



EMPLOYMENT TRIBUNALS

Claimant: Mr K Thorndick
Respondent: Munihire Operated Ltd
Heard at: East London Hearing Centre
On: 4 March 2021 (by Cloud Video Platform)
Before: Employment Judge Lewis

Representation
Claimant: In person – assisted by Ms McEwan
Respondent: Mr Le Huray

RESERVED JUDGMENT

1. The claim for holiday pay fails and is dismissed.
2. The claim for automatically unfair dismissal for raising health and safety concerns and/ or for having made a public interest disclosure fails and is dismissed.

REASONS

The issues

1. The Claimant brought a claim of unfair dismissal, he lacked two years qualifying service to bring a claim for ordinary unfair dismissal and brought his claim as one of automatic unfair dismissal as a whistleblower for raising breaches of the Working Time Regulations 1998 in respect of breaks and rest periods and raising health and safety matters.
2. The Claimant confirmed that his complaint was in respect of his dismissal and the failure to pay his holiday pay only.
3. The Respondent accepted that the Claimant was a worker for the purposes of the public interest disclosure claim and the claim under the Working Time

Regulations 1998 for holiday but did not accept that he was an employee as is required for section 100 (dismissal for raising health and safety concerns) and /or section 101A (dismissal for refusing to comply with a requirement imposed in breach of the Working Time Regulations 1998) and/or section 104, (dismissal for asserting a statutory right) of the Employment Rights Act 1996.

4. It was accepted that the particulars of employment was the only document relied on to suggest the Claimant was a worker and in that document the word 'worker' was used in brackets. It was not disputed that the Claimant was paid on a PAYE basis through the Respondent's payroll.

5. The Claimant claims he was never told he was self-employed or a worker. He was working full-time and was paid PAYE and never raised an invoice.

6. Mr Le Huray accepted that there was some lack of clarity as to whether the Claimant was a worker or an employee, the Respondent had relied on advice from NatWest Mentors however he was aware of the recent decisions on worker status (including the *Uber* judgment) and he was not going to contest that the Claimant was not an employee and has not applied to amend the response to suggest that he was not an employee. He accepted that the claim stands or falls on the findings of fact and if the Claimant succeeds the remedy is the same in respect of the alleged unfair dismissal.

7. Mr Le Huray submitted that in any event the Claimant was able to control his own rest periods and breaks within the work allocation that was given to him, whether he was a worker or an employee.

8. The Respondent denies that the Claimant raised complaints about breaches of the Working Time Directive or that his sending of the video relied on as a public interest disclosure had any bearing on his dismissal.

9. The Claimant alleges that the complaints that led to his dismissal were as a result of his exhaustion caused by the number of hours he was being required to work. The Claimant also says he complained verbally about breaches of the Working Time Regulations. He believed that the disclosures and complaints about excessive hours were the real reason for his dismissal.

Protected disclosures /bringing health and safety concerns to the Respondent's attention

10. The Claimant relies on a video he says he sent by WhatsApp to Mr Le Huray on 18 March 2020 as a protected disclosure and as his report that there had been a breach of health and safety at work.

11. The video was taken from the Claimant's cab showing his truck on the road in the dark. The Claimant was carrying out night-time work on a bypass, after completing his work he was cleaning his truck, he says, as instructed by the site supervisor, in the location where he had been tipping out that night, which was on the side of the road. He then discovered that the road had been reopened without telling him, which put his health and safety and that of the public in danger. He was left in the dark on an unlit section of road at night with no protection, which was a danger to himself and to other road users. He subsequently reported the incident

to the Health and Safety Executive but not until after his dismissal and after he had brought these proceedings, he was informed it was too late as it was outside three months after the incident had occurred.

12. The Claimant claims he informed the Respondent about the breaches of the Working Time Regulations on multiple occasions in early and mid March, specifically on 3rd or 4th of March 2020; he says he made those disclosures to Darren Le Huray and Richard (the Essex manager) over the phone before he was furloughed and to Richard via WhatsApp when he was back in work, over a week before he was dismissed on 9 June 2020.

13. There was a dispute as to the number of hours the Claimant worked. Mr Thorndick claimed that he worked an average of 88 hours a week in the four-week period through March; and that he worked 476 hours over 22 days without adequate breaks and was assigned back-to-back day and night shifts.

