



EMPLOYMENT TRIBUNALS

Claimant
Mr M S Hedley

Respondent
Euro Car Parts Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields

On 18th March 2019

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances

For Claimant: in person

For Respondent: Mr J Anderson of Counsel

JUDGMENT

The claims of unfair dismissal and unlawful deduction of wages are not well founded and are dismissed.

REASONS

1. Introduction , Issues and Relevant Law

1.1. By a claim presented on 22 August 2018, following early conciliation from 15 - 16 August 2018, the claimant made claims of unfair dismissal and "holiday pay". By a response filed on 22 October 2018 the respondent denied all liability to the claimant.

1.2. This matter came before Employment Judge Buchanan on 14 January 2019 for a final hearing. The claimant attended but the respondent did not. The respondent wrote an explanation which satisfied Employment Judge Buchanan who made case management orders of his own motion to bring this matter to final hearing, including that the claimant use as his witness statement if he wished the document now at pages 49-50 of the agreed bundle. He set out the issues from his perusal of the pleadings and said if the parties disagreed with them they were at liberty to agree a list and file it in advance. They have not.

1.3. Having read the witness statements, I see the issues slightly differently. If there was no dismissal, the issues as to its fairness do not arise. The claimant's allegation is the respondent deducted from his final instalment of wages a sum equivalent to the pay for days of leave taken in excess of the entitlement accrued. The real issues are :
1.3.1. Did the claimant resign his employment or was he dismissed?

1.3.2. What words were used by the claimant and the respondent?

1.3.3. Were the words used and acts done ambiguous or not?

1.3.4. If ambiguous, how would a reasonable person have understood such words and acts in context? Should either party have checked their meaning before accepting the dismissal/resignation in view of any exceptional circumstances?

1.3.5. Was any deduction from final salary in respect of holiday taken lawful?

1.4. Section 95 of the Employment Rights Act 1996 (the Act) includes:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

1.5. Martin –v- MBS Fastenings held, whatever the respective words and actions of the employer and employee, the question remains, “ Who really terminated the contract?” If the respondent's words and conduct show it was terminating the contract that will be dismissal under 95(1)(a). Where words and/or are ambiguous, it is neither the subjective intention of the speaker nor the subjective interpretation of the person to whom the words are spoken which is determinative. It is what objectively an onlooker with knowledge of the facts and background would have taken the words to mean (J&J Stern-v-Simpson 1983 IRLR 52).

1.6. Context is important. In Futty –v- Brekkes Ltd in 1974 a supervisor used very direct language which was held not to be a dismissal but telling the claimant to go home and “cool off” . Unambiguous words cannot normally be retracted, but if spoken in the heat of the moment an employer should allow some time to check its understanding of what was said and done was correct Kwik-Fit GB Ltd -v- Lineham 1992 IRLR 156 . This was recently affirmed in East Kent Hospitals University NHS Foundation Trust -v-Levy EAT 0232/17. The EAT also held the tribunal was entitled to decline to take into account the parties' subjective views, but those views may be relevant to what a reasonable person would think words and actions meant.

1.7. The claimant did rightly not argue s 95 (1) (c) applied. An employee is “entitled” to terminate only if the employer has committed a fundamental breach of contract Western Excavating Ltd v Sharpe. On the facts there was no breach of any express term of the contract or the implied term of mutual trust and confidence.

1.8. Section 13 says an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in writing of the worker's contract, or his written agreement or consent to the making of the deduction.

2.Findings of Fact and Conclusions

2.1. I heard the evidence of the claimant and on behalf of the respondent of Mr Andrew James Taylor . I also read the statement of Ms Lisa Marie Goodley and had an agreed document bundle.

2.2. The claimant worked for the respondent from October 2009 as a warehouseman/ General Assistant, until his employment ended in July 2018. Mr Taylor became Operations Manager of Durham branch on 1 July 2018. He started with the respondent on 13 August 2014 and had worked in other branches. He had managed the claimant for a few weeks. Senior to him was the branch manager, Luke Bennett.

2.3. The duties of a General Assistant include carrying out stock checks (referred to as the PI count) and picking parts to fulfil customer orders. The picking duties entail going into the warehouse, picking the parts, and handing them to the despatcher who then arranges delivery. The term "working on the printer" means doing picking duties. The PI count is carried out everyday. The computer system generates a schedule of random product lines to be checked. The general assistant walks round the warehouse to check the required stock lines and inputs the data onto the computer. A second check is then carried out by another person in case there are any errors. A final sign off is then done by a member of the branch management team.

2.4. All general assistants are expected to carry out a variety of duties as needed throughout the day. When Mr Taylor arrived at the branch the claimant was unofficially assigned to picking 1 day a week, with the other two assistants doing 2 days a week each. Mr Taylor tries to give everyone a balance of tasks .

2.5. On Monday 16 July the claimant says he was one of only two staff in the warehouse. That day he was given 1432 PI's to do. A part-time worker was supposed to start at 1 pm but did not turn up until 2.30. The claimant got the PIs done by 3:30 pm but still had to input 118 pages. The computer screen will automatically sign out after a period of not being used. There is a branch password which the claimant should have known. If he had input the password the computer would have been ready for use. If he did not remember the password, he could have asked anyone else, or even phoned IT to ask them to reset it. The password had not changed. The claimant had 89 pages done by the time he finished shift . He told Mr Taylor that about half an hour before his shift finished. Mr Taylor had to finish the first input himself, carry out the recount and do the second input.

