



EMPLOYMENT TRIBUNALS

Claimant: Mr M Moxon

Respondent: David Johnson and Christine Ellis
t/a MVS

Heard at: Nottingham

On: Wednesday 19 and Thursday 20 December 2018

Before: Employment Judge Brewer (sitting alone)

Representatives

Claimant: Ms D Berkinshaw, Representative

Respondent: Ms J Lee, Representative

JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.
2. The claim for notice pay fails and is dismissed.

REASONS

Introduction

1. This is a claim for unfair dismissal brought by Mr Moxon against his former employer David Johnson and Christine Ellis trading as MVS. Representation is as set out above. I had witness statements and heard oral evidence from Mr Moxon, Mr Johnson and Mrs Ellis. There was an agreed bundle.

Issues

2. The Claimant Mr Moxon is not claiming constructive dismissal. The effect of that is that there is essentially only one issue in this case which is whether or not he was dismissed. Given that the Respondent does not contend they have a potentially fair reason for dismissing him nor that they followed any fair process, it follows that if I find Mr Moxon was dismissed that will be unfair. The alternative is that he was not dismissed with the likelihood that he resigned but given that he is not claiming constructive dismissal his claim would then fail.

3. I shall refer to one case below but in relation to the question of what constitutes a dismissal this is a statutory matter set out in Section 95 of the Employment Rights Act 1996. That defines as a dismissal amongst other things circumstances in which the contract under which the employee is employed is terminated by the employer with or without notice. That is what Mr Moxon says happened in this case.

Findings of Fact

4. I make the following findings of fact in this case.

5. Mr Moxon was employed by the Respondent as a valet. He started employment on 10 March 2014.

6. By all accounts Mr Moxon was a good employee and had had no previous difficulties at work whether conduct, performance or otherwise.

7. The Respondent operates from 3 sites in South Yorkshire. One of those sites, the site at which Mr Moxon was employed, is based at Aston Common in Sheffield. The two other sites are in Rotherham and Doncaster. These two sites have contracts with Derbyshire and South Yorkshire Police Forces and are involved in crime scene operations. As a result around 75% of the Respondent's work force undergo regular DBS checks. Mr Moxon was not one of the employees required to undertake DBS checks.

8. The Aston site is the biggest site and it houses the company's offices as well as van sales, servicing, repairs and MOT's.

9. On 22 February 2018 there was an altercation between Mr Moxon and Mr Johnson over incorrect engine oil. This happened at around 10:30 in the morning. Mr Moxon says that Mr Johnson slapped him. Mr Moxon says that he then waited until his break at 11:00 am at which point he phoned his girlfriend who said he ought to go home. At that point Mr Moxon went and told one of his managers, Kate Foers, that he was going home. He did go home and he never returned to work.

10. When Mr Moxon got home his family told him he ought to contact the Police which he did.

11. On 23 February Mr Moxon contacted his GP, he had an appointment with the Citizens Advice Bureau, he spoke to ACAS and he spoke to a firm of solicitors.

12. On 26 February Mr Moxon returned his keys to the Respondent and he got Ms Foers to sign to say that she had received them.

13. The Police investigated Mr Moxon's allegation and determined that there was insufficient evidence to prosecute.

14. On 2 March 2018 Mrs Ellis on behalf of the Respondent, wrote to Mr Moxon, the document that appears at page 58 of the bundle. She says:

“I refer to your resignation on 22/02/2018 and my subsequent phone call to you on Tuesday 27/02/2018 asking you to come and have a meeting with us. Whilst I am naturally disappointed with your decision to resign, I confirm that your resignation is accepted.”

The letter goes on to set out what payments will be made to Mr Moxon and thanks him for his work, wishing him the best for the future.

15. Mr Moxon commenced early conciliation on 11 April 2018 and filed his claim with the Employment Tribunal on 19 May 2018.

Discussion and Conclusion

16. A great deal of the evidence I heard in this case revolved around the issue of whether Mr Johnson slapped Mr Moxon as Mr Moxon alleged on 22 February 2018. As I indicated to the parties during the hearing a determination of whether that incident took place was not necessary to my judgment. It would be highly relevant if Mr Moxon was claiming constructive dismissal, that is that he resigned in response to a fundamental breach of contract by the employer, but he does not assert that claim. His claim is quite the opposite. He says I did not resign. I was dismissed. Mr Moxon confirmed that he was not claiming constructive dismissal in response to a question in re-examination by his representative Ms Berkinshaw.

17. The first question I have asked myself is whether the letter which appears at page 58 of the bundle contains unambiguous words of dismissal and if not whether it contains ambiguous words which could be construed as dismissal. In my judgment they do not. Whether Mrs Ellis was correct or not in her assumption that Mr Moxon had resigned, that is clearly what the letter sets out – it is her belief that on 22 February 2018 he did resign in that he never intended to come back to work and that was the thrust of her evidence before me.

18. On the other hand it is quite clear from the evidence and indeed it is really not suggested by the Respondent that Mr Moxon said any words which could be unequivocally taken as words of resignation. He did not in short say I am resigning. As a matter of law in the absence of express wording in relation to resignation I am entitled to look at the conduct of the parties in seeking to establish what actually took place. In the case of **Harrison v George Wimpy and Co Limited** [1972] ITR 188 it was held that where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated. I note that in that case it was also said however that the employer has a duty in the circumstances to make enquiries of the employee.

19. Before I turn to analysing the evidence I heard, I turn to the question of credibility. I note in particular that Mr Moxon changed his account a number of times during his oral evidence and indeed on a couple of occasions several times within the space of one answer. For example he said that he wrote the documents which appear at pages 42-53 of the bundle.

