



THE EMPLOYMENT TRIBUNALS

Claimant: Mr B Griffiths

Respondent: Andrew Hughes Utility Services Limited

Heard at: North Shields Hearing Centre **On:** Thursday 19 December &
Friday 20 December 2019

Before: Employment Judge SA Shore

Members: Mr R Dobson
Mr D Morgan

Representation:

Claimant: Mr J Morgan (Counsel)
Respondent: Mr B Hendley (Consultant)

JUDGMENT

1. By a majority the tribunal finds that the claimant's claim of unfair dismissal for an automatically unfair reason pursuant to Section 103A of the Employment Rights Act 1996 fails.
2. By a unanimous decision the tribunal finds that the claimant's claim that he was not given the right to be accompanied at a disciplinary hearing succeeds. The respondent shall pay the claimant two weeks' pay in compensation pursuant to Section 11 Employment Relations Act 1999.

REASONS

Background

1. The claimant had spent three periods of employment with the respondent. The respondent is a civil engineering company whose specialisms include the drilling of tunnels for gas and water pipes. The claimant was employed by the respondent from 7 January 2019 until he was dismissed on 17 May 2019. He

brought claims of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 and failure of the right to be accompanied pursuant to section 10 and 11 of the Employment Relations Act 1999.

Claims

2. At the outset of the hearing, we discussed the claims with the representatives. We dealt quickly with the claim of automatically unfair dismissal which the claimant says arises out of a protected disclosure made verbally at a meeting with the respondent's managing director and another manager on 3 May 2019. There was no claim for detriment short of dismissal.
3. The section 10 and 11 claims relate to a meeting on 9 May 2019 with Mr Atkin of the respondent company and a proposed meeting on 13 May 2019 with Mr Hughes, the managing director. Mr Morgan confirmed there were no other claims.

Issues

4. There have been two previous preliminary hearings, but neither had set out a list of issues in the claim. We therefore discussed the issues with the parties and agreed that the following were relevant issues in the case:
 - 4.1 It was agreed that the claimant was an employee.
 - 4.2 It was agreed that the claimant hadn't lost the right to claim by not bringing the claim within time.
 - 4.3 Did the claimant make a disclosure?
 - 4.4 Was the disclosure in the public interest?
 - 4.5 Was it a qualifying disclosure pursuant to Section 43B Employment Rights Act 1996?
 - 4.6 Was it a protected disclosure?
 - 4.7 Was it made for personal gain?
 - 4.8 Was it reasonable in all the circumstances?
 - 4.9 Can the claimant show that the disclosure was the reason or principal reason for his dismissal?
 - 4.10 Was the claimant invited to attend a disciplinary or grievance hearing?
 - 4.11 Did the claimant reasonably request to be accompanied?
 - 4.12 Did the respondent fail or threaten to fail to comply with the request?

Housekeeping

5. There were a number of issues of housekeeping. I had conducted a telephone preliminary hearing on Friday 13 December at which the respondent had applied for an order that a supplementary witness statement filed by the claimant should not be admitted in evidence or, in the alternative, leave be granted to the respondent to file its own supplementary witness statement. I had made an order that the respondent had leave to file its own supplementary witness statement by 4.00pm on Tuesday 17 December 2019. That order had not been complied with and the respondent's supplementary witness statement was not served until just before 4.00pm on Wednesday 18 December 2019. Mr Morgan said that he had not had chance to see the supplemental statement from the respondent and needed time to take instructions. I indicated that we had not yet completed reading the papers ourselves and that we would give Mr Morgan such time as he needed to read the statement and take Mr Griffith's instructions. We checked to make sure that we had the latest version of the bundle and confirmed that we had. Mr Morgan had a number of additional documents to hand up:-
 - 5.1 A construction confederation toolbox talks issued on July 2005 regarding bentonite, water pollution/silt, and tree protection. We gave those three documents page numbers 145 to 147;
 - 5.2 An article regarding breach of section 43 Environmental Protection Act 1990, which we gave page numbers 148 to 152;
 - 5.3 An extract from the Construction (Design and Management Regulations 2015/51 – Regulation 15) to which we gave page numbers 153 to 153A;
 - 5.4 An extract from the Environmental Protection Act 1990 which we gave page numbers 154 to 160A.
6. The documents were handed up because Mr Morgan had noticed that there was nothing in the bundle that dealt with the legal ramifications of the matter that the claimant says he disclosed to the respondent.
7. Mr Morgan noted that Mr Atkin of the respondent had not attended and invited us not to consider the witness evidence tendered. Later, he said that he also noticed that the statement tendered had not been signed, so it should not be considered at all.
8. A witness statement from Brian Usher dated 17 December 2019 [34K] regarding an incident in 2018 had also been tendered in the bundle. Mr Hendley said that the statement was relevant. Mr Morgan doubted that it was. I indicated that the panel would consider the matter in the break we were about to take to consider the documents. I also noted that, given that the case had been listed for two days to include remedy, I would be limiting cross examination of the two witnesses to three hours each. In the event, neither witness was cross examined for anywhere approaching that length of time.

9. We then broke and only reconvened when Mr Morgan indicated that he had had the opportunity to take instructions on the respondent's supplementary witness evidence.
10. We heard from two witnesses; the claimant and Andrew Hughes, the company director of the respondent.
11. On the resumption, I confirmed that I had read Mr Usher's statement and was struggling to see how it was relevant to this claim, given that it related to an incident on 19 February 2018 where the respondent was alleged to have committed an act illegal dumping of waste slurry.

