



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr F Farsijani

v

Arnold James St Albans Limited

Heard at: Watford

On: 4 July 2018

Before: Employment Judge Jack

Appearances:

For the Claimant: Ms C Jones, Counsel

For the Respondent: Mr James, Managing Director

JUDGMENT

1. The name of the respondent is corrected to Arnold James (St Albans) Limited
2. The claimant's complaint of unfair dismissal fails.

REASONS

1. By an ET1 presented to the tribunal on 15 January 2018 the claimant complains of unfair dismissal.
2. The claimant was represented by Ms Catherine Jones of Counsel. The respondent was represented by Mr Nicholas James the respondent's Managing Director.
3. The claimant gave evidence himself. He adduced the hearsay statement of Evi Zehnaoglu. Mr James gave evidence on the respondent's behalf.
4. Ms Jones cited four cases: Gisda Cyf v Barrett [2010] UKSC 41 [2010] IRLR 1073, British Homes Stores Limited v Burchell [1978] IRLR 379, Strouthos v London Underground Limited [2004] EWCA Civ 402 [2004] IRLR 636 and Hassan v Odeon Cinemas Limited [1998] ICR 127.

The law

5. Section 94 of the Employment Rights Act 1996 gives an employee the right not to be unfairly dismissed by his employer. There are exceptions to that but none apply in this case.

6. Section 98 says:

- “1. In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:
 - a) The reason (or if more than one the principal reason) for the dismissal and
 - b) That is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
2. A reason falls within this sub section if it...
 - b) Relates to the conduct of the employee...
4. Where the employer has fulfilled the requirements of ss.1 the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
 - a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
 - b) Shall be determined in accordance with equity and the substantial merits of the case.”

7. The case law on the application of those tests is extensive but it is summarised by the issues.

The issues

8. The issues as discussed with the parties at the outset of the hearing are:
 - 8.1 Was the claimant dismissed?
 - 8.2 If the claimant was dismissed what was the reason for dismissal? The respondent says misconduct in not coming back to work. Alternatively, some other substantial reason namely, the claimant’s failure to return to work or give any explanation for his failure to return to work.
 - 8.3 Did the respondent need to follow a fair procedure? If so, did the procedure adopted by the respondent fall within the band of procedures which a reasonable employer could reasonably adopt?
 - 8.4 If a fair procedure was followed did dismissal fall within the bands of reasonable responses of a reasonable employer?
 - 8.5 If the respondent failed to follow a fair procedure, what is the chance that the claimant would have been dismissed if a fair procedure had been followed?

The facts

9. The claimant was born on 1 June 1988. On 31 July 2007 he started working for the respondent. The respondent is a firm specializing in plumbing. The claimant's work involved hard manual labour.
10. The respondent himself is of Kurdish heritage and he seems to have spent most of his youth in Iran but he came to this country and started working at the age of 19. His English is poor. He does speak English in a comprehensible manner. In my judgment he downplayed the extent to which he could speak English. He was able to hold down a job with the respondent for over 10 years and was able to speak with Mr James, in English, on a regular basis. Indeed, before the tribunal on the one occasion when he answered a question in English he was easily comprehensible.
11. As to writing in English I accept the claimant has limited skills but he was able to complete a timesheet each week that required not just the putting in of hours but also a brief description of the work and it has to be said his signature is more legible than most people's in this country.
12. On 4 May 2017, the respondent, in the shape of Mr Martin Burton, considered the claimant's request for leave of absence from 26 June 2017 to 29 August 2017, that is a period of 9 weeks and 2 days. Mr Burton who considered the application refused it on the basis that the summer period was a busy time for the respondent and that a more limited period of leave was the maximum which was acceptable. That resulted in some further discussions. On 8 May 2017 Mr James suggested to the claimant that he take an extended holiday but that he return to work by Monday 24 July 2017. The claimant confirmed that arrangement so that the fixed holiday dates were going to be 26 June 2017 to 21 July 2017.
13. When the claimant went to Iran he took his British mobile telephone with him. However, he changed the SIM card in the phone because the UK SIM card did not permit roaming in Iran. He bought a further SIM card in Iran to operate the mobile phone. The number of course in Iran was different to the number on his British mobile phone. He did not inform the respondents of that change of number and it appears that Mr James only learnt about that when Mr Farsijani was giving evidence today.
14. Whilst on holiday a misfortune befell the claimant. On 15 July 2017 he was diagnosed with having a lumbar herniated disc. That was confirmed by his consulting physician Dr Naeini. That was very shortly before the claimant was due to fly back to England.
15. On 20 July 2017 Mr James sent a text to the claimant asking him to contact Mr Apps, who is the Installation Manager at the respondent, so that the claimant would know where he had to go to work on Monday. There was no response to that and, indeed, there was never any response directly to the respondent from the claimant whilst the claimant was in Iran.
16. When the claimant failed to attend work on 24 July there were, in the course of that week, I find as a fact, telephone calls made by Mr James trying to

