



EMPLOYMENT TRIBUNALS

Claimant: Mr I Bashir

Respondents: 1. Plazawell Ltd t/a Al Madina
2. Mohammed Anayat Zeb

HELD AT: Manchester

ON: 16 February 2017
29 March 2017
25 April 2017
(in Chambers)

BEFORE: Employment Judge Feeney
(sitting alone)

REPRESENTATION:

Claimant: Mr Ali, Counsel
Respondents: Mr Rahman, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not dismissed and accordingly his unfair dismissal claim fails.
2. The claimant was not paid wages for May and June 2016. The claimant is awarded £728.89 in respect of that and the respondent is ordered to pay the same.
3. The claim for a failure to issue a statement of terms and conditions contrary to section 1 of the Employment Relations Act 1996 fails and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal, failure to pay holiday, failure to provide terms and conditions and unpaid wages. The claimant says that he was

dismissed by the respondent following a period off work sick. The respondent says the claimant resigned and indeed went to work for a rival company with a similar name a few doors away from the respondent's business.

List of Issues

2. The issues for the Tribunal to decide are:
 - (1) Who is the correct respondent?
 - (2) Was there a dismissal within the meaning of section 95(1) on 30 June 2016?
 - (3) If there was a dismissal, was there a potentially fair reason for dismissal?
 - (4) If the claimant was unfairly dismissed, should the claimant's damages be reduced because of **Polkey**?
 - (5) Did the respondent fail to pay wages to the claimant for May and June 2016?
 - (6) Did the respondent fail to provide a section 1 statement of main terms and conditions of employment?
 - (7) Did the respondent fail to pay the claimant holiday pay?
3. It was agreed that the correct respondent was the first respondent and the claimant withdrew his holiday pay claim.

Witnesses and Evidence

4. The Tribunal heard from the claimant, Mr Intizar Bashir, and for the respondent from Mr Mohammed Anayat Zeb, the second respondent; Mr Daniel James Barker, friend of the respondent's daughter; and the second respondent's daughter, Ms Meryum Zeb.

Findings of Fact

The Tribunal's findings of fact are as follows:

5. The claimant began working for the respondents in December 2003. He worked for the respondents as a chef. The second respondent had set up the business of Al Madina Curry Restaurant in 1999. It was mainly a takeaway with about 20 seats for people who wanted to eat in. The respondents mainly employed five staff plus family members who "come and go". The respondents stated that they assisted the claimant obtain his visa to work in the UK, and that for that purpose he would have needed a contract of employment. However, it is not possible now to find such a contract.

6. The claimant said he had never had a contract, however I find on the balance of probabilities it would have been necessary to produce some evidence that the claimant was going to be employed and what he would be employed in and therefore there was a contract of employment; however with the passage of time the claimant has forgotten this.

7. The respondents stated that the claimant would often walk out but would always come back.

8. In March 2016 the claimant was lifting a large pot of curry and felt a pain in his right shoulder. He assumed he had pulled a muscle and left work immediately to return home, advising his colleagues as the second respondent was not there. He attended his GP and the pain continued. He was sent for an x-ray and it was eventually confirmed that he had vertebrae damage and a slipped disc.

9. The respondents had included in the bundle some evidence regarding health and safety matters and advice on how to lift things; however the claimant had said he had never been given any training or advice on lifting matters. It appeared to me that this evidence related to any potential personal injury claim that the claimant might have as it was not relevant to the issues in this unfair dismissal claim.

10. The claimant said that he regularly came in with sick notes. Initially the respondents said that this was incorrect, however during the course of the Tribunal hearing the respondents did find some sick notes and found that they had been submitted to their accountant and therefore that the second respondent was unaware of this. The claimant agreed that the respondent had paid him sick pay.

11. In May and June the claimant said he received two itemised pay statements for the amount of £518.28 and £210.61 but received no actual payments. The respondents state that the claimant received cash for these payments. It was usual for the claimant to be paid in cash, however the respondent had no evidence that this money had been paid to the claimant or how it had been paid.

