EMPLOYMENT TRIBUNALS

Claimant: Mr M Tison

Respondent: Forest Road Brewing Co Ltd

Heard at: London South (by video) **On:** 06/09/23

Before: EJ England

Representation
Claimant: Represented himself (in person)
Respondent: Did not attend

JUDGMENT having been sent to the parties on 7 September 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The trial today was listed by hearing notice dated 10/03/23. That was sent to the Respondent's address listed on the ET1 and included directions for various steps to happen, including sending of documents. The Respondent has not provided any response (ET3) or any documents in the way of evidence for this hearing.

2. An initial consideration therefore was what to do about the Respondent's apparent lack of engagement. I asked for the hard copy file to be searched and was informed by the clerk that there was nothing on the file indicating that the Respondent did intend to attend today, nor anything at all. My search of the electronic file showed the same. Companies House shows the Respondent listed as active and the address provided is that on the ET1 and that used on the Tribunal file. I also looked to the extent I was able at a potentially linked case because in his ET1 Mr Tison refers to a claim brought by his colleague, Mr Mehmet Bohur, in case number 2303644/22. That claim is ongoing, the same address for the Respondent is used as in Mr Tison's claim, the Respondent has responded in that claim and in its ET3 indicated that it was not defending that claim, although a later email sent on 16/08/23 appears to suggest they probably do defend. I am satisfied therefore the address that is on the ET1 in Mr Tison's case appears to be correct and that the relevant documents have been served on the Respondent, I am provided with no reason why the Respondent has not attended and their absence from the hearing appears to be consistent with their decision not to provide a response. I was

therefore content to continue with the trial as listed and to be determined in accordance with evidence produced by the Claimant.

3. Moreover, I considered that rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1, was likely applicable such that it was for me to determine if on the available material and further information whether the claim could be determined and that the Respondent was entitled to participate in any hearing to the extent I permitted, having not sought or gained an extension of time in which to provide a response (ET3).

4. To add further complication, Mr Tison himself did not respond to the Tribunal's directions for evidence and documents. He explained that it was because he read the order on his previous phone, which did not have the ability to read the whole document or at least he did not manage to see the whole of the document and did not therefore realise from the end of the directions what was required. He has since bought a new phone and had seen the requirements. I highlighted that part of the requirement was just two days ago to send in documents and I asked him why he had not done that, he said that he did not know where to send them. He said he telephoned the Tribunal and no one picked up so he did not send it and by the time he did get a response with the hearing link for today, he considered it to be too late. His account is consistent with an email from him sent to the Tribunal on 05/09/23 but as I said to him, my view is that it would have been better to have sent the materials even if late because it was likely better late than never in light of the upcoming trial. He explained that he had already collated the documents on which he wished to rely and he then sent them in by email. These reasons referr where applicable to the evidence that I considered as part of my decision. I also, under affirmation, heard oral evidence from Mr Tison about his claims.

5. One of the first issues we dealt with was identifying what were the claims. His ET1 includes the following:

> "I believe my termination of employment was unfair because my van was constantly being overloaded with weight which put my health & safety in danger & the general publics. The week prior to me to me being sacked my van was illegally overloaded 3 times. I raised the issue twice that week by writing on the daily manifest which is seen daily by management that I was "OVER WEIGHT" then "OVER WEIGHT AGAIN" then on the Friday they now hide the full weight of my vehicle meaning I was driving around with nearly 2,000kg in a van which legal limit is 1,300kg… I believe this constitutes as automatic unfair dismissal under the grounds of health and safety" [sic.]