14. It was the Respondent's case that the drivers were expected to regulate their own breaks and the Claimant was able to determine when he took his rest breaks between eight-hour shifts that were allocated to him; he was able to sleep in his vehicle between jobs if necessary. There was a WhatsApp group for all the drivers and weekend work was offered via the group. The drivers could say whether they were interested in working at the weekend and were only allocated this work if they volunteered for it.

Findings of fact

15. The Claimant worked for Munihire Operated Ltd from 1 July 2019 to 12 June 2020 as a sweeper driver operating an 18 ton Quad Vac truck. He was a mobile operative often leaving the yard in the early morning and not returning until late at night, or sometimes a number of days later. The Claimant's vehicle had a cab area where he could sleep and some of the drivers had other equipment in their vehicles, including televisions and cooking equipment.

Incident on 3/ 4 March 2020

16. The Claimant became unwell on 3 March 2020 whilst he was at work, he was experiencing chest pain and an ambulance was called. He was told by the paramedics that his heart was okay but that he had pulled a chest muscle and that he should take painkillers; he was told to take ibuprofen to help with the swelling.

17. The Claimant was called by the Respondent's managing director, Lawrence Webster, after the incident and was asked if he was okay and was told that if he needed time off to recuperate, he was to talk to Darren (Mr Le Huray). The Claimant spoke to Mr Le Huray the next day, on 4 March 2020. There is a dispute about what was said in that conversation. The Claimant alleges that during that conversation he asked Mr Le Huray for time off due to the pain he was suffering and was told it was too late notice to have time off and was also told he was working that Saturday. In his evidence to the Tribunal the Claimant expanded on this to suggest that he was told that he could not be spared as no other drivers were available as they were off having to self-isolate due to Covid 19.

18. The Claimant told the Tribunal that he did not specifically request holiday but said that he wanted time off to recuperate; he had never taken a day off sick in his life and he was not asking for sick leave and he is not suggesting he is owed sick pay. He believes he could have used some of the 12 days of annual leave that were outstanding and which he has since been told he has lost due to not taking them within the holiday year. The Claimant relies on this conversation as being a disclosure that he was working excessive hours.

19. Mr Le Huray disputed that he was asked by the Claimant for time off on 4 March. He denied saying anything about other drivers not being available and not being able to spare the Claimant. He denied that the Claimant raised a complaint about excessive hours.

20. Mr Le Huray gave evidence that if the Claimant had said he wanted time off then he would have arranged for that to happen. He explained (which was not disputed) that he was also the Managing Director of another company which also had a number of drivers and when he could not cover work from the Respondent's pool of drivers he would subcontract the work to his other company. He told the Tribunal that in the circumstances (of the Claimant having had an ambulance called to work – albeit as it turned out for a pulled muscle) if the Claimant had asked for time off he would have moved 'heaven and earth' in order to facilitate that. He also made the point that if the Claimant had needed time off as a result of ill-health he could have called in sick but he chose not to do so. Mr Le Huray acknowledged the Claimant would not be paid sick pay as the contract did not provide for this, the Claimant would only be entitled to statutory sick pay.

21. Mr Le Huray denied that the Claimant had ever raised with him that his hours were excessive. He did not understand how he could say this. The weekend work that the Claimant now appeared to be complaining about was only ever allocated to drivers who put themselves forward for it, i.e volunteered. Mr Le Huray referred to the WhatsApp messages in the bundle which show that messages were sent to the group asking who was interested in weekend work. The responses show a number of occasions when the Claimant volunteered for some of the work and other occasions when he said he was not available.

22. The Claimant suggested that it was not possible to work the allocation of shifts shown in the calendar without working excessive hours. Mr Le Huray did not accept that at all. He did not accept, for instance, that having been given a job in Marham Park on Monday meant that the Claimant needed to attend the yard on Sunday at either 11 pm or midnight or at any point on Sunday at all. According to Mr Le Huray the journey from the yard to Marham Park was 90 minutes in rush-hour; there would be half an hour preparation of the vehicle, refuelling and refilling the water tanks and general checks of the vehicle, and therefore two hours in advance of the start of the shift was as early as anybody needed to start work. He could not understand why the Claimant would choose to attend the yard on the Sunday afternoon to prepare his vehicle and then drive on Sunday night to the vicinity of where the job was to start on the Monday morning but he was free to do so if he chose. If he chose to do this he would then be able to rest in his vehicle which was provided with sleeping accommodation. Mr Le Huray told the tribunal the V diagrams of the printouts of the vehicle movements did not give the whole story, they were only two-dimensional and did not show the reason why the vehicle was moving, which may not be for work: it could be that the Claimant was driving

somewhere to get food or refreshments or for some other reason. The V diagrams did not show that the Claimant was actually working.

