



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Thomas Lyons

v

Whittle Programmed Maintenance Limited

Heard at: Watford

On: 9 & 10 July 2018

Before: Employment Judge A Clarke QC

Members: Mr R Leslie

Mr R Clifton

Appearances

For the Claimant: In Person

For the Respondent: Mr David Jones, Solicitor

JUDGMENT

1. The claims for detriments consequent upon the making of protected disclosures and automatic unfair dismissal pursuant to s.103A of the Employment Rights Act 1996 are dismissed.

REASONS

Background

1. The claimant is a painter and decorator who was employed by the respondent from 20 June 2016 to 12 July 2017 when he was dismissed for gross misconduct after a disciplinary hearing. He brings claims alleging various detriments including his dismissal said to be consequent upon his having made various protected disclosures.
2. The disclosures (only some of which are admitted) all relate to alleged drug taking by a co-worker. We shall identify that co-worker as "S".
3. The Employment Tribunal heard from the claimant and from Mr Russell and Mr Simpson on behalf of the respondent, which is a company with various branches throughout Great Britain. Those gentlemen were, respectively, the respondent's Branch Manager for the branch from which the claimant worked and the Operations Manager, being Mr Russell's superior. It was

hoped and intended that we would hear from Ms Dunbar the HR Manager and dismissing officer, but she was taken ill last week and has not recovered sufficiently to enable her to attend to give evidence or (as had been hoped and provided for) to give evidence by video link. However, we have considered her witness statement and have her contemporaneous documentation and a transcript of the disciplinary hearing. We advised the parties of the consequent impact on the value of her evidence of her not being able to be cross-examined either by Mr Lyons, the claimant, or by the tribunal.

The facts

4. The claimant initially worked alongside his brother, who was then promoted to a junior managerial position. A new employee, S, was then recruited to work alongside the claimant. S did not drive and the claimant was instructed to pick him up from his home, or a convenient railway station and take him to whatever site they were working on. The claimant drove a company van.
5. S began work in March 2017 although he had previously done some work for the respondent as a sub-contractor. He was considered to be a skilled painter and decorator. The claimant, on the other hand, was causing concern, not only because of the quality of his work, but because of his aggressive attitude and his need for supervision. On one occasion in Autumn 2016 the claimant threatened Mr Russell that he would “punch his lights out.” On other occasions he would become aggressive shouting and “squaring up” to managers who were questioning his working method.
6. In late March 2017 the claimant was given a formal warning for his uncooperative attitude, for falsifying timesheets and for leaving a site early and without permission. He admitted the latter of the three charges, but denied the others and was found guilty of all three charges. He appealed to a senior manager who allowed the appeal on the disputed charges as he considered that an appropriate procedure had not been adopted.
7. The appeal is of significance because the appeal letter alleged that S was “bringing cannabis into work with him.” That letter is dated 30 March 2017 and claimed that the claimant had informed both his brother and Mr Russell about this and that they had done nothing in response. We have concluded that this was in fact the first time that the claimant had raised the matter with anyone. We reach this conclusion because:
 - 7.1 We found Mr Russell’s emphatic rejection in evidence of his having been told earlier of this both powerful and credible.
 - 7.2 The manager considering the appeal passed the matter to HR and Ms Dunbar, the group HR Manager, wrote to the claimant on 6 April asking that he raise a formal grievance, giving full details, so that the matter could be fully investigated. The claimant did not do so. Indeed, he did not raise the matter again until 5 July 2017, some three months later.

