation to the adjustments to Tisweb, the claimant explained that these were instances where drivers had taken a break but had forgotten to switch over the tachograph to reflect this. He had made adjustments so that it was a true reflection of what had actually happened.

z. After this meeting, PW produced a report dated 18 October 2017 which was at p158 of the bundle. He concluded that the claimant was an experienced team leader with CPC qualification and that he should have been aware of the working time rules for drivers as well as the consequences for non-compliance. He noted the claimant's explanation regarding the shortage of drivers but that this only related to a period in May 2017 and did not explain the earlier periods going back to 2016.

aa. In relation to the adjustment of the tachograph, the issue for PW was that this would mean that infringements by drivers were not being recorded and that there were no recorded coaching sessions with drivers addressing these issues as a result.

bb. PW recommended that a disciplinary hearing should consider the following issues in relation to the claimant:-

i. Working excessive hours in breach of the working time directive
ii. Making manual adjustments to Tisweb
Hi. Failing to follow the correct procedure for coaching and recording of drivers' hours infringements

cc. The report also included details of an investigation into another employee, Peter Turkington, which was related to the investigation into the claimant. No further disciplinary action was taken against Mr Turkington.

dd. MR was passed PW's report and he took forward the disciplinary process.

ee. A disciplinary hearing was arranged for 26 October 2017. It was attended by the claimant accompanied by Peter Turkington. MR held the hearing supported by Sasha Brine from HR. The minutes of the meeting begin at p169 of the bundle.

ff. The claimant stated that due to a lack of resources and the workload he had no choice but to do driving work himself. He made reference to a driver being off sick and there being vacancies at the time.

gg. This was a reference to the period of May to July 2017. At this time, MR had had a conference call, which involved the claimant, about the resources at the Glasgow depot and he gave authority for the claimant to do whatever was necessary in terms of recruiting staff in order for the work to be done.

hh. The claimant accepted that he had breached the 48 hour average but stated that he only became aware of the 60 hour limit when it was raised in PW's investigation.

ii. MR did not consider that the claimant's explanations provided mitigation for the breach of the working time rules. He was of the view that the period when there was a shortage of drivers was only a short period at the end of the time that had been looked at by

PW. It did not explain the whole 12 months that had been reviewed.

jj. MR was also of the view that the claimant did not have "no choice" in taking on the driving duties himself; he had the power to bring in agency staff or recruit drivers; he could move shifts round to meet demand.

kk. In relation to the allegation relating to the manual alterations to the Tisweb system, the claimant explained that he was fixing what he saw as mistakes rather than infringements.

II. MR was of the view that the claimant had made the changes with the best of intentions and had not been seeking some form of gain from this.

mm. MR upheld all three allegations against the claimant and dismissed him for gross misconduct at the hearing. This was confirmed by a letter dated 1 November 2017.

nn. MR considered that the claimant's conduct was so serious that he could not continue to work for the company and that it was too big a risk for the claimant to do so. He was of the view that the claimant had shown no acknowledgement of how serious the breach of the working time rules was for the company. If the claimant had been stopped by the police or DVSA had looked into this then the company could lose its O Licence and face prosecution. There was also the risk of the claimant being involved in an accident with the loss of life.

oo. MR did not consider that this was a performance or coaching issue. He believed that the claimant was aware of the rules and

had actively ignored these. MR considered transport team leaders as the first line of defence in complying with these rules.

pp. The respondent's disciplinary policy started at p54 of the bundle and the definition of "gross misconduct' was at page 58. MR considered that the claimant's conduct fell within the fourth example of gross misconduct (serious breach of the health and safety rules or procedures or behaviour likely to endanger the safety of work colleagues or to hamper the efficient running of the site or equipment) or the sixth example (dereliction of duty or serious negligence which causes unacceptable loss, damage or injury to the company or any individual).

qq. In particular, MR considered that there was a risk to the general public if the claimant was driving when tired or fatigued.

rr. The claimant submitted letters dated 7 and 13 November 2017 appealing the decision to dismiss. These were at pages 184 and 186 of the bundle.

ss. AW met with the claimant to hear the appeal on 22 November 2017. The appeal was to be a full re-hearing of the case. The claimant attended, again accompanied by Mr Turkington. Jeremiah Divers attended as HR support for AW. The minutes of the meeting start at p187 of the bundle.

tt. AW went through the points raised by the claimant in his letters of appeal and discussed each of these.

uu. AW decided to uphold the decision to dismiss at the meeting and this was subsequently confirmed in a letter dated 27 November 2017 at page 201 of the bundle.

