



EMPLOYMENT TRIBUNALS

Claimant: Mr Craig Michael Davison

Respondent: Primelink Transport Limited

Heard at: London South, by CVP **On:** 17 November 2023

Before: Employment Judge Rice-Birchall

Representation

Claimant: Ms Sole, Counsel

Respondent: Ms Mayhew-Hills, consultant

JUDGMENT

1. The complaint of breach of contract in relation to notice pay is well-founded.
2. The respondent shall pay the claimant £2200 as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.

REASONS

Background

1. The claimant brought his claim for wrongful dismissal on 16 February 2023 following his summary dismissal on 6 January 2023.

Evidence

2. The Tribunal had the benefit of a bundle of documents and witness statements from the claimant and Ms Qui Ju Yang, the director of the respondent. Both the claimant and Ms Yang gave oral evidence.
3. The hearing had been previously listed but did not go ahead. Consequently, there was a previous witness statement prepared by the respondent in the claimant's possession which differed from the statement before this

Tribunal. The statement prepared by the respondent for the previous hearing was forwarded to the Tribunal to be put into evidence.

4. Ms Yang's evidence was inconsistent. For example, she said in evidence that the claimant was dismissed partly for the number of messages on the respondent's group chat on 5 January 2023 and said that she didn't see any messages after 6pm, hence not asking him to stop. The claimant's representative then pointed her to messages which she had written on the chat at 738pm, 836pm, just before 9pm and just before midnight on that same night. Further, the reason for dismissal given in the witness statement prepared for this Tribunal hearing and for the previous Tribunal hearing differed as regards the number of messages the claimant was alleged to have sent.

Issues

5. The following were the issues agreed with the parties at the outset of the hearing:
 - a. What was the claimant's notice period?
 - b. Was the claimant paid for that notice period?
 - c. If not, was the claimant guilty of gross misconduct? Or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Findings of fact relevant to the issues (on the balance of probabilities)

6. The claimant was employed by the respondent as an HGV driver. He was one of approximately fifteen drivers. He was entitled to one month's notice under his contract of employment.
7. There were two What's App group chats used by the drivers: one included Ms Yang, who was the drivers' boss, which is referred to as "the respondent's chat", and one did not. That second group was referred to as the "posse" chat and was a private chat amongst the drivers, which was set up by the claimant. The primary purpose of that second group chat was for the drivers to alert each other to road works, delays and so on, but the drivers also expressed their opinions on the chat.
8. Some extracts from the chats were available to the Tribunal. In particular, the whole of the respondent's chat for 5 January 2023 into the morning of 6 January 2023 was submitted into evidence by the claimant on the morning of the hearing. It had not been included in the Bundle by the respondent despite the fact that it sought to rely on the number of messages sent in that chat.

9. There was some discontent amongst some of the drivers as they believed they had been promised a pay rise. In the end the claimant spoke to Ms Yang about the possibility of a pay rise and was told that it was not possible. This conversation took place around the beginning of December 2022.
10. On or around 3 December 2022, the claimant relayed Ms Yang's response to his request on the "posse" group chat. That prompted some discussion on the chat group but the claimant told the drivers to speak to Ms Yang themselves.
11. On 5 January 2023 in the respondent's chat, much discussion and activity was prompted by Ms Yang's post at 553pm in which she explains that the "blocks" will increase from 11 to 13 hours and that driving hours will extend from a maximum of nine to ten hours. This created a flurry of activity on the chat, with JB being the first to respond, saying that it seemed to be more work for less hours. Ms Yang sends the most messages in the chat as she is trying to respond to a number of drivers (at least 6) who respond to her message, including the claimant. The claimant appears to send approximately three messages and others a similar number or more in some cases. All of the messages relate to the respondent's news of a change in work patterns, and pay.
12. The claimant's messages in that whole chat are: "I agree with John, so if the blocks have gone up, then why hasn't our pay to match the block, guaranteed 12 hour pay or even an extra hourly rate. We as drivers r the works, the backbone of the company and we feel unappreciated for what we do." Then, "I can agree with you John, been promised three pay rises and not had anything in 18 months." Finally "What so u mean "screwed up" by me" (which related to a misunderstanding which was clarified by Ms Yang).
13. Ms Yang responded to driver LG who complained that there would be "more stops, more driving...but we get the same wage..." by saying, " LG, we get paid by hours....£17 is a good rate. I cannot provide it but wish you can get it. Hand in your notice whenever you're ready."
14. Needless to say, this prompted a significant amount of chat on the posse chat, being the private chat for the drivers, in which Ms Yang was not involved.
15. JB said: "WTF is that message all about. Just read it and it seems like more hours, more work but no increase in pay." The claimant posted a response which reads: "Exactly...being shartfed big time and she doesn't give a shit". Someone called Reaper then replied saying: "I'm already looking elsewhere for work, this job has already taken more that I'm prepared to give." In the Bundle, the message from the claimant is circled which denotes that Ms Yang relied on it as part of the reason for dismissal according to her evidence.