12. On 30 June 2016 the claimant visited the restaurant and asked the second respondent to complete a form from the Jobcentre. The claimant said he could not recall what form it was. However, the second respondent stated that he understood that the claimant wished to claim sickness benefit but also to work. He said he was unsure what benefit he was trying to claim and believed he was attempting a benefit fraud, and therefore said he was not willing to sign his form, saying was either sick or coming back to work and he could not be both. The second respondent said that Mr Bashir said he would leave if the form was not signed, and that he continued to refuse to sign it. Consequently the claimant demanded his P45. The second respondent said he asked the claimant to provide a resignation in writing or contact him during the week. The second respondent did not take the situation too seriously, he said, because the claimant had walked out before.

13. However, the claimant's version of events was different. He said that he was simply told when he went in with the form that he was dismissed from the respondents' employment. He was given no reason and received no warning, so he left without saying a word. He denied that he had asked the respondents to engage

in benefit fraud. He said he had no reason to resign. He presumed the respondent dismissed him because he was annoyed with his continuing sickness absence.

14. There was an incident following 30 June when the claimant entered the respondent's business premises. The respondent said that he said he would pay for his friends who were eating there, but in the event only paid £10 towards the bill of £26. The claimant said he had been passing and seen his friends eating there and out of courtesy had gone in and said he would pay their bill. He initially said he had paid all of the bill but in cross examination he agreed he had only paid £10 as he had assumed that would be sufficient due to him having been an employee and he said that was the convention, that they would only paid £10 for a meal if their friends or relatives ate there. The respondent denied there was such arrangement.

15. Following this the claimant sought his P45 on several occasions, he said, by telephone, and was eventually asked to submit a request in writing. He said he did not need to provide a written request for his P45. However, on 27 July 2016 he sent a letter to the respondents saying the following:

“Dear Mr Zeb

I am writing to you in connection with my sick pay for May and June 2016. You have shown sick pay on my payslip and you did not pay me the sick pay amount. Now you tell me that you sacked me on 30 June 2016 and I need to know the reason for sacking me and you have still not provided me with my P45.”

He sent this by recorded delivery.

16. The claimant denied that he had received any letters prior to this from the respondents. However, the respondents produced a letter dated 15 July 2016 which said:

“I am writing to you with reference to our conversation when you verbally notified me of your immediate resignation and you have not returned to your role since then. I advised you to get in touch with me within seven days should you change your mind, however I have not heard anything. I have also tried to contact you on a number of occasions. I have been unsuccessful so I assume that you have not reconsidered your decision.

Your employment has ended effective 1 July 2016 and your P45 will be issued to you in due course.”

The respondents referred to this letter in their response form.

17. In his witness evidence, however, the second respondent said that he spoke to Mr Bashir on 14 July 2016 when Mr Bashir asked him for his P45 and his daughter's (his daughter had been working for the respondents), and that the second respondent asked him to put it in writing, which he refused. This accorded with what the claimant said, which was that they did speak, although he did not put a date on it, and that he was asked to submit a request in writing for his P45 which he refused.

18. There was then a letter produced to the Tribunal of 29 July 2016 from the second respondent to the claimant. This said:

“Thank you for your correspondence dated 27 July. I would like to address the issues you have raised in your letter:

- (1) You have advised that you were not paid your sick pay in May or June 2016. This was paid to you for both months and is shown on your payslip. The company has always paid its employees by cash.
- (2) If you believe you were not paid in May why have you not questioned this earlier? You remained on sick for another month after that.
- (3) In your correspondence you mention that you were dismissed. I can confirm this was not the case. You came into the business and confirmed verbally you were resigning from your position as a chef. This was discussed at length on the day, however you were adamant this was your decision and you would not change your mind. You were also advised that if you were to change your mind we would give you seven days to contact the company or provide me with a written resignation. I also tried to contact you myself, however to no success, so I proceeded with the termination of your employment. You were the primary chef in the day shift. You chose not to come back to work or contact me to advise you of your next step. Your employment was terminated effective 1 July 2016. I am not in a position to reverse your termination as your vacancy has now been filled unfortunately
- (4) You also stated in your correspondence that you required a P45. As mentioned in my correspondence dated 15 July 2016 I have this processed by the company accountant and I will provide this to you as soon as I have possession of this myself.”