Relevant Law

9. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

10. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

11. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test

12. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell*** **M978] IRLR 379.**

13. The test effectively comprises 3 elements :-

    a. A genuine belief by the employer in the fact of the misconduct

    b. Reasonable grounds for that belief

    c. A reasonable investigation

14. It is important to note that, due to changes in the burden of proof since *Burchell,* the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

15. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

16. Delay in carrying out an investigation is capable of rendering the dismissal unfair (on the basis that the investigation is then not reasonable) even with no

evidence of actual prejudice cause by the delay ***(RSPCA v Cruden*** [19861 IRLR 83] **and *A v B*** [2003] IRLR 405, ***EAT).***

17. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Respondent's submissions

18. The respondent's agent produced written submissions and supplemented these orally.

19. Mr Edward submitted that the reason for the claimant's dismissal was conduct (or misconduct) in relation to the breaches of the maximum working hours for drivers. He submitted that this was a potentially fair reason in terms ofs98(1)ERA.

20. He made reference to the test laid down in ***Burchell*** and set out the findings in fact he asked the Tribunal to make.

21. It was submitted on behalf of the respondent that MR had reached a genuine and reasonable conclusion regarding the claimant's conduct. There was no denial of the fundamental facts by the claimant regarding the breach of the working time rules by him, either during the disciplinary process or in the course of the Tribunal hearing.

22. It was said that it was reasonable for the respondent to reach the conclusion that this was gross misconduct; the claimant was in a managerial position in which he was responsible for enforce the same rules for other drivers; he had deliberately breached those rules.

23. Mr Edward submitted that a fair process had been followed and, in particular, that the claimant had received a fair hearing on appeal. The point was made that AW had previously reversed, in part, and earlier disciplinary decision in relation to the claimant.

Claimant's submissions

24. The claimant also produced written submissions which he read out and supplemented orally.

25. He had asked to step down from his position in the belief that someone in the company would ask questions about why he had taken such a step. This request was ignored and he believe that this gave his employer a motive to dismiss him.

26. He submitted that it was the employer's duty of care and responsibility to monitor his performance and time-keeping. His manager was off work on sick leave and he believes that his employer failed to provide any support. He stated that there had been no training on the company policies and procedures raised in the course of the Tribunal hearing.

27. The claimant made reference to his long service with the company.

28. The claimant made particular reference to the length of the disciplinary hearing held by MR and that MR asked only selected questions. He believed that the outcome was pre-determined.

29. The claimant also believed that the outcome of the appeal was pre-determined on the basis that the lengthy written outcome was prepared during the adjournment.

30. Submissions were also made by the claimant about the previous disciplinary process which had resulted in a final written warning.

Decision

Was there a potentially fair reason for dismissal?

31. The Tribunal held that the respondent had shown that they had dismissed the claimant for reasons which would fall within "conduct" for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

32. The claimant had not sought to argue that the reason for his dismissal could not fall within the description of "conduct" and the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

33. Again, the claimant did not seek to advance an argument that there was not a genuine belief by the respondent or that there was some other reason for his dismissal.

34. The Tribunal heard evidence from the decision-makers, MR and AW, as to the reason why they decided to dismiss the claimant and the Tribunal had no reason to doubt the reliability or credibility of their evidence on this point.

35. In these circumstances, there being no evidence to suggest some other reason for the claimant's dismissal, the Tribunal concluded that there was a genuine belief by the respondent.

Had there been a reasonable investigation?

36. In assessing this issue, the Tribunal took account of the fact that the respondent had gathered relevant information from its systems regarding the claimant's hours of work and use of the Tisweb system which showed that he had both made changes to the data on Tisweb and had worked hours which were in breach of the working time rules.

37. This information was put to the claimant for him to respond. It is noted that he did not dispute the accuracy of the information which the respondent had gathered and, rather, sought to provide explanations for what had happened.

38. In these circumstances, the Tribunal did not consider that there was anything unreasonable about the investigation of the claimant's alleged misconduct. In particular, it appears that all relevant information had been gathered and the claimant had been given a full and proper opportunity to put his position.

Did the respondent have a reasonable belief?

39. In considering whether the respondent held a reasonable belief that the claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

40. The question for the Tribunal was whether there was objective evidence from which the respondent could come to the view which they had. In this regard, the Tribunal noted that the facts of the case were not significantly in dispute; there was no question (and the claimant did not dispute) that he had worked in breach of the working time rules or made amendments to the Tisweb system.

41. This was not a case where the claimant disputed the accuracy of the allegations and, indeed, he appeared to accept that he did the acts in question.

42. There is, therefore, no basis on which it could be said that the respondent had not formed a reasonable belief that the claimant had committed the misconduct in question given the information obtained from their systems and the fact that the claimant accepted that this information was accurate.

Was the dismissal procedurally fair?

43. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

44. In relation to the disciplinary process itself, the claimant was given the opportunity to put his case to MR and, subsequently, to AW on appeal.

45. The claimant sought to argue that the outcomes of both processes were pre-determined but there was not sufficient evidence from which the Tribunal could reach such a conclusion. The claimant made reference to the length of the hearing held by MR and the fact that he only asked specific questions. However, it seemed to the Tribunal that in a case such as this where the claimant accepted the accuracy of the allegations against him then any disciplinary hearing is likely to be tightly focussed on whether the claimant could provide an explanation of his actions which might mitigate against dismissal. The Tribunal is, therefore, not surprised that MR was focussed on such issues.

46. Similarly, in relation to the appeal by AW, there was nothing to suggest that he had reached any conclusion in advance of the appeal hearing. The claimant accepted in his submission that AW did take more time with the appeal hearing and that he was taking more interest.

47. In these circumstances, there was nothing in the procedure followed by the respondent which rendered the dismissal unfair.

Was dismissal in the band of reasonable responses?

48. It was quite clear from the evidence before the Tribunal that the respondent took issues around compliance with the working time rules very seriously. The consequences for both the respondent (in terms of losing their O Licence) and for others (in terms of the potential for injury or loss of life if the

claimant caused an accident while driving tired) weighed heavily on their decision to dismiss the claimant.

49. The Tribunal did note the issues raised by the claimant regarding his workload and the difficulties he faced in filling driving duties. However, there was very little evidence that the claimant had brought these to the attention of more senior management; there was reference to a telephone conference with MR in 2017 in which MR authorised the claimant to bring in agency staff or recruit drivers. The claimant gave evidence that he had problems retaining agency staff or recruiting new drivers but there was no evidence that he had flagged these issues to more senior managers.

50. Similarly, the claimant stated that management had known that he was undertaking driving duties. However, when asked to provide detail of this, he could only point to one email in which he stated that he was doing driving duties on the day the email was sent. The Tribunal was of the view that there was no evidence that management were aware of the fact that the claimant was working significantly in excess of the maximum working hours.

51. The claimant was an experienced employee in a management position who had been given training on the rules for drivers' hours. Indeed, he was the person responsible for ensuring other drivers complied with those hours. The respondent was entitled to expect that such an employee would be aware of the issues relating to his hours and would either ensure he complied with those rules or escalate matters to more senior management where the depot could no longer function without him breaching the rules.

52. Taking account of the seriousness which the respondent placed on compliance with the working time rules and all the other matters addressed above, the Tribunal concluded that dismissal was within the band of reasonable responses.

Conclusion

53. In these circumstances, the Tribunal has determined that the claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the claimant having committed the misconduct in question. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

54. The claim is, therefore, dismissed.

Employment Judge: P O'Donnell
Date of Judgment: 23 July 2018
Entered in register: 30 July 2018
and copied to parties