Under cross examination by Ms Lee however he accepted that he had not written them and that his girlfriend had in fact written them. He also said that he spoke to his GP on 23 February and was prescribed Diazepam over the phone. The notes which appear at page 46 of the bundle say this in relation to Mr Moxon's conversation with his GP, that she "told me to take Diazepam that I was prescribed". Ms Lee put to Mr Moxon that the only reasonable way to read those words were that the GP was telling him to take the Diazepam that he had already been prescribed and although Mr Moxon did not agree I agree with Ms Lee, the only way to read the words Mr Moxon's girlfriend had written, presumably either because she was there or because he told her was that he was advised to take the Diazepam he already had. In my judgment had the GP said I will prescribe you Diazepam which you should take, the note at page 46 would have been much clearer about that point.

20. Further difficulties arose with Mr Moxon's evidence in relation to the timing of the Police leaving his house in the first part of the investigation, how many Police Officers were there, who left first and so on. I also note that Mr Moxon says he was told expressly that Mr Johnson had admitted the offence, had been given a conditional caution and would sign a Community Resolution Order. It is quite clear from the Police logs obtained by both the Claimant and Mr Johnson under the data protection legislation that there was never any admission by Mr Johnson that he assaulted Mr Moxon and no suggestion of a community resolution order or indeed any other resolution. Mr Moxon says that the Police logs are wrong and that they are in fact lying but there is no evidence of that. Further Mr Moxon has complained and that complaint has not been upheld. I find no basis for finding that the Police logs are incorrect at all let alone deliberately so. A further issue arises in relation to those logs in that Mr Moxon said that the slap would have been caught on CCTV but the Police report is quite clear that the CCTV footage did not support the allegation.

21. Finally in relation to credibility I note that Mr Moxon said that he had been advised by the Police to return his keys. However he also said that it was his normal practice to return his keys. There is no evidence in the Police log that they did advise him to return his keys. He says that the Police advised him to contact solicitors but that also does not appear in the Police log. The only thing which appears in the Police log in relation to advice is that Mr Moxon was advised to seek an appointment with the Citizens Advice Bureau.

22. Whilst I cannot say that everything Mr Moxon said in evidence was not credible, I do find that throughout his evidence there is a catalogue of changes and variations to his evidence which together cast doubt on the credibility of his account and I have determined that where there was a conflict of evidence particularly in relation to the evidence of Mr Johnson I prefer Mr Johnson's evidence.

23. Mr Moxon's case was that from 11:00 am or thereabouts on 22 February he was off sick, he self-certified for 7 days and then he obtained a sicknote. Mr Ellis' evidence which I also accept was that no self-certification documentation is required for the first 3 days of sickness absence but for the following 4 days there would be a self-certification certificate and there is not one in this case.

24. Mr Moxon has not produced that certificate nor has he produced any prescription for Diazepam or any other medical evidence save for the fit note which I shall come to suggest that he was in fact off sick at least for the first 7 days. It is accepted by the Respondent that Mr Moxon's girlfriend telephoned the Respondent and spoke to Mrs Ellis on 23 February and said words to the effect that "he would not be in" as he was not well. In my judgment the Respondent was perfectly entitled to assume that that meant 23 February but not any other period. I also note and consider it to be highly relevant that in the original Police log and in this case on page 32 of the bundle, where the Police operator sets out almost line by line his or her conversation with Mr Moxon on 22 February the following exchange "caller says he won't be able to return to A/L and he won't be able to work there again after today". The reference to "A/L" is to the Respondent. I see no reason not to take that at face value and it is consistent with the Respondent's case. The operator is in essence recording that Mr Moxon had said he has left work and will not be able to go back. That is clearly consistent with a resignation.

25. Thereafter Mr Moxon himself refused to correspond whether on paper, electronically or by telephone with the Respondent. He returned his keys and he obtained the signature of one of his managers, Ms Foers, to confirm that he had returned them. In evidence Mr Moxon said that the Police advised him to do this and he did not ask them why. I do not find that credible for two reasons. First there is no record of the Police giving that advice in their log and second it would be very odd for somebody to not ask why he ought to return his keys and indeed very odd that the Police would give him such advice. Mr Moxon also said that this was usual, for example, if he went on holiday he would return his keys. The Respondent's evidence was that a large number of people have keys to various parts of their premises and it is not usual practice to return keys when somebody is off work. I accept that evidence. Even if it was normal practice to return keys, there is no reason for Mr Moxon to have asked Ms Foers to sign for their receipt unless he was intending not to take those keys back and again this is entirely consistent with him resigning and intending never to return to work.

26. Mr Moxon also confirmed that he discussed his employment situation with the Citizens Advice Bureau, ACAS and indeed solicitors on 23 February. Given that on his own evidence by 23 February he thought he had been told that the criminal matter was concluded because Mr Johnson had admitted guilt there would be no reason to discuss anything other than his employment situation with the CAB, ACAS or the solicitors. Indeed ACAS only deal with employment matters. The logical conclusion to draw from Mr Moxon's actions is he wanted advice about what to do given that he had left work in the circumstances which he alleges.

27. In short almost everything Mr Moxon did from 11:00 am on 22 February 2018 indicates that he left work with no intention of returning. The single piece of evidence which runs counter to that is the fit note which was delivered by his father and appears at page 69 of the bundle. However whatever the reason for him doing that the whole weight of evidence in this case supports that conclusion that Mr Moxon resigned. In my judgment it was certainly reasonable for the Respondent to conclude that he had resigned from their employment at the very latest on the day he handed in his keys if not sooner.

28. In my judgment the Respondent did not dismiss Mr Moxon, he resigned from his employment and it follows therefore that his claim for unfair dismissal and for notice pay must fail and are therefore dismissed.

Employment Judge Brewer

Date: 22 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE