



EMPLOYMENT TRIBUNALS

Claimant: Mr A Savage

Respondent: Dents Bakery Limited

Heard at: Newcastle

On: 11 January 2023

Before: Employment Judge Atkinson

Representation

Claimant: Ms Rumble of counsel

Respondent: Mr Proffitt of counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal is not well founded and is dismissed.
2. The claim for breach of contract is not well founded and is dismissed.

REASONS

Preliminary Issues

1. On 5 January 2023 the respondent notified the Tribunal that its main witness, Ms Helen Carey, was in Tenerife and asked that a request be made for permission from the Spanish authorities for her to give evidence via video from that location.
2. Such permission had not been obtained by the date of the hearing. The respondent therefore made two applications in the alternative:
 - a. For the final hearing to be postponed, or
 - b. That the final hearing commence, hearing the claimant's evidence, but going part-heard to a date when Ms Carey would be back in the jurisdiction.

3. The respondent conceded that the request for Ms Carey to give evidence from abroad came at a late stage in proceedings. The explanation was that the respondent's solicitor was unaware of the necessity to seek permission for evidence to be given from abroad and it was only when counsel was instructed that the issue became apparent.
4. The respondent submitted that only by granting one of these two applications could the Tribunal act in accordance with the Overriding Objective. Ms Carey was the respondent's key witness and their only other witness, Mr Stephenson, was an external consultant who could not speak of many of the matters in issue. Ms Carey's evidence was not capable of agreement.
5. The respondent submitted that the first of the applications was preferable, as a relisted final hearing date was likely to be sooner than a date to resume a part-heard hearing, which would have to take into account counsel's availability as well as my own.
6. The claimant opposed both applications, pointing out that the issue leading to respondent's application was of either of its own or its representatives making. Furthermore, it was submitted that the **Presidential Guidance on Taking Oral Evidence by Video or Telephone from Persons Located Abroad** was published in April 2022 and that it insufficient for the respondent to claim ignorance of this to obtain a postponement.
7. The claimant highlighted that the final hearing was fixed in September 2022 and that the respondent had ample time to make the request without jeopardising the hearing date.
8. The claimant further submitted that if the Tribunal refused the respondent's applications the respondent could not ask that Ms Carey's witness statement be considered by the Tribunal as it had been served on the Tribunal less than 7 days prior to the hearing and so this was prohibited by rule 42 of the **Employment Tribunals Rules of Procedure ('the Tribunal Rules')**. The claimant conceded that he had received Ms Carey's witness statement more than 7 days before the hearing.
9. In relation to this issue the respondent submitted that rule 42 did not prevent Ms Carey's witness statement being considered by the Tribunal. The rule requires that the Tribunal "shall consider" written representations if they are delivered not less than 7 days before the hearing. It does not prohibit the Tribunal from considering written representations delivered beyond that deadline; this is a matter for the Tribunal's discretion.
10. The Overriding Objective requires the Tribunal to deal with cases fairly and justly, which includes avoiding delay and saving expense.
11. Rule 30A(2) of the Tribunal Rules states:

"Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where:

- (a) all other parties consent to the postponement and-

- (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
 - (ii) it is otherwise in accordance with the overriding objective;
- (b) the application was necessitated by an act or omission of another party or the Tribunal; or
- (c) there are exceptional circumstances.
12. In order to grant a postponement the Tribunal would have to be satisfied that there were exceptional circumstances in this case. The application for a postponement was brought about solely due to the respondent's omission. There were no exceptional circumstances and so the application for a postponement was refused.
13. Commencing the hearing with the intention of only partly hearing the case would cause further delay and expense, whilst causing prejudice to the claimant. This application was also refused.
14. Rule 42 of the Tribunal Rules does not prevent the Tribunal from considering Ms Carey's witness statement during the hearing. The claimant made no complaint about when the witness statement was served upon him and suffered no prejudice by its late delivery to the Tribunal. Ms Carey's witness statement was to be considered by the Tribunal, with the parties to make submissions as to the weight the Tribunal could place upon it in the absence of Ms Carey being available for cross-examination.

Introduction

15. By a claim form dated 14 September 2022 the claimant complained of unfair dismissal and breach of contract. He was an employee of the respondent and claimed to have been constructively dismissed following a meeting with the respondent's directors and the witness Mr Stephenson on 6 April 2022. He claimed this dismissal was unfair and that he had not been paid notice pay that was due to him.
16. By a response form dated 19 October 2022 the respondent resisted both claims. The respondent's case was that there had been no breach of the contract of employment by the respondent and that any resignation by the claimant did not amount to a dismissal.

Issues

17. The following matters were in issue:
- a. Did the claimant resign on 6 April 2022?
 - b. If so, was an act or omission (or a series of acts or omissions) by the respondent a cause of the claimant's resignation?

- c. Did any such act(s) or omission(s) by the respondent amount to a fundamental breach of contract?
- d. If so, was the dismissal fair?
- e. If the claimant was dismissed, was he entitled to notice pay?

Evidence

- 18. At the hearing the claimant gave evidence on his own behalf. Mr Mick Stephenson gave evidence for the respondent, whilst the Tribunal also considered the witness statement of Ms Carey. The parties supplied a joint paginated bundle of documents.
- 19. The claimant's evidence was that at the conclusion of the meeting on 6 April 2022 he was told by Mr Stephenson that he was suspended from work. When asked about whether he resigned that day the claimant said he didn't know whether to resign and that he needed to obtain legal advice and there had been some delay in him being able to obtain an appointment with a solicitor.
- 20. It was put to the claimant that on 9 April it was confirmed via text message that he was not suspended (page 86 of the bundle). The claimant was asked why he did not return to work at that point. The claimant responded that he had been told he was suspended and that he could not return at that point "when they were denying what happened."
- 21. At the conclusion of the claimant's evidence, counsel for the claimant was asked whether the claimant's case remained that he resigned on 6 April 2022. It was confirmed that this remained the claimant's case and no application to amend was to be made.

Submissions

- 22. The parties both reminded the tribunal that it was for the claimant to prove he was constructively dismissed.
- 23. It was submitted on behalf of the claimant that the fact that Ms Carey and Mr Stephenson thought that the claimant had resigned on 6 April supported the contention that he had in fact done so.
- 24. On behalf of the respondent it was submitted that the claimant's evidence was at odd with his own case and that the claimant had not been dismissed on 6 April 2022.
- 25. Both parties made submissions regarding the weight that could be placed upon Ms Carey's witness statement. The respondent submitted that those parts of Ms Carey's witness statement which covered events witnessed by Mr Stephenson were consistent with his evidence. It was further submitted that Ms Carey was not a witness who had failed to attend in order to avoid her account coming under scrutiny, a postponement had been sought to allow this to happen. The claimant highlighted that he had been denied the opportunity to challenge Ms Carey's account.

Relevant Legal Framework

26. Section 94 of the Employment Rights Act 1996 provides employees with the right not to be unfairly dismissed.
27. Section 95 the Employment Rights Act 1996 defines the circumstances in which an employee is dismissed. Subsection (1)(c) provides that an employee is dismissed if:
- “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.”

Findings of Fact

28. The respondent operates a bakery and provides catering services. The claimant was employed by the respondent from 6 April 2015.
29. On 31 March 2022 the claimant attended work but left shortly thereafter after becoming unwell. Ms Carey was informed by the claimant’s partner that he was suffering from an upset stomach and diarrhoea.
30. Whilst absent from work the claimant undertook work for another bakery. The respondent became aware of this and took photographs of the claimant’s car in the car park of the other bakery.
31. The claimant returned to work with the respondent on 6 April 2022. Mr Stephenson of DP Consultancy (NE) Limited, a company providing health and safety guidance to businesses, was in attendance to assist the respondent in conducting a return to work meeting with the claimant.
32. At the conclusion of the return to work meeting the claimant was informed that it was believed he had been working at another bakery whilst on sick leave. The claimant claims he was then told that he was being suspended. The respondent claims that the claimant was informed that this matter could result in disciplinary action being taken and that this may include him being suspended or dismissed. Ms Carey and Mr Stephenson corroborate each other’s accounts, which is also consistent with the text message exchange between Ms Carey and the claimant in the following days. The claimant, however, in that text message exchange also repeats that he was told he was suspended. I find that the claimant was told that any disciplinary action could include him being suspended, but that the claimant became upset during this conversation and believed that he was, in fact, being suspended.
33. The claimant left the respondent’s premises at this point. Ms Carey thought that the claimant had resigned in doing so, but thought it prudent to confirm this with the claimant. This was done via text message on 8 April 2022 (page 81 of the bundle). The claimant responded “Sepended that’s wot he sed.”
34. The claimant did not resign on 6 April 2022. In his oral evidence he stated that on 6 April he did not know what to do and needed to take legal advice before making a decision. The claimant’s response to Ms Carey’s text

message of 8 April is consistent with this, even though the claimant did not directly answer the question of whether he had resigned.

35. The claimant did not notify the respondent of his resignation until 20 June 2022, when a letter was sent to the respondent by solicitors acting for the claimant.

Analysis and conclusions

36. The claimant's case is that he was constructively dismissed on 6 April 2022. He cannot, however, have been dismissed on that date if he did not terminate (with or without notice) the contract of employment.
37. The claimant was not dismissed on 6 April 2022. His claim for unfair dismissal is not well founded and is dismissed.
38. Likewise his claim for breach of contract is based upon him being dismissed on 6 April 2022 and so is also dismissed.

Employment Judge Atkinson

Date: 12th February 2023