23. The Claimant suggested that where the V diagram showed the truck was only moving at low speeds that showed he was working as he could not carry out his job at more than 5 miles an hour.

24. Mr Le Huray told the Tribunal that once the driver has reached the client's site is not possible for him to know how much of the time the driver has actually spent working: drivers were booked for an eight-hour shift but the job could take two hours or it could take more. If it took more than eight hours it was up to each driver to ensure that they filled in and sent back to him in the office the PDA printout which was then sent to the client to confirm the hours worked. In the Claimant's case he would often not send the PDA print out in straight away but had a habit of saving them up to the end of the week and emailing them all together.

25. Printouts from the WhatsApp conversation show the Claimant informing the Respondent on different dates that he was not available for work on [page 27] and asking for work in response to a request from the Respondent. At page 29 the Claimant asks to be allocated two jobs on a Saturday one in the day and one at night. Page 31 shows the Respondent on 2 Oct 2019 asking the group for their availability for the weekend. Page 33 is a request from the Claimant on 25 October for work for the next day – the response being there was none available. Page 35 shows that on 5 December 2019 the Respondent asks the group for their availability for the weekend – the Claimant responds saying he is not available. On 10 December 2019 the Claimant informs the Respondent he will work both Saturday and Sunday that week [37]

26. Mr Le Huray acknowledged that it was difficult to say whether or when the Claimant took his breaks but it was clear that he did have the opportunity to take adequate breaks. The provisions of the Working Time Regulations 1998 did not apply to the Claimant as he was driving a vehicle that was classed as plant/machinery and was exempt from the Regulations. I am satisfied on the evidence provided by the Respondent that the Claimant was not covered by the Working Time Regulations but worked within an exception, or derogation, within the GB domestic rules. As far as the DVSA were concerned he was not a goods vehicle driver but was rather a driver of plant and equipment. I accept all the Respondent's drivers were asked to sign an opt out from 48 hour week but that this was a standard requirement and did not mean that the Respondent accepted that particular driver was covered by the Regulations for driving all vehicles.

27. Mr Le Huray strongly disputed that the question of breaks of hours had ever been raised with him as an issue. He was non-plussed that the Claimant was raising this now (in these proceedings) when at no point in his employment did the Claimant ever say to him always with him that he was working excessive hours.

28. I find on the balance of probabilities that the Claimant did not raise any complaint of excessive hours with Mr Le Huray nor did he specifically ask for time off. I accept Mr Le Huray's evidence that he had other drivers available on 4 March 2020 and could have arranged for one of them to cover the Claimant's work. In the circumstances I find it is highly unlikely that had the Claimant requested time off,

or mentioned that he was working excessive hours, that Mr Le Huray would not have arranged for him to have some time off.

29. The Claimant did not provide evidence in respect of any other occasions on which he alleges he raised his complaints of excessive hours.

Protected disclosures /bringing health and safety concerns to the Respondent's attention

30. It was put to Mr Le Huray that the Claimant was dismissed because he had raised protected disclosures in respect of his health and safety including by sending him the video of the incident on 17/18 March 2020. [43]

31. Mr Le Huray completely refuted this. He told the Tribunal that the incident was not raised with him by the Claimant at all after sending the video. It had nothing to do with the reason for his dismissal and it had not occurred to him, in fact he had forgotten about it. In any event he did not accept that the Claimant had been told by the site supervisor to clean his vehicle at the side of the road. The Claimant had acknowledged in an email at the time that he had been told at the site induction that the tipping site was at Godmanchester Football Ground [18]. There was no reason for the Claimant to be cleaning his vehicle at the side of the road and he had taken it upon himself to do so.

Complaints about the Claimant's work

32. The Respondent received complaints from its clients about the Claimant's work on the night of 1-2 August 2019, Complaint 1[9]; on 16,17 March 2020, Complaint 2[15-18]; about the night job on 18 March 2020 [at 45] Complaint 3; and on 1-2 June 2020, Complaint 4 [p 47]

33. The complaints were both about the quality of his work and about his attitude, being difficult and argumentative and refusing to follow instructions, speeding on site, and driving over some new tarmac. The feedback included the Respondent being told by the client that they would not accept the Claimant back on the job and the Respondent had to arrange for another driver to attend.

34. Summaries of the complaints (typed up by the Claimant) were in the bundle at [9] and [15 -18], [45] and 47] respectively, the Claimant's written response is included in the document in the bundle.

35. After the complaint on 1-2 June Mr Le Huray held a meeting with the Claimant and put these complaints to him. It was the Claimant's response in the meeting that made Mr Le Huray decide that he could not carry on and had to dismiss him. Instead of acknowledging or responding to the complaints, the Claimant suggested that the problems on site were because of a conspiracy towards him; that it was easy to blame him because he is a subcontracted sweeper; and that he has a higher level of intelligence than anyone else on site which causes problems as when he suggests where they are going wrong on site or he tells them a better way of doing things the site agents and foremen don't like to listen to a sweeper operator.

36. After deliberation Mr Le Huray concluded that the Claimant's response meant that he could not expect any improvement from him as he refused to accept any responsibility for his actions and sought to blame others and make excuses. Ultimately this is what made him decide to dismiss him. The incident of the road being reopened whilst the Claimant was still cleaning his vehicle had no bearing whatsoever in his mind: he had given no thought to that and nor did he have any thought to any complaints about excessive working hours because no such complaint had been made to him and neither had any complaint about not having rest breaks.

37. I accept Mr Le Huray's evidence. I find that it is consistent with his response to the Claimant set out in his letter dated 29 September 2020 [63-64].

38. The Claimant's contemporaneous complaints to Mr Le Huray in respect of his dismissal were in relation to alleged failures to follow the ACAS Code and general unfairness. The only reference to the video now relied on as a protected disclosure was that nothing had been done about it, i.e that there had been no investigation into the incident. It was not suggested that this formed any part of the reason for his dismissal.

39. The Claimant was not dismissed in March 2020 after he sent the video to the Respondent; he returned to work after a period of furlough and it was only after further complaints were received about him in June that he was called to a disciplinary meeting. I find that the sending of the video had no bearing on Mr Le Huray's decision to dismiss the Claimant

Law

Automatic unfair dismissal

Section 100 Health and safety

40. Section 100 (1) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that (c) being an employee at a place where (i) there was no such representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Section 103A public interest disclosure

41. Section 103A provides that an employee who is dismissed shall be regarded 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.

Protected disclosure

42. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

43. Section 43B provides that 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 (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (c) that a miscarriage of justice has occurred, is occurring, or likely to occur (d) that the health or safety of any individual has been, is being or is likely to be endangered (e) that the environment has been, is being, or is likely to be damaged (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed. Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

44. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: *Babula v Waltham Forest College* [2007] IRLR 346 CA. Accordingly, provided a whistleblower's subjective belief that a criminal offence has been committed is held by the Tribunal to be objectively reasonable, neither the fact that the belief turns out to be wrong, nor the fact that the information which the Claimant believed to be true does not in law amount to a criminal offence [or breach of a legal obligation] is sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.

45. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

46. A Tribunal should ask why the alleged discriminator acted as he did, consciously or unconsciously; see *West Yorkshire Police v Khan* 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in *Trustees of Mama East Africa Women's Group v Dobson* EAT 0219-20/05. In that case the Employment Appeal Tribunal stated that it would be contrary to the purpose of the whistleblowing legislation if an employer could put forward an explanation for the dismissal which was not the disclosure itself but something intimately connected with it in order to avoid liability. The cases of *Orr v Milton Keynes Council* [2011] EWCA Civ 62 and *Royal Mail Group Ltd v Jhuti* [2017] EWCA Civ 1632 stand as authority for the proposition that an organisation's motivation in relation to the reason for the dismissal is to be taken as that of the person deputed to carry out the employer's functions.

47. Where an employee brings a whistleblowing claim but does not have sufficient continuity of service to bring an ordinary unfair dismissal claim under

section 98 of the Employment Rights Act 1996, and the legislation placing no burden on the employer to show the reason for the dismissal, the burden of proof is on the employee to show on the balance of probabilities that he was dismissed for an automatically unfair reason; see *Smith v Hayle Town Council* 1978 996 CA; *Tedeschi v Hosiden Besson Ltd* EAT 959/95; and *Ross v Eddie Stobart Ltd* EAT 0068/13.

48. Section 11 provides that such a tribunal shall not consider such a complaint unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

49. In *Kuzel v Roche Products Ltd* [2008] IRLR 530 the Court of Appeal held that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must adduce some evidence supporting the positive case. That does not mean that the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason. Having heard evidence from both sides relating to the reason for dismissal, it will be for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. This is not to say that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. It may be open for the Tribunal to find that the true reason for dismissal was not that advanced by either side. It is for the employer to show the reason for the dismissal; an employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it is.

