



Case Number: 2301168/17

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr D Haworth

and

Respondent

Don't Lean Back Ltd

Held at Ashford, Kent on 4 September 2017

Representation

Claimant:

In person

Respondent:

Mr M Stephens, Counsel

Employment Judge Wallis

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was not dismissed by the Respondent;
2. The claim of unfair dismissal therefore fails and is dismissed.

REASONS

Oral reasons were given at the end of the hearing; the Claimant requested written reasons.

ISSUES

1. By a claim form presented on 11 April 2017 the Claimant claimed unfair dismissal and notice pay. The Respondent said that he had resigned. The issue for the Tribunal is therefore to decide whether the Claimant had been dismissed or whether he had resigned. It was for the Claimant to show that he had been dismissed.

DOCUMENTS & EVIDENCE

1. Both parties produced a bundle of documents which were largely duplicated. There was a witness statement from the Claimant, Mr David Haworth, and from the director of the Respondent company, Mr Tom Wates.

I heard evidence from Mr Haworth and Mr Wates.

FINDINGS OF FACT

2. The Respondent company is an extremely small company. It is comprised of Mr Wates as the director and, when he was working there, Mr Haworth. The company provides equipment to schools. The equipment is manufactured by suppliers with whom orders are placed by the Respondent company. Mr Wates carried out the sales function. The Claimant was in charge of orders and computer systems. The office was based in Mr Wates's home. There was also a part-time bookkeeper who worked on Monday afternoons.
3. Not only was it an extremely small company based in Mr Wates's house, but at the time of the dispute the company was working on an important contract worth around £100,000, for a new client, and it was hoped that further work could be obtained if it went well. Mr Wates himself had taken on some other work and had left the matter to the Claimant to finalise. The Claimant was frustrated when Mr Wates insisted that the order be sent to the suppliers before the Claimant had completed all of his processes. Mr Wates was frustrated because the processes seemed to be taking a long time and subsequently he was even more frustrated when it transpired that the Claimant had not checked the order and a problem had arisen in respect of four items of equipment that would not be ready at the time required by the client. The Claimant felt that this problem was caused by Mr Wates.
4. Notwithstanding that difficulty, Mr Wates and the Claimant were able to work hard on 7 February 2017 and the problem was resolved.
5. I accepted Mr Wates's evidence that in order to ensure that this did not happen again he used his regular weekly meeting with the Claimant, in a café where they had breakfast, to raise what had gone wrong with the Claimant. They arrived at the café and breakfast was ordered, but it had not arrived by the time they both left following a dispute.
6. The nub of this case is what was said during that dispute. I was given different versions of that conversation by the Claimant and Mr Wates. There were no contemporaneous documents to assist, save for an email trail which began with an email from the Claimant to Mr Wates on 10 February 2017 to which I return later. The Claimant did not attend work after 8 February 2017.
7. I noted that there was general agreement that the Claimant had been acting out of character that day. He described it as him being "firm"; Mr Wates described it as the Claimant being agitated. However, it was agreed that there had been a discussion about the problem that had arisen with the contract and about who should take the blame for that problem. Mr Wates told the Claimant that he should take the blame because it was his job to check the orders and he had had time to do so; the Claimant told Mr Wates

- that he should take some of the blame because he had given instructions to issue the order before it had been fully checked. I found that there was clearly a discussion that became heated because neither of them could agree to the other's viewpoint.
8. The Claimant's version continued with Mr Wates saying words to the effect that he might as well do the Claimant's job and save the company some money, and that he could finish his food and "we'll call it a day". The Claimant then left the café and returned his key to the office within Mr Wates's home.
 9. Mr Wates's version was that the Claimant said that he had "had enough" and he also said "if you think you can do it better do it yourself". He finished with suggesting that Mr Wates deserved everything that was coming or words to that effect and swore at him as he left the café. There was agreement that both of them returned, one behind the other, to the office and Mr Wates observed the Claimant leaving behind his key and the company laptop. Nothing further was said.
 10. I noted that it is of course possible that all of those words were said during the course of that discussion which, as I have said, I am satisfied did become heated because neither party would agree to the other's viewpoint. I found that it was likely that most of those comments were made during that discussion because parties are unlikely to remember everything that they had said.
 11. It was important therefore to look at the context of the discussion. In addition to the points that I have already mentioned, the Claimant and Mr Wates were good friends and they spent leisure time together, there was no dispute about that. There was no dispute that their partners were also good friends, and that Mr Wates had arranged temporary lodgings for the Claimant with Mr Wates's parents when the Claimant first moved to the area. It was obvious that they worked closely together as they were the only two in the business, save for a part-time bookkeeper.
 12. I found that all of those circumstances indicated that this was more than an employee/employer relationship and therefore things could be said in a more informal manner than might be expected within a large company with a formal hierarchy. In any event, Mr Wates was entitled to ask questions about a problem that had arisen.

BRIEF SUMMARY OF THE LAW

13. Where there is a dispute about whether or not there has been a dismissal, the burden of proof is on the Claimant to show that there has been a dismissal.

14. It is of course trite law that if an employee is told that she has no future with an employer and is expressly invited to resign, then she is to be regarded as having been dismissed (East Sussex County Council v Walker [1972] ITR 280, NIRC). The question for the Tribunal is “who really terminated the contract of employment”. If the answer is the employer, then there was a dismissal. This is a question of fact for the Tribunal to decide in the circumstances of the particular case.
15. In one case, a director was threatened with dismissal if he did not resign. He negotiated a severance payment and an agreement was drawn up. There had been no dismissal in that case; satisfactory terms of resignation had emerged, so that the threat of dismissal was no longer an operative factor in the director’s decision to resign.
16. In another case, the employee had agreed severance terms at the same meeting at which he was told he was being dismissed. The Court of Appeal found that that was a dismissal there as he had had no time to consider the situation or seek advice.

CONCLUSIONS

17. Putting the Claimant’s case at its highest, and even if he is correct that Mr Wates made the comment that he might as well do the Claimant’s job himself, I was satisfied that that did not indicate that the Claimant had been dismissed; it seemed to me that that was an expression of frustration. The comment that they should eat breakfast and “call it a day” I am satisfied did not amount to a dismissal in this context. I accepted the Respondent’s contention that, if it was said, then it was more likely to be an attempt to bring a difficult discussion to an end.
18. I did consider the contents of the email exchange between the Claimant and Mr Wates following that altercation. I found that the contents simply confirmed the position of either party in respect of there having been either a resignation or a dismissal. However, I considered that it was relevant that the Claimant did not protest, if he thought he had been dismissed, until some two days later on 10 February 2017.
19. I also found that the Claimant’s email of 15 February 2017, which suggested that there had been misunderstandings about what had happened during that meeting in the café, and in which the Claimant sought to return to work, did suggest to me that he had pondered the matter further in the light of Mr Wates’s very clear contention in his emails that the Claimant had not been dismissed and he had resigned, and I concluded that the Claimant had perhaps begun to realise that he had overreacted to the attempt by Mr Wates to discuss the problem that had arisen with the order.

20. In all the circumstances, I concluded that there was no dismissal here. The claim must therefore be dismissed.

Employment Judge Wallis
7 September 2017