19. The claimant also denies he received this letter and stated that his letter was sent by recorded delivery and he has the record to show it was delivered the next day, but there was no such record for the respondents' letters. The claimant's daughter, Meryum Zeb, who gave evidence to this Tribunal stated that she had in fact drafted these letters. She stated this in supplementary questions and the claimant objected to this additional evidence being given, saying it should have been stated in the witness statement. She said she had drafted and read back the letters to her father and then had posted the letters to the claimant. She said she had done this because the respondents could not write in English. On the balance of probabilities I accept Ms Zeb's evidence as this would have been a good reason for writing the letters and the letters were fairly well written. While it was not in the witness statement one of the letters was referred to in the ET3 and the style was consistent with what might be expected from Ms Zeb in the light of her education.

20. The claimant received his P45 at the beginning of August. It stated that his leaving date was 1 July 2016. There was no date of when the P45 was prepared.

21. The claimant issued Tribunal proceedings on 12 October 2016.

22. On 11 October 2016 it was agreed between the parties that Meryum Jeb, the second respondent's daughter, visited the claimant's house. The claimant stated that she threatened him saying that she would hold him responsible if her father was ill (he had earlier had a heart attack) and that if her father went to jail he would suffer the same fate. He reported this to his solicitor who wrote a letter to the second respondent on 1 November 2016, which stated that:

"Our client has informed us that Miss Jeb threatened him with court action if Mr Zeb suffered from ill health as a result of the action he has taken against yourselves. He also informed us that he was told that should Miss Zeb's father go to 'jail' for this then she will ensure that my client also suffers the same fate.

We find it deeply disturbing you are using such tactics with our client and ask you to immediately cease such contact. Should you wish to discuss this case please contact our firm and we will ensure our client is aware of our discussions.

For the record you cannot sue our client if the respondent falls ill and no prison sentencing is involved in such cases."

23. Miss Jeb denied that she had said this when visiting the claimant. She said she had known him for 26 years and saw him as part of the family. She said she began crying because of the impact the court case was having on her father and said she had come round because her father's health was getting worse and this claim was not doing his health any good. She said, "You're an uncle to me" and asked him why he was making up "all these false lies. He didn't respond and we sat there in silence. I then asked him why he was doing this after everything my father had done for him. I also told him they did not know that I had gone to see him. He said that he was having hand problems being off sick, went to the takeaway, had a conversation with my father and decided to leave". She said that he said why was he saying he had left when the case was about him being sacked, and he said that was life and we would see what happens. She said Mr Bashir's wife walked in and seeing that she had been crying gave her a hug. She gave him her phone number and was offered food but she declined. Again, just before she left he offered to have her eat with them but as she was not hungry she declined. She said that he also offered to give her a lift home but she said she would take the bus. She said it was not true that she had said the two matters he had referred to. She said she had undertaken a law degree and therefore knew that there could be no court action, blaming the claimant for her father's illness deteriorating and that you do not go to jail in Employment Tribunal matters. I accept Ms Zeb's version of events. She was fluent in her answers and provided some detail around the incident, whereas the claimant did not.

24. Some other peripheral issues arose which were potentially relevant to credibility and to **Polkey** issues.

Immigration Issue

25. The second respondent stated that in or around September 2015 when he was recovering from a heart attack Mr Bashir gave permission for an Amjad Butt to work at the second respondent's premises. He was the claimant's nephew and was living with the claimant at the time. When the second respondent came back to work to check up he was provided with a copy of Mr Butt's Pakistani passport which said he had indefinite leave to remain. He remonstrated with the claimant and said he needed the original passport which was promised, but before the claimant could provide the passport, if it existed, the Home Office came and investigated. This was about 20 November 2015.

26. The second respondent provided details of the action the Home Office took and the information he provided to the Home Office at the time. These facts were confirmed by the document the second respondent referred to. However it also states that it was reasonably apparent that the document produced was a fabrication. He was found to be in breach of section 15 of the Immigration, Asylum and Nationality Act 2006 because he had not made a record of the date when he checked the documentation and that the documentation was identifiably false. He was fined £10,000 for this however it was reduced because of his candour.

Alternative Employment

27. The second respondent asserted that the claimant was involved in and had gone to work for a rival restaurant with a very similar name operating from a few doors up from the second respondent's premises.

