EMPLOYMENT TRIBUNALS

Claimant: Mr G Chauhan

Respondent: Microspot Limited

Heard at: London South (Ashford) **On: 31 July 2017**

Before: Employment Judge John Crosfill

Representation

Claimant: In person

Respondent: Mr Phillip Bunker (a director)

REASONS

1. By a decision signed by me on 1 August 2017 I determined that the Claimant's claim for a redundancy payment pursuant to Section 135 and 164 of the Employment Rights Act 1996 was not well founded and dismissed it. The Claimant has subsequently written to the Tribunal seeking full written reasons for that decision. Those reasons are set out below.

2. As a consequence of previous decisions that other claims presented by the Claimant, Mr Chauhan, were out of time, there was before me a single claim for a statutory redundancy payment. The relevant law if found in Part XI of the Employment Rights Act 1996 (the "ERA 1996").

3. Section 135 of the ERA sets out the right to a redundancy payment. The material parts read as follows:

> ***135 The right.***
>
> *(1) An employer shall pay a redundancy payment to any employee of his if the employee—*
>
> *(a) is dismissed by the employer by reason of redundancy, or*
>
> *(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.*

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).

4. Section 136 sets out the circumstances where an employee will be regarded as having been dismissed for the purposes of claiming a redundancy payment. In the present case no issue arose in that regard as the Respondent accepted that it had dismissed the Claimant.

5. Section 139 sets out the statutory definition of redundancy. The material parts of that section read as follows:

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2)…(5)

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7)….

6. Section 140 of the ERA 1996 sets out some circumstances in which an employee, dismissed by reason of redundancy can lose the right to a redundancy payment because of his or her gross misconduct. The material parts are as follows:

140 Summary dismissal.

(1) Subject to subsections (2) and (3), an employee is not entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee's conduct, terminates it either—

(a) without notice,

(b) by giving shorter notice than that which, in the absence of conduct entitling the employer to terminate the contract without notice, the employer would be required to give to terminate the contract, or

(c) by giving notice which includes, or is accompanied by, a statement in writing that the employer would, by reason of the employee's conduct, be entitled to terminate the contract without notice.

(2) Where an employee who—

(a) has been given notice by his employer to terminate his contract of employment, or

(b) has given notice to his employer under section 148(1) indicating his intention to claim a redundancy payment in respect of lay-off or short-time, takes part in a strike at any relevant time in circumstances which entitle the employer to treat the contract of employment as terminable without notice, subsection (1) does not apply if the employer terminates the contract by reason of his taking part in the strike.

(3) Where the contract of employment of an employee who—

(a) has been given notice by his employer to terminate his contract of employment, or

(b) has given notice to his employer under section 148(1) indicating his intention to claim a redundancy payment in respect of lay-off or short-time,is terminated as mentioned in subsection (1) at any relevant time otherwise than by reason of his taking part in a strike, an employment tribunal may determine that the employer is liable to make an appropriate payment to the employee if on a reference to the tribunal it appears to the tribunal, in the circumstances of the case, to be just and equitable that the employee should receive it.

(4) In subsection (3) "appropriate payment" means—

(a) the whole of the redundancy payment to which the employee would have been entitled apart from subsection (1), or

(b) such part of that redundancy payment as the tribunal thinks fit.

(5) In this section "relevant time"—

(a) in the case of an employee who has been given notice by his employer to terminate his contract of employment, means any time within the obligatory period of notice, and

(b) in the case of an employee who has given notice to his employer under section 148(1), means any time after the service of the notice.

7. Section 163(2) of the ERA 1996 provides that unless the contrary is proved an employee who is dismissed shall, for the purposes of that part of the ERA be taken to be dismissed for redundancy. Accordingly, unless I am satisfied that redundancy was not the reason for the dismissal the Claimant will be entitled to a redundancy payment.

