



EMPLOYMENT TRIBUNALS

Claimant: Mr John Hanington

Respondent: Frontline Image Ltd

Heard at: Plymouth **On: 6 June 2018**

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr John Gower, Director

JUDGMENT

1. The claimant was wrongly dismissed and is awarded notice pay (including pension) in the sum of £3,994.35.
2. The claimant suffered an unlawful deduction from his wages in respect of holiday pay in the sum of £638.88.

REASONS

Background

3. Mr Harrington was employed by Frontline Image Ltd (Frontline) from 26 June to 29 November 2017 as Head of Ecommerce Operations. The company employs about 120 people at its premises in Estover, Plymouth, and it provides customised clothing with corporate logos or designs.
4. The circumstances surrounding the end of his employment are disputed. Mr Harrington says that he was dismissed and is entitled to his notice pay of two months, plus a further sum for holiday pay and a quarterly bonus; the company says that he resigned and agreed to waive any requirement of notice.
5. These sums were claimed on the original claim form, a point which appears to have been overlooked. When it was raised in correspondence the company took the view that these were new claims, but as they were from the outset I did not consider it necessary to treat this as an application to

amend his claim. In any event, the holiday claim was dealt with in the response form and the company agreed that it was owing, in the gross sum of £807.69 representing 7 days' pay. At the date of the hearing this had not been paid.

6. The company was represented at the hearing jointly by Mr Gower, the Managing Director, and Mr Harrington's line manager, Mr Nelson, another director. I heard evidence from each of them. Mr Harrington's father, Patrick, with whom he was in contact during the day in question, also gave a statement which was not disputed and so there was no need for any cross-examination. Further short statements were supplied by Ms Angela Gower and Mr Serjeant, other employees, which I took into account, although since they did not attend for cross-examination I placed less weight on them.

Findings of Fact

7. Having heard that evidence I make the following findings.
8. Mr Harrington successfully completed a three month probationary period, and, having been recruited via an agency, the company then became liable for a placement fee of about £2,700. It was a new appointment for the company, and given his salary of £30,000 per year, a reasonably substantial investment.
9. He reported directly to Mr Nelson as Sales Director. Some issues arose in October over communication with clients, and Mr Nelson emailed him on 28 October, his day off, to say that there was a real mess, with 77 orders to be dealt with and no clear direction for who was dealing with it. Mr Harrington replied that day to say that he had left it all in the hands of two colleagues, Helen and Celine, who should have known what to do. He also, he stated, found it a little upsetting to have to deal with these queries on his day off. Mr Nelson replied by stating that the customer had had no communication and that without his own input nothing would have been sent out. This episode persuaded Mr Nelson and Mr Gower that he struggled with some aspects of the role, particularly the warehouse and despatch side of the operation.
10. The events in question followed shortly after Black Friday, on 24 November 2017, the big annual sales event, when 470 orders were placed with the company.
11. On 27 November, the Sales Manager, Mr Mackay, raised an email query with Mr Nelson about the backlog of orders for two customers, whom I shall refer to as C & D. Mr Nelson passed this query to Mr Harrington at 17.24 that evening. Receiving no reply, which is not altogether surprising given the time, he emailed Mr Harrington again at 19.32 to say that Mr Mackay would communicate with these customers.
12. Mr Nelson was clearly working late that day, as he sent a further email to Mr Harrington at 22.28 to say that there was no need for him to attend Amazon meetings and to concentrate purely on sales for eBay and another customer.
13. No explicit criticism was expressed in these emails, but it seems likely to

have resulted from some exasperation at the backlog of work and Mr Harrington's failure to respond. Whether that feeling was justified is very difficult to assess on the basis of these few emails, but I note that Mr Nelson re-sent his email of 17.24 to Mr Harrington the next day, at 21.12 (indicating a further long day's work) with the words, "John, you did not reply here also." This is unmistakably a criticism. It was not an isolated example. Similarly on 25 November Mr Nelson emailed Mr Harrington to say:

"John this is completely pointless sending through at 16:44 ON Black Friday. A real miss here."

