



EMPLOYMENT TRIBUNALS

Claimant: Mr C Slatcher

Respondent: Shawtrack Services Limited

Heard at: Nottingham

On: Thursday 7 September 2017

Reserved Judgment: Tuesday 12 September 2017

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: Mr A Gloag of Counsel

Respondent: Ms B Clayton of Counsel

RESERVED JUDGMENT

The Employment Judge gave judgment as follows:-

1. The Claimant was unfairly dismissed. His claim succeeds.
2. The Claimant was dismissed in breach of contract in respect of notice and the Respondent is ordered to pay damages to the Claimant.
3. The Respondent has made an unauthorised deduction from the Claimant's wages.
4. The Respondent has failed to pay the Claimant's holiday entitlement.
5. The remedy to which the Claimant is entitled will be determined at a Remedy Hearing on 17 October 2017 at 10 am.

REASONS

Background and Issues

1. The Claimant presented his claim to the Tribunal on 13 April 2017. In it he said that he had been employed by the Respondent since October 2006 until his dismissal on 3 January 2017. He said that he had worked in a variety of roles but at the time of his dismissal he was working as a part time Security Officer/Yardman on nights.

2. His claim described how upon his return to work after the Christmas break he was advised that he should “fuck off” as he had not been authorised to take leave during the Christmas period. He made the following claims:-

- Unfair dismissal
- Wrongful dismissal in respect of the notice period
- Wages
- Holiday pay

3. In the Respondent’s response they denied liability for these claims. They referred to various issues with the Claimant concerning his conduct and said that the reason for the dismissal was in fact redundancy. They go on to say that the principles of **Polkey** should apply and/or contributory conduct of the Claimant to reduce any award because he was on a “live final written warning” at the time of his dismissal and that he had taken off Christmas without authority. The respondent produced an agreed list of issues. The issues are as follows in respect of liability;

3.1 What was the reason for the Claimants dismissal? Can the Respondent prove that the reason was redundancy?

3.2 If they establish a fair reason was the dismissal fair? Did it fall within the band of reasonable responses?

3.3 Was the Respondent entitled to dismiss the Claimant without notice? Had the Claimant committed a fundamental breach of his contract of employment?

3.4 Has the Respondent made an unlawful deduction of the Claimants wages?

3.5 Has the Respondent failed to pay the Claimant his holiday entitlement?

Evidence

4. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle. It was said by the Claimant that he had not attended the meetings of which there were notes or received the letters the Respondents say they sent him. At the end of the hearing I was provided with the Claimants original personnel file. I heard evidence from the following:-

- The Claimant
- Mr Jamie Shaw-Browne, owner and Chief Executive of the Respondent’s
- Glen Gibson, Production Manager
- Nick Dent, Engineer
- Jamie Baddeley, Sales Director

5. Diane Higham also attended and would have given evidence relating to an alibi for the Claimant regarding the alleged meetings on 14 December 2016 and 3 January 2017. The Respondent’s witnesses changed their case though in respect of that admitting that there was no meeting on 14 December 2016 or the morning of 3 January 2017 and so her evidence wasn’t necessary.

6. I had to decide between 2 entirely conflicting versions of events. On balance I preferred the Claimant's version despite the fact that there were some inconsistencies in his own evidence. In particular in his statement he disputed the authenticity of the contract of employment dated 30 January 2013 (pages 80-84). In cross examination he accepted that he had actually signed this document and that it was genuine. He also said that he had not seen the employee handbook, extracts of which were provided at pages 90-92 but he also accepted that he received that.

7. Any inconsistency in his evidence though is far outweighed by the inconsistencies in the Respondent's case. The primary case of the Respondent's is that he was dismissed by reason of redundancy. The letter alleged to have been sent to the Claimant on 21 December 2016 at page 106 refers to his being made redundant with immediate effect. The letter is signed by "Carol" who is the wife of Jamie Shaw-Browne and a Co-Director of the company. It does not refer to any meeting and it is acknowledged that the Claimant was not at work that day. The letter is addressed to Mr Slatcher at 40 Second Avenue and I am satisfied that the Respondent's knew that he wasn't at that address.

8. The letter also refers to Mr Slatcher owing money for storage of vehicles. I have seen the invoice in respect of that storage which is dated the following date i.e. 22 December 2016. I am satisfied that there was never any agreement about storage of vans or other vehicles and that the invoice was simply prepared to avoid the necessity of making any payment to the Claimant.