8. The issues before me were therefore:

   8.1. what was the reason for the dismissal; and

   8.2. If the reason for dismissal was redundancy has the Claimant lost the right to any redundancy payment because of the effect of section 140 ERA 1996?

Findings of fact

9. The parties had provided a bundle of documents, witness statements and the Claimant played some recordings he had secretly made of a conversation with a contractor to the Respondent. The parties called evidence and were cross-examined on the witness statements. Having heard that evidence and considered the documents I made the findings of fact set out below.

10. The Respondent is a company which is in the business of design and sale of software. Once a sale is made the Respondent offers its customers support with the use of that software. The Claimant was first employed by the Respondent on 2 January 1990 and remained employed until his dismissal which took effect on 22 July 2016. He was initially employed to give technical support to software programs developed for a large format printer driver. The demand for that product ceased in around 2008/2010 and thereafter most of the technical support queries in relation to that product tailed off. However, the Claimant remain fully occupied giving technical support that to a new range of products mainly concerned with software to assist computer aided design

11. The company was for many years run by its founder and former managing director Robert Coulling and he has been in business for some 50 years. It is a small company and has had its ups and downs, generally only showing a profit at once products that it has designed and produce had been released onto the market.

12. At some point prior to 2012 Mr Philip Bunker who joined the company during a placement year at university was promoted to be General Manager. I find that a key feature of the present dispute is the relationship working relationship between him and the Claimant. Having considered e-mails disclosed by the Respondent, I find that as early as 2012 Mr Bunker was writing to Mr Coulling complaining about the Claimant and in particular his attitude towards him and towards his work. Unfortunately Mr Bunker took no steps to bring those concerns the Claimant's attention or to follow any reasonable or meaningful capability process.

13. When asked, by me, to describe his relationship with the Claimant Mr Bunker accepted that it had its ups and downs. When the Claimant was asked the same question about Mr Bunker he did not find any positive aspect to the relationship. He said that Mr Bunker said everything he did was not good enough. What is clear is that there was a great deal of mistrust between these two employees.

14. In March or April 2016 Mr Bunker at was looking for a file on the Claimant's computer when, entirely by accident, he came across a number of images taken from the online edition of the Sun newspaper of generally young women either fully or half naked. He considered this to evidence improper conduct

and, after consulting with Mr Coulling he installed some tracker software on the Claimant's computer. This enabled him to monitor the Claimant's work and internet usage.

15. In April 2016 the Claimant was sent a letter warning him that he was subject to a disciplinary investigation and in particular focusing (1) on his alleged misuse of the Internet and (2) downloading inappropriate images. In the period April through to June the Claimant was sent a series of emails criticising his work or working habits. That activity is to be contrasted with the period before that date where no formal steps had been taken to address any perceived failures of performance.

16. On 30 June 2016 the Claimant was invited to a disciplinary meeting. He was not provided with any of the evidence gathered in the course of the investigations and he knew only the bare allegations he was expected to meet. The meeting was conducted by Mr Philip Bunker. An inappropriate choice in circumstances where he had conducted the investigation.

17. In the course of the meeting the Claimant broadly accepted that he had downloaded the images found on his computer he considered them entirely innocent and saw nothing wrong with viewing them and storing them on his work computer. He broadly accepted that he used the Internet on the occasions recorded by the Respondent but said that that was no different to other members of staff.

18. At the conclusion of the meeting the Claimant was dismissed the explanation being that he was dismissed for gross misconduct. However, he was given, was said to be, contractual notice of four weeks. The Respondent apparently being unaware of the statutory minimum period of notice.

19. The Claimant then asked to remove personal files on his computer. He asked Mr Coulling when he could do so and Mr Coulling agreed to that request. The Respondent later discovered that one of the computers used by the Claimant was almost entirely blank and unusable and the other one had had its user files deleted. This led to a further investigation, the Respondent having thought that the computers had been deliberately sabotaged. The Claimant was invited to come to further disciplinary hearing on 22 July 2016. The Claimant did not attend that meeting protesting that he had not been provided with information to defend himself. Nevertheless, he was then sent a letter informed him that he was summarily dismissed on that date.