16. Later in the posse chat (which is assumed is from 5/6 January 2023 although there is no date on the extracts) there is another circled entry where the claimant responds to a comment from LG which states, "Business based on respect". The claimant replies "We don't get any, we're just a number for her to earn money". James then replies and the claimant posted again: "Put your thoughts on her group (referring to the respondent's chat), she needs to hear what everyone thinks".
17. In another screenshot provided with a circled entry, another driver, LG, puts a link to a job that has been advertised by a different company, and then also refers to an employer paying £200 per day. This is in response to the claimant asking for the link when LG mentions a vacancy (20:44).
18. The next circled entry from the claimant is: "her last message...wow..she really cares for her drivers" (21:07) and then a little later (21:25): "She thinks she can replace us all overnight, but all she get is late people, damaged trucks and shit drivers. She'll regret it when we're all gone". This was just one email in a chain in which other drivers were expressing similar sentiments, including driver JB who says: "The job is enjoyable but these things piss me off. ...The promises of an extra quid etc. You're right about people being on top of the job helping her out. Does she want the dregs?" This was at 21.34.
19. At 23:49 another driver talks about wanting to express his concerns to Ms Yang and the claimant replies, "I'm in", along with John Burdis.
20. Around midnight there is discussion about the daily rate of pay. It is between the claimant, John, LG, Colin, Selwyn and Filipe. The driver LG said he wanted to set up a meeting with Ms Yang to discuss pay because of inflation etc and everyone responded. The next circled entry from the claimant is at 00:02 when the claimant says "We need 175-180" and "Then we need everyone on board".
21. The claimant is one of a number of drivers expressing similar concerns. It is not apparent that he is a ring leader or messaging more than any of the other drivers who are partaking in the chat.
22. Ms Yang says that she became aware of many messages being sent on the evening of 5 January 2023 on 6 January 2023 after one of the drivers complained about them. She says she conducted an investigation on 6 January 2023 and found 100 messages from the claimant which she alleges were all sent on the day/night of 5 January 2023, some of which she believed destroyed the trust and confidence between the employer and employee (most, but not all, of the examples referred to in the Bundle are given above) and summarily dismissed the claimant on 6 January 2023.
23. Ms Yang provided no explanation for the claimant's summary dismissal until 9 January 2023 when she explained that the claimant had been dismissed for gross misconduct in accordance with the respondent's disciplinary policy, "section A subsection 5: fj".

24. This section reads as follows: “An employee will not be dismissed for a breach of discipline except in cases construed as “gross misconduct”. Some examples are: - h) Misuse of the IT systems for indecent, inappropriate, or unauthorised purposes. The above list is not exhaustive; j)”Gossiping, yakking, serious breach of trust, lower the moral.”
25. It is the respondent’s case that the claimant was dismissed for the messages referred to above in which it is alleged that the claimant was spreading false rumours (according to Ms Yang’s witness statement) and “bombarding the What’s App group with messages on the night of 5 January 2023.”
26. In her witness statement, Ms Yang said the following about the reason for the claimant’s dismissal: “The Claimant was dismissed on 6th January 2023 for gross misconduct. The reason for the dismissal was the Claimant had bombarded the Respondent’s employees with WhatsApp group chat messages on the night of 5th January 2023, he requested a pay raise again, he requested to raise the guaranteed pay for Drivers to be altered from 50 hours up to 60 hours, and a £1 raise of the hourly rate, the result of which was that he requested £960 per week guaranteed pay plus bonus. Instead of placing his issues into a formal grievance letter, he deliberately posted it on the company WhatsApp group. He tried to pressurise the Respondent’s Director and, at the same time, he was asking the rest of the Respondent’s Drivers from the WhatsApp Driver’s group chat to follow him. He was trying to force a pay rise. The Claimant’s demands were totally unaffordable and were rejected instantly. The Respondent undertook an investigation and found that 100 messages had been sent on the night of 5th January 2023 between the Claimant and two of his colleagues. 70 messages were found on the WhatsApp Driver Group Chat, and 30+ messages were found on the company WhatsApp Group Chat. The Respondent found that there were lots of rumours, lies and gossip being communicated to his colleagues. He had tried to poach the Respondent’s employees by requesting a link of a advertised vacancies from other companies through the Driver’s WhatsApp group from another driver. The Group Chat was for professional use intended to support the Respondent’s employees with updated information of road closures, diversions, live traffic updates, and so on. It was not intended to be used in the way that the Claimant used it. The Respondent’s Drivers had complained to the Director that their sleep time had been disturbed during their rest hours, prior to driving during the next day. This was a serious safety concern for the Respondent. The Respondent’s Drivers’ GPS satellite navigation machines were consistently interrupted by the non-stopping messages from the Claimant. All 11 drivers including the Claimant himself were driving on motorway for long distances that night, and they were disturbed by the glut of messages by the Claimant on the night of 5th January 2023. The Claimant’s actions not only put all 11 of the Respondent’s Drivers and other road users in grave danger of a road accident, but also put the Respondent company at very high risk of the irrevocable damage and liability. The Respondent had no alternative but to dismiss the Claimant in the circumstances.”