9. In respect of that letter it appeared to dismiss the Claimant with immediate effect which in itself is inconsistent with what Mr Shaw-Browne says happened on 3 January 2017. There seems no reason why the Claimant would appear for work if he had been made redundant as the Respondent's allege. The position is further confused by the letter that Mr Shaw-Browne wrote allegedly on 3 January 2017 (page 107). That refers to a meeting that morning. He accepted in cross examination there was no meeting on the morning of 3 January. There is no reference to it in his witness statement and he acknowledged that there was no such meeting in his evidence. He referred in his statement to calling Mr Slatcher into the office where Jamie Baddeley was working and having a discussion there about his redundancy and the amount that Mr Slatcher allegedly owed him. He says that Mr Baddeley witnessed the entire conversation. That is not consistent with Mr Baddeley's statement. Mr Baddeley in his evidence said that Mr Shaw-Browne had a meeting with the Claimant prior to him coming to the office simply to sign the document at page 107.

10. There are other inconsistencies in respect of Mr Shaw-Browne's evidence and the evidence of the other witnesses of the Respondent which I shall deal with in my findings of fact. I do not find their evidence credible at all.

The facts

11. The Respondent's specialise in the manufacture of commercial vehicle bodies. Jamie Shaw-Browne is the owner and Chief Executive of the company and has held the position since the company was incorporated in

1998. His wife Carol is a Co-Director of the company and works for the business. They have 44 employees. They have a 2.8 acre site at Old Harding Yard, Mansfield Road, Clipstone, Mansfield in which they store vehicles including commercial vehicles for other companies.

12. Mr Slatcher has known Mr Shaw-Browne for over 20 years and has worked in the business in a variety of roles since 2004. His most recent employment with the Respondent's commenced on 25 May 2009 as evidenced by the P11 deduction card at pages 111-112. He was working 22 hours per week and worked at night on Tuesdays and Wednesdays. The Claimant was paid £176.00 per week gross and his only deduction was for National Insurance of £2.58. His net pay was therefore £173.42.

13. The Claimant's most recent contract was updated on 25 January 2013 and is at pages 80-84. It refers to the Claimant's role as "part time Security Guard". It refers to his hours of work between 7 pm and 6 am on Tuesdays and Wednesdays. It says he is entitled to 5.6 weeks holiday per year and that on termination of his employment he is entitled to pay in lieu of outstanding holiday entitlement. The holidays have to be taken by agreement with his Line Manager.

14. The contract also refers to summary termination of his employment and the disciplinary procedure and also says in paragraph 10.2:-

"Any monies outstanding owed by you will be taken as a contra payment against this."

That of course refers to his notice pay.

15. It is not at all clear where the holiday year runs from. The annual holiday entitlement and authorisation document produced to me from the handbook which is at pages 31-32 is silent as to the holiday year. There is a reference to calendar year in clause 7.2 at page 81 but it is not at all clear to me as to whether the holiday year commences on 1 January or some other date during the year. The P11 deduction card at pages 111-112 showed that he only had one week's holiday during that financial year during week 39. He took no other holiday during that year.

16. It is accepted by the parties that there was an issue about him taking holiday during the Christmas period. Until 2012 the Claimant was happy to work during the period between Christmas and New Year but there was a dispute about the issue of payment and whether an enhanced payment should be made for this period. I am satisfied that from Christmas 2013 the Claimant declined to work during this period and the Respondent had to make alternative arrangements.

17. Mr Gibson says that he had a meeting with the Claimant on 6 January 2016 over his absence over the 2015 Christmas period. He says that he had had to arrange a factory engineer to cover security because of that absence. I have seen the notes at pages 93-94 and on balance I do not accept that they were contemporaneous. No such formal meeting took place. As I have described previously I am satisfied that there was an issue about the Claimant taking time off during the holiday period but this was not dealt within any formal meeting. If he had taken unauthorised leave of absence according to the Respondent's that would be a disciplinary matter and the disciplinary process

could have been instituted which would have involved inviting him to a meeting and giving him a formal warning of some sort. There is no letter inviting him to a meeting. There is also no letter confirming the outcome of any meeting and I am satisfied that this document has been created for the purpose of this Tribunal.