20. The Claimant he appealed that dismissal and that appeal was considered by Mr Coulling. Mr Coulling upheld the decision to dismiss the Claimant. At the date of the hearing the Respondent had not recruited any employee to fill the Claimant's role as it had been undertaken by another employee. I was told and accept that they do intend to replace the Claimant it had just taken time to find a suitable replacement.

21. The secret recordings made by the Claimant were of little assistance in determining any issue I had to decide. It does not reflect well on the Claimant that he would attempt to solicit statements favourable to his case while making a secret recording.

22. As stated above the Claimant brought a number of claims in his ET1 including a claim of unfair dismissal. He had not however presented those

claims within the statutory time limit of 3 months and accordingly the only claim that remained was a claim for a redundancy payment.

Discussion and conclusions

23. The first key question that I have to decide, when I have regard to the presumption of redundancy in section 163(2) of the ERA 1996, is whether the Respondent has satisfied me that the reason, or if more than one, the principle reason for dismissal was other than redundancy falling within section 139 ERA 1996.

24. The Claimant contended that the fact that his work had gradually diminished and the fact that he had not been replaced pointed towards his dismissal being by reason of redundancy. He argued that the grounds upon which he was dismissed were spurious. In particular, he attacked the suggestion that the Respondent really believed he had damaged the computers he used.

25. Having heard all of the evidence in this case I have no hesitation in finding that the reason for the dismissal was rooted in the difficult working relationship between the Claimant and Mr Bunker. It is very clear that Mr Bunker found the Claimant very difficult to manage. He also considered him to lack dedication and to be poor at his job. Rather than take any of the usual steps to address performance the matter was left to fester. The Claimant however, through his conduct, gave Mr Bunker all the ammunition he needed to dismiss him.

26. When Mr Bunker discovered that the Claimant had a collection of mild pornographic images on his computer I find that Mr Bunker saw this as an opportunity to demonstrate that the Claimant was not pulling his weight. The subsequent tracking of the Claimant's internet usage provided further evidence of this. I consider that many employers, even ones not motivated by exasperation, would have considered the downloading and storage of pornographic images to a work computer to be misconduct. The Claimant appears to be oblivious to the fact that such images are to many highly offensive. The fact that they used to be published in a newspaper does nothing to excuse that. They have no place in a working environment in 2017.

27. I find that the reason that the Claimant was dismissed was that his own actions in downloading pornographic images and spending work time on the internet had provided Mr Bunker with good reasons to dismiss an employee he had difficulty in managing and considered to be highly unsatisfactory. I do not find that he was in any way motivated by a diminishing workload or a diminishing requirement for employees. He was motivated by a desire to dismiss the Claimant who he, rightly or wrongly, considered to be an unsatisfactory employee. That is not a reason which falls within the definition of redundancy contained in Section 139 of the ERA 1996.

28. In the circumstances the Claimant is not entitled to a redundancy payment and his claim falls to be dismissed. The Respondent sought to persuade me that its approach to these disciplinary matters was exemplary. My findings above suggest that this was not the case. The matter was predetermined and there was scant regard for proper procedural safeguards. The Respondent is

fortunate that the Claimant missed the deadline for bringing a claim for unfair dismissal.

29. In the light of my finding that the reason for the Claimant's dismissal was not redundancy but arose because of the difficult working relationship between the Claimant and Mr Bunker it is not necessary for me to consider whether or not the Claimant, by his actions in relation to the Respondent's computers, would have lost the right to a redundancy payment in any event. There was clearly evidence that would suggest that there had been a malicious effort to erase the Respondent's computers but that evidence was not, by itself, sufficient that I could find on the balance of probabilities that that was the case and that there had been gross misconduct. I therefore make no alternative finding in respect of the issue that arose under Section 140 ERA 1996.

Employment Judge Crosfill

Date 18 October 2017