



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

10

Case No 4111384/2021

Held on the Cloud Video Platform on 10 October 2022

15

Employment Judge A Jones
Tribunal Member Z Van Zwanenberg
Tribunal Member A Mathieson

20

Mr B Hewitson

Claimant
In person

25

Saint-Gobain Building Distribution Ltd
t/a Jewson Ltd

Respondent
Represented by
Mr Khan, of counsel

30

35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

40

The unanimous decision of the Tribunal is that the claimant's claim should be dismissed.

E.T. Z4 (WR)

Reasons

Introduction

1. The claimant submitted an application to the Tribunal on 15 September 2021 in relation to his employment with the respondent and in particular its termination. There then followed a long procedural history regarding the claim. By the time of the final hearing, the issues for the Tribunal to determine were whether the claimant's dismissal amounted to discrimination arising from his disability in terms of section 15 Equality Act 2010 ('EA') and whether the claimant was a disabled person for the purposes of section 6 EA and if so, whether the respondent had knowledge of that fact.
2. The claimant represented himself throughout the proceedings and gave evidence on his own behalf. The respondent was represented by Counsel and a joint bundle of documents was produced. Although the claimant suggested at the commencement of the hearing that documents on which he had intended to rely had not been included in the bundle, on examination, they had in fact been included. The claimant expressed concern that he had not received the bundle until Thursday of the previous week, but did not make any application in that regard.
3. Counsel for the respondent indicated the respondent was prepared to concede the issue of disability but still sought to argue that the respondent did not have knowledge of the claimant's disability at the material times.
4. The respondent called one witness, the claimant's manager Mr Meakin. Both parties made oral submissions.
5. Having considered the evidence, submissions and documents to which reference was made, the Tribunal made the following findings in fact.

Findings in fact

6. The claimant worked for the respondent initially as an agency worker for a period at the respondent's Slateford branch. He then applied for a permanent position with the respondent as an HGV driver in early 2001. He was not successful in that application but was offered a job at the respondent's Craigentenny branch.

7. The claimant was sent a letter offering him employment and subsequently underwent a 5 day training course. The claimant's site manager was Mr Darren Meakin who did not interview the claimant but was involved in the claimant's induction process. The claimant's employment commenced on 11
5 May 2021.
8. At the time of the claimant's appointment to the role with the respondent, the claimant was aware that he was under investigation by the Transport Commissioner for fraudulent use of his tacograph when in a previous role. The claimant had initially been required to attend a driver conduct hearing at
10 the end of 2019 in relation to these matters but this hearing had been postponed on a number of occasions due to the COVID pandemic. The claimant was aware that this was a serious matter which could impact on his ability to perform his role with the respondent. The claimant did not disclose this information to the respondent either at the point of his recruitment or
15 during his induction.
9. The claimant had some issues with a supervisor and in particular the way in which the supervisor spoke to him in the early weeks of his employment. He raised these issues with Mr Meakin. He was not satisfied with the way in which Mr Meakin dealt with the matter and sought to raise his concerns with
20 Mr Davidson a regional director whom the claimant had encountered during his induction. The claimant spoke to Mr Davidson about these matters and having done so decided not take the matter any further.
10. The claimant had initially drafted a letter of grievance around 22 June concerning the actions of his colleague 'Terry' which he gave to Mr Meakin.
25 Having spoken to Mr Davidson and discussed the matter further with Mr Meakin, the claimant informed Mr Meakin that he did not want to progress any grievance.
11. Mr Meakin confirmed this position in an email to Mr Davidson on 25 June.
12. The claimant was required to attend a hearing before the Traffic
30 Commissioner on 29 June to consider the allegations against him in relation to the use of his tacograph. The hearing was a remote one and the claimant participated in the hearing in a meeting room at the respondent's premises during his working hours. The claimant did not inform Mr Meakin or any other

member of the respondent's staff either of the fact of the hearing or that he intended to participate in the hearing during working hours.

13. The outcome of the hearing was that the claimant was to be banned from commercial driving between 16 July and 30 August 2021. The claimant immediately informed Mr Meakin of the fact that he was to be banned from driving during that period. Mr Meakin asked the claimant to put the information in writing and he would take advice on what should happen.