14. Mr Harrington read the 21.12 email the following morning, his last day of employment. Mr Nelson was out of the office, returning that afternoon, but he had a meeting with Mr Gower about the backlog. On his account, Mr Gower told him to "get an update, sort it out or the warehouse will be shut down."
15. Read literally those words seem rather melodramatic, and I do not conclude that, if said, he meant them in that way. He just wanted Mr Harrington to see if he could sort things out and impress on him the urgency of the situation. They agreed that they would all have a meeting that afternoon when Mr Nelson was back.
16. Mr Harrington was however in a state of anxiety, not just as a result of this conversation with the Managing Director but the general backlog and the feeling of being blamed and under pressure. He went to the warehouse and tried to find out what the issues were and got some further information. He also read the rather critical emails awaiting him.
17. At 10.52 that morning he emailed Mr Nelson and Mr Mackay, copying Mr Gower, to say that he felt very sorry to be bombarded with emails relating to the despatch for client C, which was not his responsibility; that things were not working, that he could sort it out in a couple of hours if allowed to do so and said that he hoped to discuss it further in the afternoon meeting.
18. He called his father to discuss the situation. His father told him that he had done the right thing in asking for a meeting to sort things out. His father also suggested that if he could not manage this it might be best for him to take the rest of the day off as holiday. (Although Mr Peter Harrington was not questioned about his witness statement, there is a discrepancy between advising his son to have a meeting that afternoon and to take the rest of the day off, so I conclude this was an alternative, if he was too stressed.)
19. He decided to take the holiday suggestion. A few minutes later, at 11.05, he emailed Mr Nelson and Mr Mackay again, and again copied Mr Gower,

"I have tried to have a meeting to discuss the current situation. Unfortunately I am not prepared to work under the current conditions and will be taking the remainder of the day off as holiday. Please let me know when you are free to discuss."
20. This was a dramatic change, but it was not a resignation. Employees take holiday, not ex-employees. It also ended with a request to discuss matters. In short, Mr Harrington needed a few hours away to deal with the situation. It is also true however that he did not state that he was suffering from

stress, and as Mr Gower pointed out, the word stress was only used for the first time at this hearing.

21. Having sent this email he called his father again, at about 11.15. By then he had already left the building and had received a call from Mr Gower asking him to come back to work.
22. Mr Gower interpreted this email as walking off the job, as deserting the company at its busiest time. By then Mr Nelson had returned, and the final discussions began.
23. It was extremely difficult to reconstruct these discussions, since there was so little agreement over what took place, even over which room or rooms they took place in. Mr Nelson and Mr Gower both said that they met in the main company board room for about 20 minutes. Mr Harrington said that it took place in Angela Gower's office.
24. Overall, I prefer Mr Harrington's version of events. Firstly, it is clear from the tribunal file that Mr Harrington was chasing the company for witness statements until the last minute and had already supplied his own. His ended with the words, "I, John Hanington, believe the above to be a true record of the events of 29th November 2017." His father's statement was in the same terms. These words, which are not standard, also appear on the bottom of the statements from Mr Nelson and Mr Gower, although each of them gave evidence that they had not seen his statement before giving theirs. That seems to me very unlikely.
25. The account set out in the claim form is simple and straightforward: he came back to the office, met the two directors, and was told by Mr Gower that his actions meant that he had resigned. After some discussion he was told that he would be leaving immediately, paid for November (one more day) and had upset people by being fractious. He was asked to leave his computer logged in, remove his personal effects and hand in his swipe card.
26. This struck me as likely to be true. On his oral evidence, he did not know the word fractious, but he had no doubt ruffled feathers, particularly Mr Nelson and Mr Mackay. His own emails had been critical of Mr Mackay, and Mr Nelson's had been critical of him. Both managers viewed him leaving the office without permission as a serious matter, and it is understandable in those circumstances that they would treat it as a disciplinary matter.
27. That approach is borne out by the response form. This states that Mr Harrington said at the meeting that there were many aspects of his employment situation he was unhappy with, and it was affecting his health, but that is not reflected in their witness statements. The response form also suggests that it was contrary to company policy to self-certify holiday and that this was the reason for calling Mr Harrington back to work, suggesting that he was in disciplinary trouble. That suggestion was not really pursued at this hearing, so there was a measurable difference in the response form and the evidence presented.
28. It is also difficult to accept that the parties could simply have been at cross-purposes. I considered that possibility with care. On one view Mr

