



EMPLOYMENT TRIBUNALS

Claimant: Mr I Kendell

Respondent: Maritime Transport Limited

Heard at: Leeds (by video) **On:** 23 October 2023

Before: Employment Judge T Knowles

Representation

Claimant: In person

Respondent: Mr Wakelin, Solicitor

RESERVED JUDGMENT FROM A PRELIMINARY HEARING

The Judgment of the Tribunal is that the Claimant's claim is struck out under Rule 37(1)(b) because it has no reasonable prospect of success.

RESERVED REASONS

Issues

1. The sole issue for me to determine today is the Respondent's application to strike out the Claimant's claim under Rule 37 of the Employment Tribunal Rules of Procedure 2013.

Evidence

2. This was a public preliminary hearing video hearing.

3. The Respondent produced a bundle of documents, 111 pages. References to numbers in brackets in these reserved reasons are to page numbers in the Respondent's bundle of documents.

4. The Claimant confirmed that he had a copy of the Respondent's bundle of documents.

5. The Claimant had sent to the Tribunal links to a shared drive containing 5 videos in MP4 format. These were available to me during the hearing and afterwards when

deliberating my reserved judgment.

6. Neither party gave evidence. Both parties made verbal submissions.
7. I reserved my Judgment at the conclusion of the hearing due to insufficient time.
8. I apologise to both parties in the delay in sending this Judgment to them which has been caused by my lack of availability to set aside time to give the matter due consideration.

Presenting history

9. Following his dismissal from his position as a HGV Class 1 Night Driver on 2 May 2013, the Claimant notified ACAS of his prospective claim on 9 May 2023 and was issued with an early conciliation certificate on 12 May 2023.
10. On 23 May 2023 the Claimant issued his claim form to the Tribunal. His claim is for unfair dismissal only.
11. In his claim the Claimant explains difficulties in his home life causing him to need some leave from work.
12. He states that he took some time off and explained to his manager on 11 April 2023 that he may need flexibility in the future.
13. He explains that he returned to work on 18 April 2023 and was suspended due to a public complaint being made about driving using a handheld device watching films and TV programmes.
14. The Claimant suggests he did not touch his phone and was only listening to music. He states that he was dismissed after a disciplinary hearing on 2 May 2023.
15. He refers to his appeal in which he stated that the video from 4 April 2023 was not from the time the member of the public complained about, but was told it made no difference.
16. The Claimant is in effect suggesting that his difficulties in his home life which caused him to request occasional leave were the real reasons for his dismissal.
17. The Claimant refers to his 10 years' service and complains that his dismissal was unfair.
18. The Respondent entered a response to the claim stating that the Claimant was dismissed for conduct, namely because video footage showed that the Claimant had mounted his mobile phone on the dashboard of his LGV, in his direct line of vision, adjacent to his speedometer, and appeared to be watching "YouTube" music videos while driving.
19. The Respondent noted that the Claimant admitted during the disciplinary hearing that the reason he had mounted his mobile phone on the dashboard in front of him so that he could skip tracks, which the dismissing officer understood to be an admission that he had interacted with his phone while driving.
20. The Respondent contended that the dismissal was fair.
21. By letter dated 23 June 2023, the Respondent made an application to strike out the Claimant's claim.
22. By letter dated 5 August 2023 the Tribunal listed the application for a 2-hour public preliminary hearing on 23 October 2023.

Submissions

23. The Respondent made the following submission based on documents within the bundle:

- a. That the email complaint from a member of the public (30) on 4 April 2023 identified the vehicle and its location.
- b. That the Respondent had identified the driver and the vehicle at the location (33).
- c. That the Claimant admitted he was the driver (37).
- d. That the Claimant admitted interacting with the mobile telephone (39).
- e. That the Claimant admitted the phone was displaying videos from YouTube (40,41).
- f. That the Claimant stated that he was not denying anything (42) and that there was no argument from him (52).

