



EMPLOYMENT TRIBUNALS

Claimant: Mr D Fawcett

Respondent: Logikal Network Limited

Heard at: Liverpool **On:** 15 May 2023

Before: Employment Judge Liz Ord

Representation:

Claimant: In person
Respondent: Mr Flood (Counsel)

JUDGMENT having been given orally on 15 May 2023 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided.

REASONS

Preliminaries

1. At the remedy hearing on 26 June 2023, in the interests of justice, the tribunal reconsidered its reasons for the 50% reduction in compensation. By consent, the judgment was varied to reflect a 50% reduction solely because of the claimant's conduct, and no reduction was made for the possibility of the claimant being dismissed in any event. As the overall 50% figure for reduction was maintained, this variation made no difference to the compensation figure awarded, which was £2,179.42 (with the reduction).

Complaints and Issues

2. The claimant complains of unfair dismissal.
3. The issues for the tribunal are:
 - What was the reason for the claimant's dismissal?

- If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? In particular:
 - Did the respondent genuinely believe that the claimant had committed the misconduct?
 - If so, was this based on reasonable grounds?
 - At the time the belief was formed, had the respondent carried out a reasonable investigation?
 - Was the procedure within the band of reasonable responses?
 - Was dismissal within the band of reasonable responses?

Evidence

4. The tribunal had before it a bundle of documents (263 pages), and witness statement from the claimant, Darren Nogueroles, Sam Roberts, and Inez Drapiewska.
5. It heard evidence on oath from Darren Nogueroles, Sam Roberts, Inez Drapiewska and the claimant.

The Law

6. Section 98 of Employment Rights Act 1996 provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

- a)
- b) Relates to the conduct of the employee

98(4) whether the dismissal is fair or unfair

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

7. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

8. The main **caselaw** that the tribunal took account of is set out below.
9. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that:
“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.”
10. ***British Home Stores Ltd. Burchell*** [1980] ICR 303 held that “First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”
11. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.
12. The test to be applied in determining reasonableness is whether the employer’s decision to dismiss fell within the range of reasonable responses available to it – **(1) *Post Office v Foley* (2) *HSBC Bank plc v Madden*** [2000] ICR 1283, CA.
13. In ***J Sainsbury plc v. Hitt*** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer’s decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.

Findings of Fact

14. The nature of the respondent’s business was that of a licenced carrier, and Darren Nogueroles was at all material times the director. The claimant was employed by the respondent as an HGV driver.
15. On 7 September the claimant received a text message at 14.38 from Mr Nogueroles telling him to take his trailer to Stafford as soon as possible for Sam Roberts. The claimant was in Shapp at the time and he was shortly due to take his required rest break, which he believed had to be 11 hours long. On his calculation, from the beginning of his break, that would have taken him to 2.30am before he could start work again, and 2.45am before he could be on the road, after checking the vehicle.
16. He rang Sam Roberts to ask when the trailer was needed for and Mr Roberts told him 5.30am. In evidence Mr Roberts said he assumed the claimant was taking the same break as him, and that he could get to Stafford for 5.30am. The claimant told Mr Roberts he could not do it for that time. Mr Roberts rang Mr Nogueroles and told him the claimant was not going to bring the trailer.