Decision and reasons

12. The first thing I ought to record in this decision and reasons is that there is no familial or other link between Mr Morgan, who represents the claimant, and Mr Morgan, who is one of my colleagues on the panel. We found this a difficult case on which to make findings, because neither side produced evidence that may have been available to it, which made our task harder than it might have been. The central issue is whether the claimant made a protected disclosure in a meeting with Mr Hughes and Mr Atkin of the respondent on Friday 3 May 2019. There were no contemporaneous notes taken by either party and no contemporaneous communications from either party by e-mail, letter, text or telephone upon which to rely upon as a record of what had been said.
13. The claimant says that he was part of a team working on site drilling near the M1 at Temple Newsam in the last week of April 2019. He says he attended site as usual on the morning of Monday 29 April 2019 and saw that drilling slurry had been dumped under a hedgerow and in a field. He took photographs. He then reported the illegal dumping to Mr Atkin and Mr Hughes at a meeting on 3 May 2019. He showed them the photographs. He was told to keep quiet about the matter.
14. Mr Hughes said that he was aware of the spill in early Monday morning of 29 April and he had a decision to make at 3.00am on that morning as to what to do. He had authorised the dump of the slurry and later he told Mr Griffiths to go out and photograph the waste and arrange for it to be cleaned up. He said that Mr Griffiths took the photographs but that he, Mr Hughes, had to organise the clean-up himself. He says that the meeting on 3 May 2019 never happened and no disclosure of any sort was made by the claimant. He says they would never have had such a meeting on a Friday because they are so busy billing the work they had done in the week. He only saw the photographs when they were disclosed for these proceedings.
15. It is rare that there is such a fundamental conflict of evidence in a case such as to deny that a meeting had even taken place. The claimant was adamant that the meeting was on 3 May 2019 and we did not consider the options that it had taken place on another day because of his evidence. We had to assess the circumstantial evidence to enable us to come to a decision as to whether the claimant had shown on the balance of probabilities that a disclosure had been

made. The burden is on him to show that. On this point, the panel was divided. The majority view was taken by myself and Mr Dobson. We found the claimant's evidence in chief was vague and lacking detail. He did not say where the meeting was or what time it had taken place. He had not said how he had made the disclosure of the photographs, whether he'd shown a photograph on a telephone, or had printed the pictures out.

16. The evidence was that he had been at another meeting with Mr Hughes between 29 April and 3 May but had not said anything. There were no documents to corroborate the meeting on 3 May. There was no follow up by e-mail or text from the claimant. He had supplied a supplementary statement, which had been almost as vague as his original statement on the issue of this meeting. The claimant had not contacted Mr Hughes after he saw the slurry spills on 29 April until he alleges he made the protected disclosure on 3 May.
17. We considered the fact that there was no document from the respondent about the meeting and diaries, no record of the spill being recorded in a company log on Sunday night or Monday morning. There was no record of the tanker being arranged by Mr Hughes to clear-up the spill, although there was an invoice for a tanker produced at page 117, which we found to be inconclusive as a piece of evidence.
18. Mr Morgan held a contrary view and found that the claimant answered questions in cross examination and questions from the panel credibly in a way that filled in the gaps in his witness statement. The claimant's evidence in chief showed that a protected disclosure had been made and that his account was therefore credible.
18. The panel also considered subsequent events. Mr Dobson and I found that the claimant did not put anything in writing, despite his concerns being seemingly ignored. When he was brought into a meeting by Mr Atkin on 9 May 2019 and threatened with a written warning, he did not link the threat of the written warning to the protected disclosure which he says he made only six days previously.
19. The claimant was invited to a meeting on 13 May 2019 by e-mail (pages 73 to 74), which escalated into a stand-off between the claimant and Mr Hughes. Mr Griffiths' final e-mail gave a legal analysis of the respondent's errors and its position which stated:

“Andy you know full well that it wouldn't be possible today to arrange professional/legal representation would take more than a few hours notice. I'm not stupid Andy. I was hoping this could have been sorted out amicably but as you have decided to continue with the fundamental breach of a statutory right to a fair and proper disciplinary hearing along with a pre-meditated outcome, it is in total disregard to the ACAS Code of Practice and is deemed automatically unfair. For now, I will keep my powder dry and await your decision.”

20. Mr Dobson and I found that there was nothing in that e-mail that linked the intended disciplinary action to the asserted protected disclosure. In evidence, the claimant said he had made a successful whistleblowing claim against a former

employer. He accepted that he was aware of the mechanics of a protected disclosure claim, yet had not mentioned the protected disclosure until after his dismissal.

21. Mr Morgan found that having made the protected disclosure on 3 May 2019, the threatened disciplinary on 9 May 2019 and the intention admitted by Mr Hughes to hold a meeting on 13 May 2019 at which the claimant was to be sacked, come what may, meant that his dismissal was predetermined. He was not convinced by the respondent's explanation for the claimant's dismissal, which was said to be because of a downturn in work, and would have found the claimant's claim of automatic unfair dismissal contrary to Section 103 of the Employment Rights Act 1996 to be proven.
22. As Mr Dobson and I do not find that the claimant has shown on the balance of probabilities that he made a protected disclosure, we are led to the conclusion that his claim of unfair dismissal fails. That means that, by a majority, we find that the claim of unfair dismissal fails.
23. The panel makes a unanimous decision, however, that the claimant's claim to have been denied representation at two disciplinary meetings on 9 May 2019 and 13 May 2019 succeeds. The claimant was clearly asking to be represented and he was denied that opportunity, with the result that he didn't attend the meeting. We find that he was right in considering that meeting to be of a disciplinary nature and therefore in breach of sections 10 and 11 of the 1999 Act. The respondent shall pay the claimant two week's pay, which the prescribed award in such cases. We leave it to the parties to agree the exact sum due.

EMPLOYMENT JUDGE SHORE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
8 January 2020**

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