24. The Respondent submitted that at the disciplinary hearing on 28 April 2023 the Claimant did not dispute touching his telephone whilst driving (58,59). The Claimant accepted the phone was in view (61). The Claimant did not dispute the conduct and said he was not making any excuses (68).

25. The Respondent submitted that the decision to widen the investigation and look at other days when the Claimant was driving was reasonable in the circumstances.

26. The Respondent submitted that the Claimant's suggestion that the investigation was somehow related to asking for time off work was speculative.

27. The Respondent submitted that they have a clear policy preventing the use of a mobile telephone which had been provided to the Claimant and he had signed a copy confirming receipt (92).

28. The Respondent submitted that their handbook defined gross misconduct in their disciplinary policy and the conduct meets the definition (27).

29. The Respondent referred me to the case of **Ahir v British Airways plc 2017 EWCA Civ 1392, CA**. The Respondent submitted that there were many parallels with this case.

30. The Claimant made submissions concerning needing time off due to his wife's medical condition and asking for help if he needed time off owing to her medical situation.

31. The Claimant submitted that he then returned to work only be suspended.

32. The Claimant submitted that the video footage from 4 April 2023 being from a different time and to the fact that the complaint could have come from someone in a car therefore they would not have been able to see his dashboard.

33. The Claimant referred to the investigation producing a video downloaded on 6 April 2023 then three other videos downloaded on 12 April 2023, after he had requested support with time off.

34. The Claimant submitted that he believes that the complaint was made up.

35. The Claimant submitted that there was no match between the complainant's name and their email address.

36. The Claimant submitted that he had worked there for 10 years and that the sanction was too harsh.

The Law

37. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the Tribunal's right to strike out a claim or response.

38. This provides

"37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success..."

39. Strike out is a draconian measure which should only be exercised in exceptional cases.

40. I should take care when striking out a claim brought by a litigant in person (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***), particularly where the issue is a poorly pleaded case. In such cases I should consider instead other measures to ensure that the case is clearly pleaded and make a deposit order instead.

41. Strike out may not be appropriate in cases involving disputed facts because it would normally be necessary to hear the evidence first (***Cox v Adecco and ors 2021 ICR 1307, EAT***).

42. Nonetheless cases involving disputed facts may be struck out, for example where the Claimant is making fanciful factual assertions (***Ahir v British Airways plc 2017 EWCA Civ 1392, CA***).

43. Case law on striking out is clear that I should take the Claimant's case at its highest (see for example ***Cox***).

Conclusions

44. In a claim of unfair dismissal, the task for the Tribunal is firstly to determine what the reason for dismissal was and whether or not it was for one of the five potentially fair reasons set out in sections 98(1) and 98(2) Employment Rights Act 1996. Conduct is a potentially fair reason. A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (***Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA***).

45. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence (***Alidair Limited v Taylor [1978] ICR 445 CA***).

46. Guidance applicable to cases of misconduct was given by the EAT in ***British Home Stores Limited v Burchell [1980] ICR 303***. The issue of fairness involves three elements:

- 1 *Whether the employer believed the employee was guilty of misconduct, and*
- 2 *Had in his mind reasonable grounds upon which to sustain that belief, and*
- 3 *At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter was reasonable in the circumstances of the case.*

47. This guidance must be read in the light of ***Boys & Girls Welfare Society v***

McDonald [1996] IRLR 129 EAT which reminds the Tribunal that in considering the question of fairness for the purposes of section 98(4) the burden of proof is neutral.

48. In **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT** that the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

49. All of these questions inform the application of the relevant statutory provision concerning fairness in cases where a potentially fair reason is established, Section 98(4) which provides that the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

50. The question of whether or not the Claimant's claim of unfair dismissal has no reasonable prospects of success requires consideration of all of these tests.

51. In my conclusion, the Respondent shall establish that the reason for the Claimant's dismissal was conduct.

52. The Claimant's only real challenge to that from the Claimant is the circumstantial coincidence of the date of his request that the Respondent be flexible in response to his requests for leave owing to his wife's medical situation.