28. A friend of the second respondent's daughter, Mr Barker, gave evidence about this in that he had attended the premises and observed Mr Bashir working there and had taken some videos which did appear to show the claimant working there. The claimant said that he was simply helping out a friend. There was also a document produced which the respondents alleged showed that the claimant was involved in the business because it was something to be read out at the mosque and a donation was made at the mosque in favour of the new business. The claimant said that did not prove that he was involved in the business, and yes he had sponsored that request on behalf of an old friend, but the money had come from the friend who was running Madina Traditional and he was not a director or any sort of owner of the business.

29. Considering Mr Barker's statement, it only recorded one visit to the other premises. However, from the videos it did appear that the claimant was working at these premises. Whilst Mr Barker's evidence was of three visits to the premises and one recorded visit which is fairly limited and does not prove anything ultimately, it did appear from the videos that the claimant was working at the premises and so I accept that the claimant was more involved in Madina Traditional than he had implied.

Respondents' Submissions

30. The respondents stated that their version of events should be accepted for the following reasons:

- (1) The claimant could not recall the exact words that were said, although the respondents were much clearer;
- (2) That the claimant had been shown to have been dishonest regarding several other matters i.e. the immigration status of his nephew;
- (3) That he had been working for the other business although he had denied it;
- (4) That he had lied about what Meryum Zeb had said to him as it was evident she would know there would be no prison involved in an Employment Tribunal case;
- (5) That he had attended the restaurant with his friends after his alleged dismissal, which seems inconsistent with a dismissal.
- (6) The claimant had pursued a holiday pay claim and yet had now withdrawn it which showed he was prepared to misrepresent matters.
- (7) That it was inconceivable the claimant would not be able to remember what the form was about and that he was not being truthful about this as it would expose duplicity and support the respondent's case;
- (8) The respondents had not been chasing him to return to work so why would they suddenly dismiss him? No explanation was given for why they would have dismissed him at this point in time;
- (9) That the second respondent had repeatedly called the claimant, which was again inconsistent with him having dismissed him;
- (10) The second respondent had been honest about finding the sick notes.

31. The Tribunal should bear in mind that the claimant had been a litigant in person throughout, and that the failure to mention in the witness statement that Meryum Jeb had drafted the letters was a result of that and was not an indication that the second respondent and Ms Jeb were lying.

Claimant's Submissions

32. The claimant submitted that the second respondent lacked credibility; his evidence was confusing and inconsistent. There was a lot of things he could not remember and many extraneous issues such as parking ticket/immigration fraud were raised, and that the claimant's evidence regarding the sick notes was proved to be correct.

33. The respondents had stated they did not know he had an injury until these proceedings, which was plainly incorrect. Why was he off sick? It was clearly stated on the sick notes that he had a shoulder/neck problem.

34. It was implausible also to suggest that the claimant would have caused the respondents to suffer a £7,000 fine and no action would be taken against him, and suggests that the respondents knew all along what the situation was.

35. The claimant submitted that the second respondent had been inconsistent, saying adamantly that he had paid the claimant these two months' wages that the claimant was claiming, but then said that his business associate, Mr Khan, had done this on reflection.

36. The claimant submitted that he was more credible. His argument regarding why he was helping out at the other business, Mr Zubi Udin, was entirely plausible, and there was nothing in the mosque notice which said he was the owner of the business, neither did the video evidence prove anything other than he was helping there on that particular day. Mr Barker had accepted it was not inconsistent with the claimant doing that.

37. Further, the claimant had been honest and agreed that on reflection he had only paid £10 for his friend's meal.

38. The claimant had no reason to resign. He said he was told he was dismissed from the next day, which is consistent with the P45, and the reason why he was dismissed was because he had told the second respondent he was not fit to return to work. The fact that 30 June was never used as the termination date suggests that there was no resignation on that day. The second respondent had also put forward other termination dates, such as 27 and 15 July.

39. In relation to the contract of employment it was submitted that there was no evidence that such a contract had to be provided to the Home Office. There was no evidence that other employees were provided with contracts of employment, which suggested the claimant was not.