8. The claimant explained to this us by saying that he was gathering evidence. However, the only evidence he gathered in that period was a single photograph which shows two cigarette packets and a pack of cigarette papers that S was said to have left on the seat of the vehicle when he went back to get his keys on a date in late May. That is despite the claimant's assertion that S smoked cannabis in the van and at work on a daily basis and always brought a substantial quantity of cannabis to work which he put in the glove compartment.
9. By late June 2017 concerns as to the claimant's performance were increasing. Jobs he was involved with were running over budget because, it was believed, he was not working a full day and his work was often of a questionable quality so as to require remedial work. A performance review was scheduled for 12 July as a result of these concerns.
10. On 4 July Mr Russell spoke to the claimant by telephone to discuss the payment of two fixed penalty notices incurred by the claimant when he was driving the company van. The claimant became agitated and irate, blaming the penalties on the fact that he had to collect S. He said that he would no longer collect S. Mr Russell pointed out that it was the claimant and not S who was responsible for the claimant's driving and noted that the timing on the notices showed that it was the claimant who was late. The claimant admitted in evidence to us that he was late on the day in question (asserting, contrary to Mr Russell's evidence, that both penalty tickets were incurred on the same day.) It appears that he would have been between one and two hours late to work that day. He maintained that although he happened to be late on the day on which he incurred the fixed penalty notices, S was regularly late on other days. Mr Russell instructed him to pick up S as usual in the future. The claimant made no mention on this occasion of S's alleged drug taking.
11. On the following day the claimant did not pick up S. Mr Russell called him and the claimant reiterated that he would not pick up S again as this was because he had incurred fixed penalty notices as a result. He was again angry and shouting at Mr Russell, but again he did not mention S's alleged drug taking.
12. The claimant did refer to it in a call to Mr Simpson later that same day. On this occasion he alleged that S was working under the influence of drugs on a regular basis and smoking cannabis in the works van to and from work.
13. Mr Simpson decided that this needed to be investigated and told Mr Russell to go with the claimant's brother and to make an unannounced search of the van and of both the claimant, S and their bags. Mr Russell was advised by HR that if either man appeared to be under the influence of drink or drugs then testing should be arranged. In the event, it appears that HR attempted to arrange for testing, in case it was needed, but were unable to do so. In the event, as Mr Russell did not observe that either individual appeared to be under the influence of drink or drugs, no test was sought to be arranged by him.

14. The claimant told us that Mr Simpson had informed him in advance that there was to be an unannounced inspection of the van in the next few days. We reject that. As Mr Simpson told us, this would not have been appropriate given that he considered that the claimant's allegations regarding S might be designed to deflect attention from the claimant's own shortcomings and also because of the claimant's reaction (described below) when Mr Russell did come to inspect the van.
15. The searches took place on 7 July, but it is first necessary to deal with events earlier that same day. The claimant sent to Mr Simpson, by email attachment, three photographs which he said he had taken of the "weed on the passenger side of the van where [S] sits, there are bits of weed class B drugs everywhere." The three photographs taken on a mobile phone are very close up shots of what are said to be parts of the van floor. They certainly shown debris and detritus, but it is impossible to see if that material contains any evidence of drug use.
16. When cross-examining Mr Russell, the claimant asserted that the photographs were taken that same day and then sent to Mr Simpson. At his disciplinary hearing he said that he took them at 8:15 that morning. He therefore put to Mr Russell that the floor area had looked precisely as it did on the photographs sent to Mr Simpson when Mr Russell had started his search and that he (Mr Russell) had cleaned away all the evidence of drug use in order to protect S. Later he told us in evidence that the photographs had been taken over a week before the 7 July, but that the state of the floor area remained exactly the same, despite use of the vehicle in the meantime. He then stated that S had not been in the van for the last week so his side of the van had been undisturbed. However, it was (until that moment) common ground that he had picked S up on 4 July, being the day of the conversation about the fixed penalty notices.
17. We have seen photographs taken by Mr Russell of the inside of the van during his search. The claimant was present beside Mr Russell and accepts that these photographs were taken then. They do not show the areas of debris as photographed by the claimant. Having heard from the claimant and Mr Russell we are satisfied that Mr Russell did not "clean" the van before taking his photographs. We also note that at the disciplinary hearing the claimant did not say that he had seen Mr Russell do this, yet he was standing next to him as he began the search at the front of the passenger side and remained as close as possible throughout.
18. In those circumstances we conclude the van was as photographed by Mr Russell when he began his search and that the photographs produced by the claimant were taken either on a different occasion or earlier that day. In either case, the claimant had either put debris in place which he intended to say showed drug use and then removed it, or had photographed general debris intending to say it showed drug use and then removed it. In this regard we note that the claimant was able to locate the May photograph (referred to above) on his current phone but said that he could not locate those three photographs as he had changed his phone. His evidence in those respects and generally and the unconvincing way in which he gave it

have led us to conclude that he was concocting a case against S either to avoid having to pick him up in the mornings, or to deflect attention from his own inadequacies in terms of performance and timekeeping, or both.