Conclusions

Reason for the Claimant's dismissal

50. Having heard the evidence I am satisfied on the balance of probabilities that the reason in Mr Le Huray's mind when he reached the decision to dismiss the Claimant was the Claimant's conduct in response to the complaints received about him. I am satisfied that the sending of the video and/or the contents of the video were not in the Respondent's mind and played no part in the decision to dismiss him. As a result I do not need to address whether they video amounted to a protected disclosure.

51. As a result of my findings of act set out above I do not find that any complaints about excessive hours was made nor any complaint of breaches of the Working Time Regulations. I therefore do not find any basis for a complaint that the dismissal was as a result of either raising health and safety concerns or

asserting any relevant statutory rights.

52. The claims for automatically unfair dismissal fail and are dismissed.

Holiday pay

53. The Claimant gave evidence about his understanding of his entitlement holiday pay. He accepted that he understood that it was a use it or lose it situation and he had to use it up by the end of the leave year. He understood the leave year ran to the end of March: he did not understand that it finished on the 22nd or 23rd of March and he had not checked with his employer how much leave he had left in March. He accepted that he did not make a written application for holiday in March or ask to take the outstanding leave he says he was owed. He believes previously he may have made a written application either by filling out form or by making requests on WhatsApp for earlier periods of leave which he accepted he had taken. He based his claim to the Tribunal on allegedly being told on 4 March that he could not take leave for the reasons he says Mr Le Huray gave him on that occasion, which amounted to that it was too short notice and no-one was available to cover the work.

54. The Claimant accepted that the Working Time Regulations provide for notice to be given before leave can be taken (Regulation 15) and that leave could be refused for specific reasons. He accepted that he had not made any other written requests whether via WhatsApp or text and he did not suggest there were any other occasions on which he had requested leave and it was refused.

55. On the Claimant's own evidence he had not requested leave in accordance with the provisions of the Working Time Regulations, he was asking for the following day off as a result of having suffered chest pains. The Claimant's evidence was that was not seeking sick leave, and had never taken sick leave, but he was requesting time off to recuperate.

56. I accept Mr Le Huray's evidence that he did not understand the Claimant to be either making a request for annual leave or notifying him that he would be taking sick leave.

57. The contract provides for the leave year to run from April to March, it does not specify a date in March but contrary to Mr Le Huray's practice at the time, of varying the date for the leave year from year to year depending on when the Easter bank holidays fell, I find that must be read as running from 1 April to 31 March.

58. It was not disputed that the Claimant had 12.5 days outstanding at the end of the holiday year. I cannot find on the evidence before me that the Claimant was prevented from taking any leave as a result of Covid 19. The national lockdown came into effect on 27 March 2020, it was not suggested that the Claimant had requested any leave between 27 and 31 March and was unable to take it as a result of the pandemic or lock down, nor as it suggested that he had been unable to take any of his leave before that date as result of Covid 19.

59. The only dispute is whether the Claimant requested leave on 4 March. I do not find that Mr Le Huray refused the Claimant's request for leave on that date as a result of being short of drivers due to Covid 19. As set out above I accept Mr Le

Huray's evidence that he had other drivers available and would have subcontracted the work to his other company if necessary.

60. The provisions of Regulation 13(10) and (11) of the Working Time Regs, allowing leave to be carried over for two years, do not apply in this case as the Claimant has not been prevented from or unable to take his leave in the relevant leave year for reasons related to the Covid 19 pandemic.

61. I do not find that the Claimant requested leave in accordance with the provisions of the Working Time Regulations or that there was a refusal of leave in breach of those regulations. Had Mr Le Huray refused it for the reason of lack of notice that would be a proper reason for refusal under the Regulations.

62. It was not disputed that any leave not taken before the end of the holiday year was lost. Unfortunately for the Claimant he lost his 12.5 days leave accrued in the holiday year from April 2019 to March 2020. The contents of the document at page 57 which sets out the holiday entitlement for the period 2020 to 2021 was not disputed. At the date of his dismissal the Claimant was entitled to 6.2 days holiday, including two bank holidays; two bank holidays were taken leaving a balance of 4.2 days. He was paid 5 days of holiday pay in his final salary.

63. The claim for holiday pay fails and is dismissed.

**Employment Judge Lewis
Date: 28 July 2021**