get hold of the claimant but for the reasons I have explained regarding the change of the SIM card to the mobile, none of those telephone calls were successful.

17. On 7 August 2017 Mr James sent a text to the claimant asking what had happened to him. For the same reason that text was not received by the claimant.
18. On 14 August 2017 the claimant wrote a letter which was sent by email which appears at page 49 of the bundle and says:

“Dear Farhad,

Re: Extended vacation

We refer to our agreement for you to take an extended vacation for four weeks. Our agreement was for you to return to work on 24 July 2017. As it is now 14 August 2017, some three weeks later and you have not returned, it would appear that you have decided to resign your employment with Arnold James (St Albans) Limited by default.

We assume that you are not returning to work and will issue the relevant paperwork accordingly.”

19. That is signed by Mr James.
20. That letter attached to an email was read by Miss Abi Zehnaoglu who is the claimant’s girlfriend. She started a WhatsApp series of messages on 16 August 2017, starting at page 47 of the bundle, in which she said the last photograph was taken the first day when he came to hospital with the pain. There were some seven photographs sent with that message. Then the Doctors decided on MRI and treatment. That received a prompt reply from Mr James thanking her for the information.
21. On 1 September Mr James sent a follow-up messages saying, “Abi have you heard from Farhad?”. She replied “Hi Nick, not yet. It’s really bad internet connection. I’m so worry. I tried call him every day.”
22. On 2 September 2017: “Hi Nick, I spoke Farhad’s brother today and he said Farhad had a kidney operation and he will return to London soon”. Pausing there that reference to a kidney operation is a mistake, it appears to have been due to a misunderstanding. Ms Zehnaoglu is of Turkish heritage and does not speak Persian or Farsi as spoken by the Kurds very well.
23. There was then another message on 9 October in which Miss Zehnaoglu said “Hi Nick, Fred sent me a message. He will be in London on Monday and will be in work on Tuesday 17 October. Thanks.”.
24. On Tuesday 10 October she said:

“Hi, I tried to call you today but the call was diverted and I left message for you. Then I called to Loyce (*Pausing there she is the person who deals with the payroll matters*) regarding the P45 which Fred received today via email. He has a serious operation and he couldn’t fly back 6 hours after the operation

because of his doctors didn't allow him. He has a all evidence of illness he will provide you. But this P45 its really surprised him. It's not fair. He work 11 years in this company and always on time at work. Now dismiss him due to illness. It's not reasonable. I would like you to review all this which he will provide you all evidence related his illness.

Thanks

regards.

Abi”

25. The P45 has a termination date of 31 August 2017. That is the date of dismissal pleaded by the claimant in his ET1 and it is accepted by the respondent in its ET3.
26. The 10 October email which has the P45 as an attachment was the first time the claimant had received the P45.
27. Subsequently, at the end of November, the respondent invited the claimant to a meeting but the claimant did not attend. Instead, on 15 January 2018, as I have said, the ET1 was issued.