53. But the complaint from the public pre-dates that request and on the Claimant's own case, the Respondent is seen to have been investigating that complaint at least 5 days prior to the Claimant's request.

54. The Claimant's suggestion is totally speculative and supposition. He has no evidence to support his claim that he was dismissed owing to the leave discussion.

55. The Respondent has compelling evidence of the trigger for their investigation into the Claimant's conduct.

56. The Claimant's submission that the email may have been fabricated and his reference to the email address being different to the name of the person are all, again, speculative and supposition.

57. The fact that the person's name on the email differs from the email address is a non-point. There is no more evidence that this indicates fabrication than it indicates something other than fabrication.

58. In my conclusion, the three-stage test set out in **British Home Stores Limited v Burchell [1980] ICR 303** will also be satisfied in the Respondent's favour.

59. There can be little doubt that the Respondent believed the Claimant was guilty of the misconduct. The Respondent was informed by the Claimant's clear admissions. The video evidence is also clear. As the Claimant put it during the internal proceedings "*there's no argument from me*".

60. The Claimant's answer to that, in his claim, appears to be that the video footage for 4 April 2023 is not timed at the same time as the member of the public stated he had seen the Claimant. The Claimant's case is therefore that there was no evidence that he had YouTube videos playing on the dashboard of his LGV at the particular point in time that

the member of the public had complained about.

61. The Claimant should look at the reasons for dismissal set out in his dismissal letter. These make it clear that the Claimant was not dismissed for watching YouTube videos at the particular time the member of the public complained about. He was dismissed for watching videos whilst driving.

62. I have considered the videos at the parties' request. The video from 4 April 2023 is clear enough. A video is playing on his phone which is sat inside the dashboard of his LGV in front of him whilst he is driving. The Claimant can be seen altering the angle of the phone to his line of sight.

63. There may be a dispute between the Claimant and the Respondent about whether or not the video for 4 April 2023 produced by the Respondent shows the precise moment that the member of the public complained about. But nobody knows the precision which the member of the public applied.

64. The Respondent says it is the correct time, taking into account known discrepancies in the timing displayed by the in-vehicle camera system.

65. The Claimant disputes that.

66. But the complaint from the member of the public is only the trigger for the investigation, and what was complained about turns out to be correct for that day, and again on 6 April 2023, that the Claimant appears to be watching videos whilst driving his LGV.

67. Any tribunal reviewing the evidence is most likely to find that the Respondent genuinely believed that the Claimant was watching videos on his phone whilst driving and that they had reasonable grounds for making that conclusion.

68. The investigation is most likely to be found to be within the range of reasonable investigations open to a reasonable employer. They looked at their vehicle tracking and driver records, and obtained in-vehicle camera evidence. They interviewed the Claimant and he did not dispute what could be seen in the video.

69. The final question for the Tribunal will be the sanction of dismissal and whether or not that fell within the range of reasonable responses that may be adopted by a reasonable employer.

70. The Tribunal will need to take into account that the Claimant had 10 years' service, which is considerable.

71. Nonetheless, I think it is most likely that dismissal will be found to be within the range of reasonable responses that may be adopted by a reasonable employer.

72. As the Respondent set out in its dismissal letter, the safety implications of driving an LGV with distractions in front of you need not be elaborated on any further.

73. For those reasons, taking the Claimant's case at its height, I conclude that it is highly likely, almost certain, that a Tribunal reviewing this case will conclude that the Respondent acted reasonably in treating the conduct as sufficient reason to dismiss the Claimant.

74. There is in my conclusion no reasonable prospect of the Claimant succeeding in his claim of unfair dismissal. There is virtually no prospect of him succeeding in his claim at all.

Employment Judge T Knowles

22 November 2023

RESERVED JUDGMENT & RESERVED
REASONS SENT TO THE PARTIES ON

23 November 2023

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FOR THE TRIBUNAL OFFICE