27. In her original witness statement, Ms Yang said that the claimant had himself sent 100 text messages overnight to his fellow employees. That was a change from the position put forward in the witness statement before this Tribunal and the claimant's oral evidence in which she suggested that the 100 messages from the claimant were sent through the two different chats. Ms Yang confirmed that her first witness statement contained an error, but it appears that that is what Ms Yang believed at the time of the postponed hearing, as the statement was signed and dated and Ms Yang confirmed that its contents were true at the outset of the hearing.
28. The respondent's position is that the claimant's conduct destroyed the trust and confidence which should exist between employer and employee.

Law

29. At common law an employee is wrongfully dismissed if their dismissal was in breach of the contract of employment. Normally this will mean dismissal without the notice due under that contract, but it could also cover a purported summary dismissal for cause by the employer (such as where there is an act or a series of breaches which, taken individually, would not amount to gross misconduct) where in fact the employee had not been guilty of gross misconduct.
30. A dismissal which is wrongful is not necessarily unfair, and vice versa. This is because an employer may behave unreasonably in dismissing an employee even though it has observed the letter of their contract by giving the requisite notice. A decision to dismiss may be reasonable even if it involves a breach of contract.
31. Also, the unfair dismissal test in misconduct cases of whether the employer had a 'reasonable belief' that the employee was guilty of the alleged misconduct does not apply in wrongful dismissal; in order to succeed with a complaint of employee breach, the employer will have to prove, on the balance of probabilities, that the employee misconduct (or other breach) in question was actually committed.

Conclusions

32. The claimant was entitled to one month's notice of termination of employment.
33. The claimant was not paid his notice.
34. The claimant was not guilty of gross misconduct. The respondent was unable to show, on the balance of probabilities, that the employee misconduct alleged was actually committed or that the claimant was guilty of gross misconduct.

35. The respondent's evidence is confused around the reason for dismissal and the evidence relied on. The reasons given on 9 January do not marry up with the first witness statement and the second witness statement contains further inconsistencies and changes. It was difficult to ascertain the gross misconduct alleged. A number of different factors were asserted in Ms Yang's witness statement. The Tribunal has addressed them each in turn.
36. The first was that the claimant had bombarded the Respondent's employees with WhatsApp group chat messages on the night of 5th January 2023.
37. Ms Yang alleges that an investigation found that 100 messages had been sent on the night of 5th January 2023 between the claimant and two of his colleagues, 70 of which were found on the posse chat. As stated above, Ms Yang's position on that changed from her first witness statement in which she alleged that the claimant himself had sent 100 messages overnight.
38. Ms Yang also states that, "the Group Chat was for professional use intended to support the Respondent's employees with updated information of road closures, diversions, live traffic updates, and so on. It was not intended to be used in the way that the Claimant used it."
39. There was no evidence in the Bundle to demonstrate that that number, or anything like that number, of messages had been sent by the claimant that night. From the extracts in the Bundle, the claimant did not appear to have sent more messages than other members of the team and no disciplinary action was taken against them at all. This allegation is simply not made out on the evidence provided to the Tribunal, or on the balance of probabilities.
40. Ms Yang said, in oral evidence, that the reason they formed part of the allegation of gross misconduct was because of the content, rather than the number, of the messages and the fact that she was being bad mouthed which she could not accept. The respondent's main concern appeared to be the drivers' chat (the "posse" chat). It must be noted that these messages were sent on a private chat between the drivers. The respondent was asked to explain which messages she was referring to and she referred to messages which she had circled from the claimant, most of which are referred to above.
41. The content of the claimant's messages was not significantly different to those sent by others, who were also talking about leaving and rates of pay (all prompted by the message from Ms Yang on the respondent's chat about the change in hours). Again no action was taken against other members of the team who had sent similar messages. The claimant's messages were very much part of the chat, and it was not apparent that he was an instigator of the negative comments, or even the main participator.
42. In any event, sending messages in communication with colleagues who are participating in the same conversation and subject on a private chat for the drivers is not gross misconduct. Again, there was no evidence to support

the contention and, on the balance of probabilities, the allegation is not made out.