Harrington was insisting on going home and the two managers viewed this as walking out. Mr Nelson and Mr Gower then asked him (on their evidence) a number of times if he was insisting on walking out, to which he replied that he was, or that he was sticking with his original decision.

29. This cross-purposes theory breaks down however, since at the end it was common ground that Mr Harrington had to hand in his swipe card giving access to the premises. If he had been responding in the way described, insisting on getting away for the afternoon, and been told as a result to hand in his swipe card, there would have come a point at which he made clear that he was not resigning.
30. Two further factors appear significant. Firstly, Mr Harrington rang his father for a third time after these events and told him that his action in taking the afternoon off had been treated as a resignation. (This was the evidence of his father which was not challenged) Secondly, Mr Harrington contacted ACAS that afternoon to initiate this claim. It seems to me unlikely that an employee who has decided to resign would then take that step. The company, on the other hand, did not write to him to set out its version of events. Indeed, although it is said that he was sent his P45, this was not received.
31. A further detail of less note is that there were in fact two meetings. This was agreed. At some point Mr Nelson and Mr Gower went out to discuss things between them and resumed in another room – they say in Ms Gower’s room. They also agree that Mr Harrington went back to his desk in the meantime. Mr Gower said that was just somewhere for him to sit, but it is difficult to reconcile with an employee intent on resignation.
32. It is also well-established in such cases that all of the surrounding circumstances have to be considered. These include the fact that:
 - a. Mr Harrington came back to the premises to discuss the situation, which indicates that he had no settled intention of leaving;
 - b. He had no other job to go to; and
 - c. The directors had been unhappy with his performance.
33. I therefore prefer the view that this was a dismissal rather than a resignation. It follows therefore that Mr Harrington ought to have received his notice pay and the holiday pay to which it is agreed he was entitled.
34. It is not necessary to have a further hearing to deal with compensation. Mr Harrington was entitled to two months’ net pay. His gross salary was £30,000 per year or £2,500 per month. His net salary for November 2017 involved deductions of £304.20 for tax and £218.40 for national insurance. It is not appropriate to deduct any sum for his own pension contribution or student loan, during the notice period. Hence:
 - a. the net sum was £1977.40, or 79.1% of the gross amount.
 - b. Two month’s net salary is **£3,954.80**
 - c. To this must be added the corresponding pension, which was a 1%

contribution from the company, or a further **£39.55**

d. The net equivalent of his gross holiday pay of £807.69 at 79.1% is **£638.88**

e. Hence, the total amount is **£4,633.23**

35. As to the bonus claim, I did not find this due and owing. His terms of employment were set out in an email of 16 August 2017. This stated that his bonus scheme would start on 1 September “and in the following 12 months this scheme which will be linked to sale and profit should amount to £6k. Criteria will be set early 2018.”

36. That does not amount to a contractual commitment to pay a quarterly bonus of £1500. It is not sufficiently clear, as the overall amount was subject to variation based on the company performance and criteria had not been set. That last phrase also indicates that it would be paid annually. In any event, Mr Harrington did not quite achieve a full quarter in employment, since it ended on 29 November, even if he was paid for the next day too.

Employment Judge Fowell

Date 06 June 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE