EMPLOYMENT TRIBUNALS

Claimant: **Mr R Keen**

Respondent: **GU Indulgent Foods Ltd**

Heard at: **East London Hearing Centre (via CVP)**

On: **20 June 2022**

Before: **Employment Judge Feeny**

Representation

Claimant: In person

Respondent: Ms Murray (Solicitor)

JUDGMENT having been sent to the parties on 29 July 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The Issue

1. The Claimant had brought a complaint of "ordinary" unfair dismissal (pursuant to section 98 of the Employment Rights Act 1996 ("ERA")) and a complaint of automatic unfair dismissal pursuant to s 100 ERA (health and safety cases).

2. This was an open preliminary hearing to determine the Respondent's application to strike out the Claimant's complaint of automatic unfair dismissal, alternatively for a deposit order in respect of the same complaint. This hearing was listed by EJ Lewis at a previous case management hearing on 11 January 2022. She identified the issue for determination at this hearing as:

   > "whether to strike out or make a deposit order in respect of the claimant's contention that the instructions he was given by the respondent following his grievance was too prescriptive and too complicated for him to apply and therefore amounted to a circumstance of danger which was serious and imminent."

3. The complaint of “ordinary” unfair dismissal was to go forward to a final hearing in any event.

The Hearing

4. The hearing took place by CVP. There was a technical issue in that the Claimant’s bandwidth appeared to be such that he could not appear on screen without intermittently losing audio connection. In the end it was agreed that the Claimant would take part by audio only, with his camera switched off. This resolved the problem and I was satisfied that the Claimant was able to participate fully in the hearing. No complaint was raised by him to suggest otherwise.

5. In advance of the hearing I received a bundle of documents from the Respondent containing a limited number of primary documents. I also received written submissions from the Respondent.

6. The Claimant had prepared a lengthy witness statement, running to 34 pages. Despite the length, I was satisfied that the purpose of the statement was solely to address the matters relevant to the strike out application, rather than to provide evidence in a more general sense, and I took a short adjournment to read the entire statement before hearing submissions from the parties.

7. I heard oral submissions from Ms Murray, solicitor representing the Respondent. I then heard oral submissions from the Claimant in support of his case. After hearing submissions, and taking evidence from the Claimant on means, I gave judgment orally at the hearing. These are the written reasons in support of that judgment.

The Claim

8. I will summarise the factual basis of the claim in this section. I did not hear any evidence on these matters and the below should not be taken as findings of fact. These factual issues will be determined at the final merits hearing in due course.

9. The Claimant was a Technical Operator at the Respondent, a food manufacturer. As part of his duties, as a qualified forklift truck driver, the Claimant was required to move products around the site. This involved driving through doors, which opened through a motion sensor, into a refrigeration unit.

10. On 31 May 2020 the Claimant damaged a door by colliding his forklift truck into it. He was dismissed for gross misconduct on 17 July 2020 but then reinstated on appeal on 7 September 2020 with a final written warning issued to him instead.

11. The letter dated 7 September 2020 (which was in the bundle) concluded by saying that the Claimant would be required to undertake “full re-training on safe

and unsafe behaviours when working within the warehouse". This was to be a 5 day course initially envisaged to run from 14-18 September 2020 with him returning to normal duties on 24 September 2020.

12. The Claimant was not happy with the Respondent's conduct at this point and submitted a grievance. In essence, he felt that during the disciplinary process he had been given conflicting instructions on how to drive safely. He refused to return to work (including taking the safety course) until he felt that the safety issues had been resolved.

13. The Claimant attended a grievance hearing on 23 September 2020 and an outcome letter was sent to him on 8 October 2020 (a copy of which was also in the bundle). The letter sought to clarify the matters raised by the Claimant, including his assertion that he had been given conflicting instructions on when to brake. He was again told to attend the 5 day refresher training so that he could resume his duties.

14. The Claimant appealed the grievance outcome. The appeal process was eventually concluded with a long and detailed letter dated 3 December 2020. This addressed the various matters raised and reiterated yet again the need for the Claimant to undertake the refresher course.

15. The Claimant continued to refuse to attend the refresher course or otherwise return to work and he was eventually dismissed for an unauthorised absence from work in February 2021. The Claimant contends that his refusal to return to work met the definition in s 100(1)(d) ERA and so his dismissal was automatically unfair.

The Parties' Submissions

16. Ms Murray submitted that the Claimant's position was usefully summarised in paragraph 3.2.5 of the Claimant's statement. She said that this paragraph did not describe danger which was "serious and imminent". Further, the Claimant could have reasonably avoided the alleged danger by driving safely and taking care.

17. In his oral submissions, the Claimant challenged the provenance of the risk assessments produced by the Respondent. As to the issue with the driving, he said that the instructions given were too prescriptive to allow him to drive safely and that the further instructions given during the various disciplinary and grievance processes did not clarify the situation but made it worse. He explained that he did not turn up for the refresher training as he felt it would only amplify the problem. He also relied on previous complaints about health and safety not being acted upon as causing him to lose trust with the Respondent's processes.

The Law

18. The Tribunal's power to strike out a claim is contained in rule 37 of Tribunal Rules of Procedure. The Respondent relies on rule 37(1)(a), namely that the complaint has no reasonable prospect of success.

19. The Court of Appeal in **Ahir v British Airways plc** [2017] EWCA Civ. 1392, §16 provided the following guidance on the test.

> “Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

20. As noted at the end of the above passage, the test for making an order under rule 39 is less onerous, the Respondent has to show that there is little reasonable prospect of the complaint succeeding.

21. As for s 100(1)(d) ERA, the relevant section is as follows.

> (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—
>
> […]
>
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
>
> […]

22. There was a recent discussion of the application of this test by the EAT in **Rodgers v Leeds Laser Cutting Ltd** [2022] EAT 69. In that case it was said that the key elements of the test are whether:

    a. The Claimant believed that there were circumstances of danger which were both serious and imminent;

    b. That belief was reasonable; and

c. The Claimant could not reasonably have been expected to avert the serious and imminent circumstances of danger.

23. The test is therefore a mix of the subjective (did the Claimant have the belief) and the objective (was such a belief reasonable).

Conclusions

24. As this was an application to strike out I did not hear evidence on any of the underlying factual matters and, as already indicated, I have made no findings of fact. I have proceeded on the basis that the Claimant may well prove at trial his contention that the Respondent was lax in health and safety matters. For instance, the provenance of the risk assessment relied on by the Respondent, including whether it was actually in place at the material time, appeared to me to be a triable issue.

25. The essence of the Claimant's claim under s 100(1)(d) ERA was that he was given conflicting instructions on how to drive the forklift truck, in particular when it was safe to brake or not brake. This was summarised in paragraph 3.2.5 of his statement as follows.

> "3.2.5 The respondent has provided a long list of requirements for the FLT operators to comply when operating a potentially deadly machine:
>
> i. Avoid sudden stops
>
> ii. Attempt sudden stops (grounds for dismissal if not carried out)
>
> iii. If there is a need to brake, to prevent colliding with any stationery or moving obstacle including fabric doors, you were required to do so (backed by a written warning)
>
> iv. If braking would or is likely to cause a collision that is worse than a collision caused by not braking then we would not expect you to brake
>
> v. Unless exceptional and unforeseen circumstances justify a different course of action, you will use your brakes to prevent colliding with the freezer door or other objects.
>
> The above requirements are far too complicated and prescriptive to compute by a fork lift operator who has to make split-second decisions. The rules are generally contradictory. Two of the rules (ii and iii) are backed by disciplinary sanction and are the most dangerous of the rules and they were issued as a result of formal proceedings. Rule ii (attempt sudden stops) was issued as part of the reason for dismissal and was not removed in the appeal."

26. I do not agree that these instructions, even as framed by the Claimant in the above passage, are conflicting or complicated. For instance, (iii) above is prefaced by the clause "if there is a need to brake". It is tolerably clear from the above that all the Respondent was doing was instructing the Claimant that he should brake to avoid a collision unless it would be unsafe to do so. This is a common sense instruction that no trained forklift truck driver should have a difficulty following.

27. I have doubts as to whether the Claimant would succeed in proving that he subjectively had the belief that those instructions amounted to circumstances of serious and imminent danger. There is force in the submission made by Ms Murray on behalf of the Respondent that the Claimant was raising these matters in an obstructive manner simply because he was unhappy with receiving a disciplinary sanction in July/September 2020. Ultimately, however, the question of the Claimant's motive will be left to the Tribunal at the final hearing.

28. However, even assuming the Claimant will prove the subjective element of the test, in my judgment, he has no reasonable prospect of successfully satisfying the objective element. There is simply no prospect of a Tribunal at the final hearing coming to the view that the instructions given to him at various times on how to drive a forklift truck safely, in particular on the circumstances when he should and should not brake, amounted to "serious and imminent" danger. Even if the "serious" element was met, which I do not consider it is or could be, it is inconceivable that this danger could reasonably be described as "imminent".

29. In my judgment, the Claimant also has no reasonable prospect of successfully persuading a Tribunal that the third element of the test is met: that he could not reasonably have been expected to avert the serious and imminent circumstances of danger. The obvious way to avert the danger would be to attend the 5 day refresher course to learn and understand the correct rules for braking (assuming, for present purposes, that the Claimant was genuine in his confusion on this point). In answer to my question, the Claimant could give me no logical justification to support his refusal to attend the training and there is no reason to think his position on this point will improve by the time of trial.

30. Finally, I recognise that the Claimant also relied on a loss of trust and faith in the Respondent's attitude to health and safety more generally as a reason why he felt he could not return to work. This may well be relevant to the "ordinary" unfair dismissal claim, such as the reasonableness of the Respondent's view that the Claimant was guilty of misconduct by staying away from work, but it has little or no bearing on the question as to whether there were circumstances of danger which were serious and, in particular, imminent.

31. In reaching these conclusions, I have considered the evidence and submissions the Claimant may seek to rely on at the final hearing. However, even taking the Claimant's case at its highest, it is clear that the matters he complains of could not conceivably be viewed, on an objective analysis, as circumstances of serious and imminent danger which he could not be expected to avert. His s

100(1)(d) complaint has no reasonable prospects of success and is accordingly struck out pursuant to rule 37.

Employment Judge Feeny
Date: 10 August 2022