19. When Mr Russell attended the site on the 7 July he asked the claimant for the van keys. The claimant was agitated and would not hand them over. He continued to refuse to do so until telephoned by Mr Simpson and ordered to do so. He says that he was concerned that Mr Russell would remove the evidence. We consider, in all the circumstances, that Mr Russell was correct to conclude that the refusal was because the claimant was concerned that no evidence of drug use would be found. Indeed, we note that had he been told of the inspection in advance, he would have been expected readily to hand the keys over.
20. When the search took place it occupied some 15 minutes and was thorough. Nothing suspicious was found. Both men's pockets were voluntarily searched. Again, nothing suspicious was found. Both had smoking materials of an ordinary kind. Mr Russell reported on these matters to Mr Simpson. Such was Mr Simpson's concern that he asked Mr Russell to repeat the search in case anything had been missed.
21. As he was looking at the back of the van for the second time, the claimant shouted to Mr Russell to come to the front passenger side, the door of which had been opened. The claimant pointed to a small object on the floor, claiming it was "weed". Mr Russell looked at the photograph he had previously taken of the area and the piece of material was not present. We have seen both the photograph in question and the photograph of the item in question in the palm of his hand. It is clear that that item was not present when Mr Russell first searched the vehicle. Mr Russell's conclusion was that the claimant had "planted" it subsequently. We consider that to be a reasonable conclusion in all of the above circumstances. In the light of the evidence we heard, it is difficult to see how otherwise it could have got there.
22. The item was never analysed professionally. It looked like a very small piece of MDF that had broken off or a tiny piece of twig. It had no smell, even when gently rubbed between fingers. Mr Russell retained it and the claimant never asked for it to be tested.
23. Whilst discussing matters with the claimant, Mr Russell was told that the client's manager on site, one Tracey Dunne, had raised concerns about S's drug use on site with the claimant. Mr Russell approached her, but she flatly denied ever having had such concerns or ever having raised concerns with the claimant. She did, however, tell Mr Russell that the claimant had told her about the fixed penalty notices, how he blamed S because if he didn't have to pick S up he would not have got them and how he was refusing to pick S up anymore even when ordered to do so. He did not mention drug use.

24. Mr Russell sent an email summarising the events of 7 July to Ms Dunbar on 10 July. She disclosed this to the claimant as part of the disciplinary process.
25. On 10 July, it having been decided that the meeting to consider the claimant's performance should become a disciplinary hearing, the claimant was required to attend a disciplinary hearing on 12 July at 3pm. The letter set out four disciplinary charges. These were:
 - 25.1 Repeated or serious failure to obey instructions.
 - 25.2 Serious and repeated acts of insubordination.
 - 25.3 Making a disclosure of false or misleading information maliciously, for personal gain, or otherwise in bad faith.
 - 25.4 Making untrue allegations in bad faith against a colleague.
26. The letter attached relevant documents, including the 10 July email. The claimant was offered the opportunity to be accompanied. Ms Dunbar was to conduct the hearing with Mr Russell in attendance.
27. Unbeknown to the respondent's the claimant tape recorded the meeting and has produced a transcript. It shows that Mr Dunbar too the lead and reviewed the matters of concern, in particular the claimant's refusal to pick up S and the making allegedly false allegations against him. These were reviewed in detail. The claimant maintained that S had constantly smoked cannabis, the respondent (by Mr Russell) maintained that this had been investigated and not only was there no evidence (other than what the claimant said) to support this, but the evidence showed that the claimant had fabricated the evidence against S. Ms Dunbar formed the view that the claimant could no longer work for the respondent as he had destroyed his relationship with his manager and with S (who now knew of what the claimant had alleged). Indeed, the claimant still maintained that S had acted as alleged and that he would not pick him up in the future. He had been insubordinate and abusive to managers, particularly in relation to the events concerning S's alleged drug use. The allegations in respect of his standard of work and timekeeping were hardly touched upon at the meeting and did not feature as a reason for dismissal. In the light of his conduct and its consequences (in terms of the destruction of working relationships) Ms Dunbar decided to dismiss the claimant with one week's money in lieu of notice. This and the reasons for his dismissal were confirmed in a letter of 13 July 2017.