6. Mr Tison accepts that he has no right to claim 'ordinary unfair dismissal', having been employed for under two years. He explained that he was only claiming unfair dismissal and no other types of claims, including wages, and said that he had spoken to ACAS who advised him that he should pursue a claim for automatic unfair dismissal related to health and safety. After I asked him more specifically what he was complaining about he explained that he had raised concerns about health and safety relating to the overloading and state of vehicles that staff were asked to use in his job as a drayman (beer delivery

driver). He explained that such practices were illegal because of the impact they have on breaking distances and it raises health and safety concerns about the roadworthiness of the vehicles. He said he had raised this earlier in his employment and more specifically in the last week before he was dismissed he had returned after a period of sick leave and raised the concerns in the week immediately prior to being dismissed on the Friday without any warning. He also said in that week he was lied to as well because he was told that his vehicle was not overweight, when in fact it was. He confirmed that he was not claiming any detriments but instead was claiming solely about dismissal.

7. The issues therefore are really about what was the reason he was dismissed. Was it for the principal reason as he says, of raising health and safety concerns? I considered the claims could be brought as an automatic unfair dismissal claim relating to a protected disclosure claim, i.e. 'whistleblowing', or raising a health and safety concern in line with s.100 Employment Rights Act 1996 (ERA 1996). I considered that both could not succeed because they both consider the principal reason for dismissal and you cannot have two principal reasons. After asking Mr Tison it appeared that although his claim could come under both types of claim, it was more applicable and simpler to be considered as a health and safety claim under s.100(c)(i) ERA 1996. He explained that there was no health or safety committee or representative in his workplace; he told me and I accept there was not even a handbook. He says he raised concerns, that is why he suffered and that is the basis on which I have understood his claim.

8. I have not considered it necessary to set out an explanation of case law concerning a s.100 ERA claim. I have considered the general principles applicable and do not consider that a recitation of case law would add anything to the specific legal issues being considered and stated in the legislation.

9. I gave oral judgment at the end of the hearing with reasons. Subsequently Judgment was issued to the parties and by an email of 19/09/23, the Respondent requested written reasons for the judgment.

Findings of Fact

10. Mr Tison was employed from 01/03/22 to 30/11/22 as a drayman. He informed me that he had good feedback about his performance and this included a £100 one off payment. This is evidenced by a text message he provided that states "we are gona put £100 in your bank. Thanks so much for stepping up when we were a driver down. We have also had two customers this week specifically praise and mention you on deliveries so thank you for that!" [sic.]. His GP record of 28/10/22 records "recently got a promotion and things are going well for me".

11. In October 2022 Mr Tison had a number of weeks off work due to an accident suffered at work in which something appears to have dropped on his foot. I make no findings of fact about the cause of that accident. A fit note signs him off from 19/10/22 to 13/11/22. Mr Tison confirmed that he had returned to work the week preceding dismissal and I accept his account of the chronology.

12. Mr Tison stated that he raised concerns about the overloading of vehicles initially in April/May 2022 but then again more strongly and directly in the final

week of his employment. Mr Tison provided to the Tribunal copies of the delivery manifests from 22/11/22 on which he had written “overweight”, 24/11/22 on which he had written “overweight again” and 25 November 2022 on which he had circled the apparent weight of the loaded van and written “false” then explained his view why it was false. I accept these are genuine copies of documents made at the time and his further evidence that he discussed his concerns orally at the time with his employer.

13. Without warning, on 30/11/22 Mr Tison was dismissed. A reason of sickness absence appears to have been relied upon by the Respondent, although this is unclear because Mr Tison was unclear himself and the Respondent did not attend.

Conclusions

14. Did Mr Tison raise concerns as outlined at s.100(1)(c) ERA 1996? My conclusion is that Mr Tison did for the following reasons:
    a. I have seen photos of the manifest that Mr Tison completed during the final week of his employment where, as his ET1 says, he highlighted that the vehicles were overweight and that the correct weights were not being stated because the Respondent had not included certain weights in the total.
    b. I heard and accepted the oral evidence from Mr Tison that he had raised such concerns to his employer orally in the final week of employment. I noted this was consistent with his annotations on the manifests and a focus he had on the state of the delivery vans, having also taken photos of their degenerated state, also supplied to the Tribunal.

15. I accept that the principal reason why Mr Tison was dismissed was because of him raising those concerns, in particular in the final week of his employment:
    a. Firstly there is no contrary reason put forward by the Respondent. They had the opportunity to defend this claim and they have not.
    b. I consider that the burden to demonstrate the reason for dismissal is on the Respondent, as per s.98(1) ERA 1996 which refers to “this Part” which I understand to be Part X of the ERA 1996 and includes s.100 ERA 1996. Despite this burden, I have nevertheless required Mr Tison to adduce evidence to support his claim.
    c. There was very scant formality in the process in which Mr Tison was dismissed, which raises concerns for me about the genuineness of the reason and motivation of the Respondent. There was seemingly no procedure at all, he was simply brought in and told that he was to be dismissed. I considered the size and administrative resources of what I have understood as a small employer and that Mr Tison was employed for less than two years but did not consider that I can infer these factors offset the concerns I have about the procedure employed and what that means about the employer’s motivation.
    d. Mr Tison explains in his ET1 that he had a positive working relationship prior to dismissal in terms of this performance prior and this was consistent with his oral evidence. I have also seen the text message in which he is praised for his performance for customer feedback being positive and even given effectively a bonus for his

good performance, which raises questions therefore as to why get rid of him if not for those health and safety concerns.

e. I considered the dismissal could have been because of his injury and the time off he had to recover, but again that is not a reason put forward by the Respondent and I note in any event that Mr Tison was in fact back at work and working when he was dismissed.

f. I note the very close correlation in time of Mr Tison raising his concerns in the week before he was dismissed and then his dismissal. This was confirmed by the dates on the manifest and the dismissal that then occurs almost immediately afterwards in that week. Correlation does not of course indicate causation necessarily but it is another factor when balanced up that demonstrates to me the principal reason for dismissal.

16. I therefore find for Mr Tison and find that the principal reason he was dismissed was because he raised a health and safety concern in accordance with s.100(c)(i) ERA 1996.

Compensation (Remedy)

17. Mr Tison is claiming lost earnings. There is no basic award that can be awarded because he does not have a complete year's service. He was not paid any notice pay and claims his lost earnings from his notice period as part of his compensatory award.

18. He has given me a figure of £1856 net per month as his pay from the Respondent, explaining that originally he was on a lower salary and then he was given a pay rise. I have looked at the payslips he supplied and the final pay slip is not much use because it includes sick pay and other payments include holiday pay. He explained that the £1856 is what he considers to be an average. Looking at the pay slips I consider that, if anything, Mr Tison's monthly pay by the end of his employment may have been higher and taking an average as he has done may include the earlier lower pay. In any event I am content that it is not to the Respondent's detriment if I accept his figure and is just and equitable to apply given it is provided to me by Mr Tison and appears broadly correct.

19. He told me that he got his first new job after dismissal on 06/02/23 and his pay was £1400 net. Again, I have seen payslips for that new job and although they are different amounts Mr Tison explained that he averaged out that pay as well. Again, if anything, on the summary check that I was able to undertake it appears that Mr Tison is under-claiming for this element of compensation but again I consider it just and equitable to use the figure that he has supplied.

20. He explained that he then started another new job, his current job, on 17/07/23, which pays nearly the same as that from the Respondent, paying £1835 per month net. He was claiming no other losses.

21. The total I consider he is owed is therefore £6297 and the calculation of that in summary is the addition of:

a. 2 months loss of his monthly pay from the Respondent of £1856, representing effectively the whole of December and January and totalling £3712.
b. 5 days at his daily rate for February amounting to £305.
c. Once he started his new job on the 6th February he had ongoing losses of £456 per month. 5 months of that ongoing loss takes him to July, which equates to £2280.
d. This period of loss takes the losses to just before he started his latest job, which is very nearly the same pay as he received from the Respondent and is the time at which I consider it to be just and equitable over which to award compensation considering his efforts in mitigation (noting the burden is on the Respondent to prove a failure to mitigate loss) and his losses suffered.

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Employment Judge England
Date: 3 October 2023