40. Regarding the wages in May and June, the claimant had stated this quite clearly in his very first letter to the respondents and maintained that since. If he was going to lie, why limit it to two months?

41. The claimant also sought a 25% uplift.

Respondent's Reply

42. The respondent submitted that if the claimant's claim succeeded there should be no uplift as the first respondent was a small business struggling to survive.

43. Regarding **Polkey**, the claimant could have been fairly dismissed; because the claimant was asking the respondents to engage in a benefit fraud and this could be the only reason why he was dismissed.

44. Regarding the claimant's losses, he would have no losses as he would have been on Statutory Sick Pay ("SSP").

The Law

45. This case entirely revolved on a factual dispute regarding whether or not the claimant resigned or was dismissed. If he was dismissed then the respondents would need to make out a permissible reason for dismissal in accordance with section 98 of the Employment Rights Act 1996. In this case the respondents would argue that the claimant would have been dismissed for conduct in asking the respondents to engage in benefit fraud.

46. Regarding a contract of employment, the claimant's claim is under section 1 of the 1996 Act, namely that the respondents are required to provide a statement of terms and conditions within two months of an employee beginning their employment.

47. In respect of the unlawful deductions, clearly the claimant is entitled to his wages. There was no argument about that as the itemised pay statement showed the amounts that the respondents intended to pay him and therefore again this is simply a question of a finding of fact as to whether the claimant did receive the monies or not.

48. The holiday pay claim was withdrawn.

Conclusions

49. This was an extremely difficult case to decide as there were supporting and detracting factors on both sides. The claimant was a more credible witness than the second respondent. It seemed inherently improbable that the claimant would attempt a benefit fraud after years of working for the respondent or wish to resign, neither did that fit with the respondent's contention that the claimant was working elsewhere. There was no evidence the claimant was fit enough to work. It seemed inherently more likely the respondent simply was fed up with him being absent. Indeed the letter of 29th stated he had been replaced – that was inconsistent with the respondent's position that they wanted to give him the opportunity to return.

50. However on the balance of probabilities I accept the respondents' evidence, mainly on the basis of the two letters and Ms Zeb's evidence that she drafted and sent them; also the fact that one of the letters at least was referred to in the ET3 provides some corroboration that these letters were sent. The claimant did not dispute this point after he received the ET3, there was no correspondence about it and it had first been raised in his witness statement. Also I found the claimant unreliable in parts as he struggled to record the specific words that Mr Zeb had said of dismissal; that he did appear to be working for Mr Udin whilst he was injured; and the fact that he could not remember what the form was that he took in, it seemed to me that even if he could not remember he could have made enquiries of the DWP. Further, it is unlikely he would have gone into the restaurant and paid for his friends if he felt that he had been dismissed.

51. Accordingly I find that the claimant did resign on 30 June; I do not find the claimant was asking the respondent to engage in a benefit fraud but that was the respondents understanding and he refused to sign the papers; that the respondent did nothing initially as he believed he would change his mind; that following a conversation on 14 July he could see that that was not going to happen and therefore he sent the letter of 15 July. This made sense in the context that the

claimant had resigned before and he wished to clarify the situation. It did not change the fact that the claimant had resigned on 30 June. Therefore the claimant's claim of unfair dismissal fails and is dismissed.

52. In respect of the claimant's claim for wages, whilst I have not found the claimant entirely credible the itemised pay statement shows that he was owed this money and the respondents have no proof whatsoever that they actually did pay him in cash. Nobody gave direct evidence of this and therefore I accept the claimant's evidence that he was not paid. In future the respondents may feel it prudent to at least obtain a signed receipt where workers have been paid in cash. I award the claimant and order the respondents to pay in respect of the unpaid wages £518.28 and £210.61, a total of £728.89.

Failure to provide written statement of terms and conditions

53. I accept the respondents' evidence that this would have been provided in order for the claimant to prove that he was in employment, and accordingly the claimant does not succeed in respect of this claim as well.

Employment Judge Feeney

Date 14th June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
26 June 2017

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2404358/2016

Name of case(s): Mr I Bashir v 1. Plazawell Ltd t/a Al Madina
2. Mohammed Anayat Zeb

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 26 June 2017

"the calculation day" is: **27 June 2017**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office