2.6. There are disputes about events on 16 July. Mr Taylor the claimant was not working hard but spending time on his phone outside of his usual breaks. Mr Taylor asked him what he was doing. He did not answer. Mr Taylor told him to get on with his work and put his phone away. Compared to the other two assistants, he seemed to be working slowly. The claimant denies being slow that day, but whichever version is correct , I have no doubt the claimant found it to be a bad day.

2.7. The claimant says his "day on the printer" was a Wednesday but Mr Taylor says it is not fixed like that as holidays, sickness and other daily tasks cannot always be foreseen and can vary in urgency. He looks at what needs to be done at regular points throughout any day as no two days are exactly the same. On 17 July 2018 the claimant turned up for work 10 minutes late. Mr Taylor assigned picking duties to him, explaining others were quicker on the PI than he was and they needed to make sure they caught up from the day before. He was unhappy Mr Taylor had put him on picking duties and accused him of being slow. He told Mr Taylor he was victimising him. Mr Taylor told him that was not the case. The claimant replied "*I think you are*". He was not happy, and was muttering under his breath.

2.8. Ms Vivienne Savage, the branch's administrator, asked the claimant, as she normally did, if he wanted a "cuppa". He replied "*don't make me one, I might not be staying*". Mr Taylor heard this and asked the claimant to repeat it. He replied he was "*going home*" "*do not need this shit*" and began to walk out the building. Mr Taylor walked across the car park and asked him to confirm it again, and whether he wanted to put it in writing. Mr Taylor says he confirmed he was leaving and would email his resignation. The claimant says Mr Taylor sent him home with the words "if you're going, just go now". In many cases, I have to decide between conflicting versions of what happened,. Any witness may be credible and honest but mistaken. I use the word lying to mean witnesses deliberately stating something they know not to be true. Witnesses may also (a) say they remember as a certainty something which they inaccurately recollect and (b) embellish or exaggerate a point which is basically true. In this case, I have seen both variations on both sides. Taking the claimant's case at its best, even he does not say Mr Taylor uttered unambiguous words of dismissal.

2.9 After that, Mr Taylor spoke to Ms Savage and David Unsworth, Senior Sales Adviser who both said the claimant had done this before when he was told to do something he did not want to do and that he would be back. Mr Taylor rang Ruth Dumphrey-Brooks, his regional manager, to tell her the claimant had walked out. She responded "not again" and told Mr Taylor this was something he had done before but Mr Taylor should ring HR to let them know. He rang HR and asked Liz Hopwood (HR Business Partner) what he should do. She told him to wait a few days to see if the claimant came back or made contact with the branch.

2.10. When the claimant got back home he says he rang "head office" which is in Tamworth. A receptionist said she would put him through to an HR Business Partner and, if she did not answer, he was to leave a message and she would get back in touch with him. He says he left a voice message but no one got back to him. He rang again on 19 July and was told the same thing . His statement says "*I did not return to work as I was waiting for a call back from the HR department to sort out the issue. I did not think that it would be necessary to turn to return to work until the issue was sorted out. I rang on the 19th and said that I was worried that **I would be sacked** if this was not resolved and the office said "don't worry about it just leave a message with Liz and she will get back in touch with you" but she never did. I received my P 45 on 28 July with no explanation.*" The emboldened words show even he did not think he had already been sacked.

2.11. The claimant made no contact with the branch. Mr Taylor called HR to say he still had not showed up for work. The HR officer said she would process him as a leaver. The respondent has an automated system which, as a result of his not returning to work or making contact, generated a P45 , P60 and his payslip from which 9.25 days pay been deducted. On 28 July he received that.

2.12. Mr Taylor had no further contact from him at all until HR told him in December he had made a written complaint. Ms Goodley is an HR Business Partner who has been with the respondent since 2003. She became involved when the claimant sent page 49 to her colleague, Liz Hopwood on 19 November 2018. Ms Hopwood was on holiday when it arrived so it was passed to Ms Goodley. She investigated his complaint, looking at emails from Ms Savage (page 51) and Mr Unsworth (page 52) and speaking to Mr Taylor. She checked to see if there was any record the claimant

had made contact as he was claiming, but there was none. She learnt from the witnesses the claimant had walked out without giving any notice and had not come back. Mr Taylor had not dismissed him. Ms Goodley wrote to the claimant on 12 December 2018 with the outcome of her investigation and heard nothing further.

2.13. My conclusion is the claimant's words on 17 July, taken in isolation, did not terminate the contract. The respondent then did exactly as the law suggests and waited to see what the claimant would do next. Had he not heard from HR, he had over a week to contact Mr Taylor, Mr Bennett or Ms Dumphrey-Brooks, whom he knew. What he said on 17th combined with him driving away from the workplace and then making no further contact in my view means he really terminated the contract. There was no dismissal so his unfair dismissal claim fails.

2.14. As regards claim the holiday pay Ms Goodley's statement and records at page 48 confirm he had taken in excess of his holiday entitlement for 2018, at least the 9.25 days deduction from his final payslip . The claimant's contract at clause 7.6 reads: "*If , on termination, you have taken more holiday than you have earned in that year, the Company shall be entitled , as a result of your agreement to the terms of this contact , to deduct the value of the unearned holiday from any final payment of salary made to you.*" There was a deduction, but a lawful one,so his unlawful deduction of wages claim fails..

TM Garnon Employment Judge
Date signed 18 March 2019