18. It is alleged by the Respondent's that there was a disciplinary meeting between Mr Gibson and the Claimant on 23 June, the outcome of which resulted in a formal verbal warning. The notes of the meeting are at pages 95-96 and the outcome letter is at page 97. The decision, according to the letter was that he would receive a formal verbal warning which would remain on his record for 12 months. The offences committed were;

- 18.1 Smoking on site in the security cabin which was a non-designated area,
- 18.2 Watching TV whilst on duty,
- 18.3 Consuming alcohol whilst on duty.

Under the Respondent's disciplinary policy the Claimant would be invited to attend such a meeting and there is no letter of invitation to attend such a meeting. The notes of the meeting are almost word for word exactly the same as the outcome letter.

19. There are a number of other matters which cast doubt on whether any warning was given on 23 June and therefore the authenticity of both the minutes and the letter.

They are:-

19.1 The disciplinary procedure sets down certain principles (page 42):-

"Apart from an informal verbal warning, you have the following rights in relation to disciplinary action.

- To be informed of the allegations of misconduct or poor performance to be addressed at any disciplinary hearing
- To be accompanied by a work colleague
- To appeal against any disciplinary action

Formal verbal warning (Page 43)

"The verbal warning will remain on your file for six months."

Gross misconduct

The disciplinary procedure provides that certain kinds of offence can result in summary dismissal because they amount to gross misconduct. This includes:-

- "Being in possession, whilst on company premises of illegal drugs and substances or alcohol"

20. Therefore I have the following concerns following this alleged meeting:-

20.1 The allegations set out in the notes are of an extremely serious nature and would, if established, have justified the Respondent's

dismissing the Claimant at that point without notice. A formal verbal warning for the offences as alleged would be highly unlikely.

20.2 Contrary to the company policy he was not invited to any meeting, nor was he informed prior to the meeting of what were the allegations he faced.

20.3 He was not given any right of appeal.

20.4 If the company was following their own disciplinary procedure a formal verbal warning lasts for 6 months not 12 months as set out in the alleged letter.

21. I am also bound to consider the timing of this alleged letter which falls on 23 June which would make, at the date of alleged dismissal for redundancy, it a live matter if it was a formal verbal warning. Overall therefore I am satisfied that this was a document that was created for these proceedings.

22. It is alleged by Mr Dent that he caught the Claimant asleep inside the gate house on 22 September 2016. He says that he recorded this (page 98). Apart from the note I have seen no evidence to corroborate what Mr Dent says. He apparently took no steps at the time saying:-

“I should give the Claimant the benefit of the doubt that this was a one off incident and didn’t report it at the time.”

23. He then goes on to say that on 27 October 2016 he found the Claimant again sleeping in the security hut and that he made a record of this (page 101). He says that he reported this to Glen Gibson after that second incident. Mr Gibson corroborates this version of events and says that he informed Jamie Shaw-Browne about this incident after a customer had raised a similar complaint (page 99). The letter from the customer is in fact dated 15 October 2017. I have not heard from the customer but obviously putting the wrong date on the letter adds to my concern about the genuineness of that letter of complaint.

24. I have seen what is alleged to be the notes of a meeting between Mr Shaw-Browne and Mr Slatcher on 18 October 2016 at 19:10 (page 100). The difficulty with the alleged meeting on 18 October is that according to the evidence of Mr Dent and Mr Gibson, Mr Shaw-Browne did not know anything about the allegation that the Claimant was asleep “on the job” until after 27 October 2016. In my view this amounts to considerable carelessness in the preparation by the Respondent’s of documents that in my view were falsely created for these proceedings.

25. In that alleged investigatory meeting it says that he would be “invited to a meeting the following week” at which they would discuss the allegations further. There is no evidence of any letter inviting him to a meeting on 26 October 2016.

26. What I was presented with was a letter dated 28 October 2016 (page 102) which referred to him receiving a written warning following his none attendance at a disciplinary meeting arranged for 26 October 2016. Apart from the fact that there is no evidence of any letter inviting him to a meeting and the inconsistencies that I have previously described the letter also does not inform him of any right of appeal against the written warning. I am again satisfied that this letter was also prepared for the purposes of this hearing.

27. The Respondent's alleged that there was a meeting between the Claimant and Mr Shaw-Browne on 14 December 2016. This is set out in paragraph 10 of the response at page 25. There is a note of that meeting at page 103. Mr Shaw-Browne says that there was "an administrative error in the recording of some dates". He explains that the meeting that is recorded as 14 December 2016 actually took place on 13 December 2016 and his letter dated 15 December 2016 was actually sent on 14 December 2016. The reason for his change of heart is because he discovered that the Claimant was calling a witness who would say that he could not have been at a meeting on 14 December 2016 because he was with her, Diane Higham, on that occasion.

28. There are other matters which also lead me to consider that those documents were falsely created for the purposes of these proceedings. Again there is no invitation to attend the disciplinary meeting and again there is no mention of any appeal. The note of the meeting talks about how the Claimant "failed to respond to attend a disciplinary meeting last week" which presumably meant that he had been invited to a meeting the previous week. There is no letter of invitation to that meeting either.

29. The Respondent's say that they wrote to the Claimant on 21 December 2016:

"Making the part time security job redundant with immediate effect."

As they acknowledge the Claimant was not in work on 21 December 2016 and was on holiday.

30. The Respondent's have a redundancy policy (page 76). That provides:

"If a redundancy situation arises, for whatever reason, the company will take whatever steps are reasonable in an effort to avoid compulsory redundancies, eg:-

- Analyse overtime payments
- Reduce hours
- Lay off with statutory guaranteed pay
- Ask for voluntary redundancies, whether anyone has plans to retire early or is considering a career move

If compulsory redundancies are necessary, employees will be involved and consulted at various meetings to discuss selection criteria, any alternative positions, and be given every opportunity to put forward any views of their own.

Employees will be given the opportunity to discuss the selection criteria drawn up. The company reserves the right to reject voluntary application for redundancy if it believes that the volunteer has skills and experience that need to be retained for the future viability of the business."

31. According to Mr Shaw-Browne he decided a few days after issuing the Claimant with a "final written warning" that he needed to make one of his Security Guards redundant, that:

"We then had to then decide between the Claimant and other Security

Guards as to who could take over the new role. The Claimant had always made it clear he didn't want a full time role, he had no inclination or the capability to take over the care of the dog and the role itself required a huge degree of trust between the parties. The Claimant's attitude and complete disregard for authority meant he couldn't be trusted in the role."

32. I am satisfied that if they had dismissed the Claimant by reason of redundancy as said by Mr Shaw-Browne on 21 December 2016 (page 106) he has not complied with any of his own redundancy procedure whatsoever. There was no consultation with the Claimant and no meetings with him at all even to tell him that he was redundant. There was no evidence that the respondents considered any steps to avoid redundancy. There were no meetings to discuss criteria for selection. No consideration of alternative positions. No opportunity to put forward the Claimant's views.

33. The letter of 21 December 2016 then goes on to explain why he would not be receiving a redundancy payment. Again the alleged letter is badly thought out. There is only a right to off set monies owed from notice pay according to the contract. There is no right to make any deductions from redundancy pay in the policies and procedures. Any deduction against redundancy pay therefore would be unlawful. Also, the letter ignores his entitlement to notice pay. He was due 7 weeks' notice.

34. I was then also shown the invoice which is at page 108. The company charge certain people for storing vehicles on their site. I am satisfied that Mr Slatcher who had known Mr Shaw-Browne for 20 years and was a loyal employee would not have been charged for storing a vehicle. In any event it seems strange that he would be issued with an invoice in respect of van storage in May as late as December. That leads me to the conclusion that the invoice was also created for the purposes of these proceedings to justify the Respondent's behaviour.

35. We then move to 3 January 2017. Mr Shaw-Browne explains in his witness evidence that:

"On 3 January 2017, on seeing the Claimant appear for work, I called him into the sales office where Jamie Baddeley was working late."

He refers to the letter which is at page 107. I have already dealt with the inconsistencies between Mr Shaw-Browne's account and that of Mr Baddeley but the letter itself refers to "our meeting this morning". Mr Shaw-Browne confirmed that he did not meet the Claimant that morning. He insists that the Claimant signed the letter and Mr Baddeley witnessed it. For the reasons outlined above I again do not believe him. I prefer the evidence of Mr Slatcher. He had sent a text message to Glen Gibson about his shifts over the Christmas period and that he wanted and had made a request earlier for leave during the Christmas period. He did not receive a response and believed that he had the leave granted. I am satisfied that that was his genuine belief.