43. Ms Yang also referred to 30+ messages were found on the respondent's Chat. Ms Yang confirmed that there was nothing wrong with the messages as regards their content (which was around the same subject as on the posse chat). In fact there appeared to be approximately three messages from the claimant.
44. Ms Yang herself had been part of that conversation, sending messages at 738pm, another at 836pm, others just before 9pm and yet others just before midnight (even though she first said in oral evidence that she had not seen any messages after 6pm). At no point did she ask the claimant, or others, to stop, or indicate that she thought there were too many messages, or that the content of the messages was improper. In fact, as stated above, the claimant sent approximately three messages on that chat, fewer than some of his other colleagues and messages which were similar in content and tone as his colleagues.
45. Again, there was no evidence to support the contention and, on the balance of probabilities, the allegation is not made out. The respondent has exaggerated the number of messages sent by the claimant. Ms Yang, if she conducted an investigation as alleged, cannot have believed that that number of messages had been sent.
46. Ms Yang also states that part of the reason for the claimant's dismissal was that "he requested a pay raise again, he requested to raise the guaranteed pay for Drivers to be altered from 50 hours up to 60 hours, and a £1 raise of the hourly rate, the result of which was that he requested £960 per week guaranteed pay plus bonus. Instead of placing his issues into a formal grievance letter, he deliberately posted it on the company WhatsApp group. He tried to pressurise the Respondent's Director and, at the same time, he was asking the rest of the Respondent's Drivers from the WhatsApp Driver's group chat to follow him. He was trying to force a pay rise. The Claimant's demands were totally unaffordable and were rejected instantly".
47. In her oral evidence the claimant said that it was "bad manners" to request a pay rise again once a request had been rejected and that the pay rise requested was not affordable. She said it was improper to ask for a pay increase and that he should have raised a grievance.
48. Ms Yang then confirmed, when asked if asking for a pay increase was alleged to be gross misconduct, that the claimant was not dismissed because he asked for a pay rise, and that he would not have been dismissed for that reason, but it was because he "caused damage to the company". The Tribunal assumes this is because Ms Yang believes he should not have mentioned pay on the posse chat. But this was a private chat for the drivers and the claimant was not the only one who raised it. LG and JB also sent similar messages and were not dismissed by Ms Yang. It was JB who asked

Ms Yang for a chat to discuss pay, not the claimant. Accordingly this allegation is not made out on the balance of probabilities.

49. Ms Yang alleges that she found that there were lots of rumours, lies and gossip being communicated to his colleagues. When asked in cross examination to demonstrate this she said that the messages were not in the Bundle. She again mentioned that it was because there was talk about pay at other companies. From the evidence in the Bundle, it was LG who said that he had found out that another company was paying £160 per shift and who asked Ms Yang for a meeting to discuss wages. Accordingly this allegation is not made out on the balance of probabilities.
50. It is further alleged that the claimant had tried to poach the respondent's employees by requesting a link of a advertised vacancies from other companies through the posse chat from another driver.
51. As to this allegation, the claimant had asked for the link of a job that another driver had mentioned that was available. Whilst the claimant did make the request, it was another driver who referred to the vacancy. Asking for a link of a job being advertised on a private chat does not amount to poaching employees which would require more than requesting a link for an available vacancy. Again this allegation is not made out on the balance of probabilities.
52. The final allegation is that the respondent's drivers had complained to Ms Yang that their sleep time had been disturbed during their rest hours, prior to driving during the next day and that this was a serious safety concern for the respondent, that the drivers' GPS satellite navigation machines were consistently interrupted by the non-stopping messages from the claimant; that all 11 drivers including the claimant himself were driving on motorway for long distances that night, and they were disturbed by the glut of messages by the claimant on the night of 5th January 2023. It is alleged that the claimant's actions not only put all 11 of the respondent's drivers and other road users in grave danger of a road accident, but also put the respondent at very high risk of the irrevocable damage and liability."
53. This allegation is not made out on the balance of probabilities. First there is no evidence that the claimant did, in fact, send that number of messages. Second, drivers have a responsibility to ensure that they drive safely and can (even should) switch off their phones if necessary whilst driving.
54. The messages for which the claimant were dismissed did not amount to gross misconduct either in number or content. In particular, the discussions about pay were not instigated by the claimant in the chats. Many other drivers participated fully in the chat over that subject and sent as many messages as the claimant but none were dismissed or even disciplined.
55. The claimant was not guilty of gross misconduct, nor did he do something so serious that the respondent was entitled to dismiss without notice.

56. Accordingly, the claimant was dismissed by the respondent in breach of his contract of employment and is owed notice pay.

Employment Judge Rice-Birchall
Date: 10 January 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/>