Alleged disclosures and detriments

28. The claimant relies upon a number of alleged disclosures in the months of March and July 2017. Of those disclosures, we have found that several were not made at all. However, three were. These were firstly to Mr Thomas (on 30 March) and then to Mr Simpson, on 5 and 7 July. Before

considering each and the detriments alleged to have been associated with them, we need briefly to summarise the relevant law.

The law

29. Section 43B of Part IVA of the Employment Rights Act 1996 provides:

“(1) In this part a “qualifying disclosure” means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

- a. That a criminal offence has been committed, is being committed or is likely to be committed ...
- d. That the health or safety of any individual has been, is being or is likely to be endangered, ...”

30. There is no dispute in this instance that what was disclosed on the three occasions referred to above, amount to “information” and that the information in question tended to show that a criminal offence had been committed etcetera or “that the health and safety of any individual (in this case the claimant) had been, is being or is likely to be endangered.”

31. The claimant lacks the relevant qualifying service to bring an “ordinary” unfair dismissal complaint, but s.103A of the 1996 Act provides:

“An employee who is dismissed should be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal, is that the employee made a protected disclosure.”

There is no qualifying period required in order to bring a claim under s.103A. It follows that the tribunal must identify the reason (or principal reason) for dismissal.

Application of the law to the facts

32. The key issue for us to decide is whether the disclosures referred to above (or any of them) were, in the claimant’s reasonable belief, made in the public interest. We do not consider that any of the three were for the following reasons:

32.1 We have found many of the allegations to be untrue. Much of the evidence of S’s drug taking was invented or fabricated. There is no public interest in the promulgation of untruths. We exclude from this the original allegation made on 30 March that S was bringing cannabis to work. As to whether that was the case we make no finding. Given our findings about other aspects of his evidence we cannot accept the claimant’s evidence at face value, but without hearing from S and without drug testing, we do not and cannot make a finding that this was a lie.

32.2 The claimant did not make the disclosures in the public interest, but in order to avoid having to pick up S and/or to deflect attention from his own inadequacies of performance.

33. For those reasons this claim must fail. However, we also find that the detriments alleged are not causally linked to the alleged disclosures:

33.1 As regards to the 30 March disclosure the claimant relies upon the continued insistence that he pick up S and the failure to uphold his appeal as detriments. The respondent continued to require him to pick up S because it was necessary for him to do so in order for S to get to work and not because he had made any disclosure. The appeal was upheld, save in so far as the conduct for which he was warned was admitted and that warning remained in place because of the admission.

33.2 As regards the disclosures to Mr Simpson in July, the detriments relied upon are the subjecting of the claimant to a disciplinary process, the failure to investigate his allegations and his dismissal (relied on upon via s.103A). He was subject to the disciplinary process and had allegations of gross misconduct made against him because the respondent reasonably believed that there was evidence to suggest that he had made what he alleged to be protected disclosures in bad faith. The principal reason for his dismissal was the breakdown in working relationships caused by a combination of his refusal to pick up S, his falsification of drug related allegations and his attitude towards his managers.

33.3 Hence, even if we had found that the claimant made protected disclosures, his claims in respect of detriments consequent thereupon (including dismissal via s.103A) would have failed.

33.4 For those reasons this claim is dismissed.

Employment Judge A Clarke QC

Date:6/8/18.....

Sent to the parties on:

.....
For the Tribunal Office