17. Mr Noguerol called the claimant and told him to take the trailer. The claimant said he could not do so because he needed an 11 hour break. Mr Noguerol repeated the instruction three times, but the claimant refused. Due to the claimant's history of misconduct, Mr Noguerol thought he was purposefully disobeying a reasonable management instruction.
18. Previous problems with the claimant's conduct had resulted in the Transport Manager (Inez Drapiewska) issuing him with warnings. In March 2020, he was given a warning after three written reprimands for his persistent breach of the Driver's Hours rules and regulations. In July 2020, he attended a disciplinary hearing and was issued with a verbal warning because of persistent tachograph infringements. In February 2022 he was given a verbal warning for disregarding the "4:30h driving rule", and in March 2022 he was given a warning due to persistent breach of Driver's Hours and Working Time Directive rules and regulations.
19. The claimant's attitude was defiant and unhelpful, and he did not explain to Mr Noguerol that he had been asked to get the trailer to Stafford for 5.30am. Mr Noguerol did not mention the required arrival time and whether there was any flexibility in it. There was no discussion at all about the time the trailer had to be in Stafford. However, the claimant thought he was being asked to have it there for 5.30am because of the conversation he had had with Mr Roberts. He therefore, refused to take it.
20. Mr Noguerol gave the claimant an ultimatum. He was to either take the trailer to Mr Roberts in Stafford or be sacked. The claimant felt he was in a catch 22 situation. If he took the trailer, he would be in breach of the tachograph laws and would be sacked because of his history of previous breaches, or he would be sacked for not obeying an instruction. Either way, he felt he could not win.
21. Mr Noguerol proceeded to sack him on the spot. There was no investigation and no procedure was followed. No letter of dismissal was written, and no information was given about the claimant being able to appeal.

Discussion and Conclusions

What was the reason or principal reason for the claimant's dismissal?

22. There is no dispute, the reason for the claimant's dismissal was his conduct.

If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? The tribunal will decide, in particular, whether:

- (i) ***the respondent genuinely believed that the claimant had committed the misconduct;***

23. Based on the claimant's history of misconduct, which had resulted in formal warnings in 2020 and 2022, Mr Nogueroles thought his refusal to do the Stafford run was another instance of disobedience. On this basis, I find that Mr Nogueroles had a genuine belief that the claimant was refusing to follow a reasonable management instruction and believed this to be misconduct.

(ii) *this belief was based on reasonable grounds;*

24. The belief was based on an erroneous assumption that the claimant knew he was deliberately refusing to carry out a legitimate management instruction. In fact, the claimant thought he was being asked to break the law, which could have resulted in his dismissal in any event, given his previous history of breaches.

25. Mr Nogueroles did not try to understand why the claimant was refusing to take the trailer. He did not discuss timings with him or how his required rest break could be accommodated into the schedule. As a manager, it was his responsibility to attempt to find a solution to the rest break issue, and not leave it to the claimant to suggest times and sort out.

26. Consequently, the belief was not based on reasonable grounds.

(iii) *at the time the belief was formed, the respondent had carried out a reasonable investigation;*

27. Mr Nogueroles did not carry out any investigation.

(iv) *the respondent followed a reasonably fair procedure;*

28. The respondent did not follow any procedure. Mr Nogueroles made a snap judgment based on the assumption that the claimant was unreasonably refusing to obey a legitimate instruction.

29. There was no dismissal letter and the claimant was not informed of his right of appeal.

30. No consideration was given to any alternatives to dismissal.

31. This is not one of those rare cases where no procedure needs to be followed.

(v) *the dismissal was within the band of reasonable responses.*

32. Mr Nogueroles did not properly consider the situation and gave the claimant no reasonable opportunity to explain himself. He did not investigate the circumstances surrounding the claimant's refusal to do the job. He made a snap judgment, and failed to consider alternatives and/or other potential sanctions.

Summary conclusion

33. For the reasons given above, the respondent did not act reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason

to dismiss him. Therefore, the claim is well founded and succeeds.

Reduction for blameworthy conduct.

34. The claimant did not explain to Mr Nogueroles how the timings meant he could not get the trailer to Stafford by 5.30am. His attitude was defiant and unhelpful and, due to previous history, led Mr Nogueroles to think he was being disobedient.
35. For this reason, the claimant's conduct was blameworthy and contributed to the dismissal. Therefore, a reduction of 50% in compensation is justified.

Reduction for the chance the claimant would have been dismissed in any event.

36. There is no evidence that the claimant would have been dismissed in any event. On this occasion he had not breached any rules or regulations and it was reasonable for him to refuse to take the trailer to Stafford for 5.30am. There was no other reason for dismissing him at the time. Therefore, no reduction is made for the chance of the claimant being dismissed in any event.

Employment Judge Liz Ord

Date 26 September 2023

JUDGMENT SENT TO THE PARTIES ON

29 September 2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.