36. He returned to work on 3 January 2017 where he was met by Mr Shaw-Browne who complained to him that he had not booked the leave and that he was sacked. He was told to "fuck off" and when Mr Slatcher challenged him about that he said "that he would happily pay £10,000 to defend the case rather than pay me anything". There was no further meeting or letter signed by the Claimant and witnessed by Mr Baddeley as alleged by the Respondent. The

Claimant did as he was told and left the premises.

37. After his dismissal on 3 January he received no letter of dismissal, no right of appeal, not even a P45. The P45 that I have seen says that he was dismissed on 1 January 2017. That is neither 21 December 2016 when the Claimant was allegedly made redundant nor 3 January 2017 when he was actually dismissed.

The Law

Unfair dismissal

38. The claim of unfair dismissal is made under Section 94 of the Employment Rights Act 1996. Section 98 provides:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it:-
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”

39. It can be seen from this that it is for the Respondent’s to show the reason for the dismissal and that it was a potentially fair reason. If they establish a potentially fair reason then I go on to consider the fairness of the dismissal.

40. Ms Clayton contended that the primary reason for the dismissal was redundancy and she relied on the case of **Mitchells of Lancaster Brewers Limited v Tattersall** UKEAT/0605/11. Her contention was that consultation would have been futile. I reminded her that where the dismissal was on the grounds of redundancy I would refer myself to the case of **Williams and Others v Compare Maxam Limited** [1982] IRLR 83. It set out certain principles which should be departed from only where some good reason is shown to justify such a departure. The principles include:-

- Giving warnings
- Consulting
- Establishing criteria for selection
- Making sure selection is made fairly in accordance with the criteria
- Consider alternative employment

Wrongful dismissal

41. The Respondents must be able to establish that the Claimant has committed a fundamental breach of his contract of employment entitling them to terminate his contract without notice.

My Conclusions

42. I am satisfied in this case that the Respondent's have not been able to establish a fair reason for the dismissal. The reason for the Claimant's dismissal was certainly not as contended by them as being because of redundancy. The fact that they did not go through any procedure shows that that was not the reason.

43. I prefer the evidence of the Claimant for the reasons outlined above. In this case I am satisfied that the dismissal was because the Claimant took leave off between Christmas and New Year believing that that leave had been approved.

44. Mr Shaw-Browne dismissed the Claimant summarily by telling him to "fuck off". He did not undertake any of the procedures set out in his disciplinary procedure. He did not invite the Claimant to a meeting or tell him in advance of that what the allegations were. He did not give him any right of accompaniment. There was no hearing at all. He did not write to the Claimant after the dismissal and give him reasons for it and did not give him any right of appeal.

45. The Claimant's dismissal was unfair and Mr Shaw-Browne knew it was. He then created the following documents;

- 45.1 The notes of the meetings on;
 - 45.1.1 6 January 2016
 - 45.1.2 23 June 2016
 - 45.1.3 18 October 2016
 - 45.1.4 14 December 2016

- 45.2 The warning letters dated;
 - 45.2.1 23 June 2016
 - 45.2.2 28 October 2016
 - 45.2.3 15 December 2016

45.3 The redundancy letter dated 21 December 2016

45.4 The invoice dated 22 December 2016

45.5 The letter dated 3 January 2017

Breach of Contract / Notice

46. The Claimant was entitled under his contract of employment to 7 weeks' notice. He was not given 7 weeks' notice. I am satisfied that the Claimant had not committed any fundamental breach of his contract of employment that entitled the Respondent to dismiss him without notice. He had simply taken holiday which he believed that he was entitled to and which had been implicitly approved. The claim for breach of contract therefore succeeds.

Holiday Pay

47. At the time of his dismissal the Claimant was not paid any holiday pay. He was dismissed on 3 January and I need to calculate how much holiday he is due once I have heard further evidence.

Wages

48. The Claimant has not been paid for 3 January 2017 when he attended for work. There has therefore been an unlawful deduction of his wages.

Remedy

49. In view of my findings above I will listen to any submissions that the parties might have about **Polkey** and contributory conduct at the Remedy Hearing which will take place on 17 October 2017 at 10 am.

Employment Judge Hutchinson

Date 15 September 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE