



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr J Graham

and

Respondent
ASDA Stores Ltd

REASONS

(requested by the claimant on 11.5.17)

1. These are the written reasons for the tribunal's judgment of 10 May 2017, sent to the parties on 17 May 2017.
2. By a claim form presented on 5 May 2016, the claimant complains that he was unfairly dismissed by the respondent. The respondent contends that it dismissed the claimant on 8 February 2016 on account of his conduct, namely, his unauthorised absence.
3. At the start of the hearing the claimant announced that he was actually pursuing his claim on the basis of a constructive dismissal. His new case was that he resigned on 7 February 2016 in response to the respondent's repudiatory breach, namely a breach of the implied term of trust and confidence. This was a surprising turn of events. I say that because the notes of a case management discussion held by Employment Judge Baron on 30 January 2017 record that constructive dismissal was raised by the claimant on that occasion in relation to a resignation in October 2015 which was withdrawn by agreement. He made no reference to a subsequent resignation. It was confirmed on that occasion that the matter would proceed on that basis of an actual rather than constructive dismissal and that had been accepted by the parties. Nevertheless, I allowed the claimant to pursue his alternative case.

Issues

4. I had to consider the following issues:
 - a. Was termination of employment effected by a resignation or an actual dismissal.
 - b. If resignation – did the claimant resign in response to a fundamental breach of contract – i.e. breach of the implied term of trust and confidence, namely:
 - i. The way in which the respondent handled an assault against him.
 - ii. Coercing him into withdrawing his resignation with false assurances
 - iii. Falsely signing him in as present at work
 - c. If there was an actual dismissal – was it for a potentially fair reason and if so, was it in all the circumstances fair having regard to equity and the substantial merits of the case.

The Law

Constructive dismissal

5. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.
6. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.
7. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Agreed facts

8. The claimant was employed as a checkout operator at the respondent's store in Clapham. On 29 December 2015, the claimant was issued with a first written warning for being absent without authority between 15.9.15 and 29.12.15. The warning was for a period of 12 months and advised that any further unauthorised absences during that time could result in summary dismissal. [77-80]. That warning was not appealed.
9. On 28 January 2016, the claimant was invited to attend a disciplinary hearing to consider his unauthorised absence since the 11 January 2016. The hearing was adjourned from the 1 February due to the claimant's non attendance and re-listed for 8 February. The claimant did not attend the reconvened hearing but was represented by a GMB union official. The outcome of the hearing was that the claimant be dismissed summarily and this was confirmed by letter on the same day. [129-131]. The claimant appealed the decision but following an appeal hearing on 16 March 2016, which he attended, the decision was upheld. [155-156]

Was there a resignation?

10. The claimant contends that he resigned on 7 February 2016, the day before the disciplinary hearing, and relies on an exchange of emails between himself and John McCarthy, Regional Support People Trading Manager, in support of this. The email exchange was about the outcome of the claimant's grievance and his unwillingness to return to work until various matters had been resolved. On 4 February 2016 the claimant wrote:

"Please note it down as formal notice that if after speaking with Amy & no resolve still not reached & AWOL preceding is still to go ahead next Monday.....this email is to be considered as my formal resignation due to me literally reaching brake point in mind, body & spirit"

11. On 7 February, John McCarthy replied "*I am not in a position to decide your resignation for you. If you wish to resign, I would require you to instruct me as such, including your last day of employment.*"
12. The claimant acknowledged the email but did not provide the information requested. Instead he simply asked that his earlier email be forwarded to Amy, the store manager. Mr McCarthy therefore sent a further email reiterating his earlier instruction. There was no further response from the claimant. [100-98]
13. The claimant's correspondence, on an objective construction, simply informs the respondent of a future intention to resign conditional upon events that may or may not happen. That is too ambiguous to amount to a resignation. Further, the conduct of the claimant following this correspondence is inconsistent with him having resigned. Although he did not attend the disciplinary hearing on 8 February, there was a union official there on his behalf, which strongly suggests that he considered the employment relationship to be on-going. I was taken to the notes of the disciplinary hearing and there is no record of the GMB official having made representations that the employment had already terminated, most probably because that was not his understanding of the situation. The claimant attended the appeal hearing and one of his grounds of appeal was that the sanction of dismissal was too severe. In other words, he was seeking the replacement of the dismissal finding with a lesser sanction. The effect of that, had it been successful, would have been to reinstate the employment relationship. That is inconsistent with the Claimant's contention that the relationship had irretrievably broken down.
14. Taking all of that into account, I find that there was no resignation and that the employment terminated as a result of an actual dismissal by the respondent on 8 February 2016.
15. The claimant does not dispute that he was absent from work on the relevant dates. He also accepts that the absences were not authorised. Although the claimant felt he was justified in remaining off work, the disciplinary panel concluded otherwise and I am satisfied that they were entitled to do so on the evidence. The reason for dismissal i.e. conduct, is therefore made out.
16. I heard evidence from the decision makers, Mr Willingham and Mr Martin whose witness statements set out reasoned explanations for their conclusions which, I am satisfied, were reached in good faith. I am also satisfied that a fair procedure was applied and that dismissal was in all the circumstances fair.
17. The claim of unfair dismissal therefore fails and is dismissed.

Employment Judge Balogun

Date: 8 June 2017