14. The claimant provided Mr Meakin with a handwritten note summarising the circumstances of the Traffic Commissioner hearing on 30 June, and indicated that he intended to appeal against the severity of the punishment.

15. Mr Meakin contacted the Transport Department of the respondent for advice. After discussion it was agreed that once clarification had been obtained regarding the claimant's appeal, a decision would be taken as to what should happen to the claimant.

16. In the following days, Mr Meakin asked the claimant on a number of occasions what was happening in relation to his appeal.

17. Around 13 July, Mr Meakin and the claimant had a discussion regarding the claimant's appeal against his driving ban. The claimant asked Mr Meakin to take the appeal 'out of the equation' and to inform him what would happen to his employment. Mr Meakin informed him later that day that the claimant would likely have to look for alternative work, but that an official meeting 'would have to take place.'

18. Mr Meakin then sought advice from the respondent's HR department, who advised Mr Meakin to hold a probationary review meeting and to dismiss the claimant.

19. The claimant was invited to attend a probationary review meeting at 8am on 15 July with Mr Meakin. The claimant asked for the time of that meeting to be changed to accommodate a hearing at the Sheriff Court in relation to his driving ban. The claimant had not previously informed Mr Meakin that such a hearing was to take place.

20. The claimant attended a Sheriff Court hearing regarding his driving ban remotely from his lorry during his working hours on 15 July. He did not ask permission from the respondent to do so. The outcome of that hearing was

that the claimant's driving ban was postponed to commence on 31 August. The claimant informed Mr Meakin by text that he was 'ok to drive til August 31st'.

5 21. When the claimant returned to the Craigentenny branch following delivering his first load that, which was delayed, the respondent had other urgent deliveries to be made. Around 3pm, the claimant was asked to take a delivery to Ratho. He refused to do so and Mr Meakin spoke to the claimant about this. The conversation became heated and the claimant again refused to make the delivery. Mr Meakin then informed the claimant that if he was
10 refusing to do the delivery, then the probationary review meeting would go ahead at 4pm as previously arranged. The claimant refused to take part in the hearing and informed Mr Meakin that he was going home 'on the sick'. The claimant then left the premises.

15 22. Mr Meakin took advice from HR who informed him that he should complete the review meeting in the claimant's absence. Mr Meakin completed a form later that day. He concluded that the claimant had failed to meet the required standard and that he should be dismissed. He gave the following reason. "Due to an issue which has arisen with Barry's licence being suspended and on several occasions he hasn't made us aware (interview, court case, and
20 appeal) I feel that the trust has been broken and cannot be repaired."

23. That evening the claimant drafted a grievance which he sent by email to Mr Meakin at around 9.30pm. Mr Meakin received the grievance the following morning and sought advice from HR.

25 24. The respondent treated the claimant's grievance as a complaint as his employment was terminated and wrote to the claimant responding to that complaint in a letter dated 23 July .

25. The claimant was dismissed with one week's notice pay.

30 **Observations on the evidence**

26. The Tribunal did not find the claimant to be a credible or reliable witness. The Tribunal was of the view that he sought to minimise his dealings with the

Traffic Commissioner. He continued to suggest that he had not been 'investigated' or 'charged', took objection to that terminology and said that he was innocent until proven guilty. While he accepted that he had been banned from driving for 6 weeks he refused to recognise that he had any obligation to inform the respondent of a possible ban at the time he was recruited or in advance of the hearing.

27. The Tribunal preferred the evidence of Mr Meakin in relation to the circumstances in which the claimant took part in the formal hearing in relation to the Traffic Commissioner and in particular accepted his evidence that the claimant had locked himself in a meeting room in the respondent's offices to conduct the hearing and was absent from his duties and could not be located during that time. While the Tribunal accepted that the claimant had some flexibility in when he took breaks, it did not accept that this flexibility extended to participating in formal court proceedings in work premises during working hours, without first seeking permission to do so. The Tribunal did not accept the claimant's analogy with colleagues watching Netflix on their phones while they were waiting for loads to be prepared on their lorries.

28. Neither did the Tribunal accept that the claimant had lodged a grievance against Mr Meakin prior to the decision to dismiss him. The Tribunal was of the view that while the claimant was critical of the way in which Mr Meakin had dealt with the complaints raised by him against his colleague, the grievance which was not ultimately pursued had been directed against the colleague and not Mr Meakin. The grievance regarding Mr Meakin was not sent to Mr Meakin until after Mr Meakin had taken the decision to dismiss the claimant. It could not therefore have formed any part of Mr Meakin's decision to dismiss the claimant.

29. The Tribunal found Mr Meakin to be both credible and reliable and where there was any conflict in the evidence preferred that of Mr Meakin.

30 Relevant law

30. Section 15 EA provides that "A person (A) discriminated against a disabled person (B) if - (a) A treats B unfavourably because of something arising in

consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim and that this provision does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

5

Submissions

31. Parties made brief oral submissions. The claimant's submission appeared to be that it was the disagreement he had had with Mr Meakin, which had arisen
10 out of the claimant's disability in that he had anxiety which caused him to become more argumentative, was the reason for his dismissal and that therefore this amounted to disability discrimination.

32. The respondent's position was that the claimant was dismissed because of his driving ban and his lack of candour in relation to the proceedings
15 concerning that ban. It was said that this was borne out by the contemporaneous evidence and the facts in agreement between the parties. Moreover the financial consequences of the respondent being required to pay for an agency worker over the period of the claimant's ban if he had remained in employment, together with the evidence of the impact on client service
20 made it clear that this was the reason for dismissal and that it was nothing to do with the claimant's disability.

Discussion and decision

33. The Tribunal preferred the submissions of the respondent. The Tribunal found
25 that there was no evidence whatsoever that the claimant's disability (assuming for present purposes that the respondent did have knowledge of the claimant's disability) had anything to do with the decision to dismiss him.

34. The claimant was not transparent with the respondent regarding the ongoing proceedings against him which he would have known could impact on his
30 ability to perform his duties with the respondent. While the Tribunal accepted that the claimant was not dishonest with the respondent during the

recruitment process, in that he answered all the questions he was asked, the Tribunal found it difficult to accept that the claimant did not think he had a duty to be transparent about the proceedings which were ongoing against him in relation to his commercial licence.

- 5 35. The claimant then participated in a formal hearing concerning his commercial
license from the respondent's premises during working hours, without asking
permission or telling anyone about the hearing. He only disclosed the
information once a ban had been imposed on him. The claimant while initially
10 indicating that he was going to appeal the severity of the ban (and notably,
not the finding against him that he had made fraudulent use of his tacograph),
then told Mr Meakin to take the appeal out of the equation. Whether or not it
was the intention of the claimant that he wanted Mr Meakin to tell him the
worst case scenario if the appeal was not successful (and the Tribunal did
not accept that the claimant was credible in this regard), Mr Meakin was
15 entitled to take from his conversation with the claimant that the claimant would
not pursue an appeal against the driving ban.
36. The Tribunal accepted that the respondent's business was very busy during
this period and that in addition to the financial consequences of providing
cover for an unavailable driver, there would be customer service issues
20 caused by the lack of consistency of drivers.
37. The Tribunal also accepted Mr Meakin's evidence that initially he was willing
to wait until he found out more about an appeal by the claimant. When he
was informed that the appeal 'should be taken out of the equation', this is
what caused him to act at that time.
- 25 38. The claimant did not put to Mr Meakin that his disability had caused him to
take the decision to dismiss or explain in any way why it was his disability
rather than his lack of candour and his driving ban which had caused Mr
Meakin to take the decision to dismiss the claimant.

39. In these circumstances, the Tribunal found that there was no evidence whatsoever that the claimant's disability had played any part in the decision to dismiss the claimant and therefore his claim falls to be dismissed.

5

Employment Judge: A Jones
Date of Judgment: 11 October 2022
Entered in register: 13 October 2022
and copied to parties

10