Discussion

28. The first question is whether the claimant must be treated as having resigned or whether the respondent dismissed him. It is well established that resignation and dismissal can be affected by actions as well as words. An employee who following an argument storms out of his place of work and after a period of reflection fails to come back will be treated as resigning. Likewise, an employer who escorts an employee off the premises and bars the doors behind him is treated as dismissing he employee.
29. In the current case the claimant failed to come back to work; he failed to respond to texts, failed to answer phone calls. He did not contact the respondent at all. I have to consider matters objectively on the basis of facts known to the respondent.
30. The culmination of the claimant's failure to respond or to contact the respondent himself, coupled with the length of time the claimant was absent without leave, in my judgment objectively shows that the claimant was resigning. He simply disappeared. It is true that there were no doubt communication difficulties from Iran in that telephone lines give a poor signal and that the internet is slow but none of those are sufficient to justify the complete absence of any contact with the respondent.
31. In my judgment the respondent's letter of 14 August 2017 was an acceptance of the claimant's resignation by conduct. If I was wrong about that I need to consider whether the letter of 10 August was a dismissal by the respondent. Ms Jones submits that the 10 August letter was not a dismissal. I disagree. The concluding words of the letter which says, "We assume that you are not returning to work and will issue the relevant paperwork accordingly", in my judgement is a sufficient expression of an

intention to terminate the contract for the letter to amount to a letter of dismissal.

32. I then would need to consider what the reason for dismissal was. In one sense a failure to attend for work will prima facie always be misconduct but on the facts of this case that is, in my judgment, a somewhat lawyerly analysis of the matter. Mr James' state of mind was that the claimant had simply disappeared. That, in my judgment, is some other substantial reason rather than dismissal for misconduct.
33. As to procedure, where an employee disappears, it is difficult to think what a sensible procedure could be adopted by a reasonable employer. In my judgment the dismissal for some other substantial reason, in this case, did not require any procedure because there was no means of contacting the claimant. Even if I was wrong as to the reason for the dismissal being some other substantial reason and the true reason was misconduct, this case, for the same reason in my judgment, would fall into that vanishingly small number of misconduct cases where there was no need to conduct an investigation and a disciplinary hearing. On 14 August there was simply no means of sensibly starting an investigation and then inviting the claimant to a disciplinary hearing. The claimant had simply disappeared. In those circumstances again, I find that a fair procedure was followed in the event that it was the respondent dismissing the claimant for misconduct.
34. So far as the question of what would have happened if the respondent had failed to follow a fair procedure, the position here is that dismissal, sooner or later, on medical grounds, was inevitable. The claimant is still in an obviously bad physical state. There is no way in which he could carry out the heavy work required for the plumbing work on which he had been engaged and there is no scope for making reasonable adjustments. For the reasons I have explained he is not capable of carrying out works of a clerical nature because his language skills are not sufficient.
35. Doing my best, if I had to reach this question, I would have said that a fair procedure investigating the question of the claimant's medical conditions would have resulted in his being employed for a further two months and he would have then of course have been entitled to dismissal with notice.

Resolution of the issues.

36. Accordingly:
 - 36.1 Was the claimant dismissed? No.
 - 36.2 If the claimant was dismissed, what was the reason for dismissal? This issue does not arise but if I am wrong about the question as to whether the claimant was dismissed, the reason was some other substantial reason, namely the claimant's failure to return to work or give any explanation for his failure to return to work.
 - 36.3 Did the respondent need to follow a fair procedure? Again, if the question arises I find that a fair procedure was followed.

- 36.4 If a fair procedure was followed, did dismissal fall within the band of reasonable responses of a reasonable employer? Yes.

- 36.5 If the respondent failed to follow a fair procedure, what is the chance that the claimant would have been dismissed if a fair procedure had been followed? The claimant would have been dismissed after two months but he would have been dismissed with notice but that question does not arise on the resolution of the case.

Employment Judge Jack
18 July 2018

Date:

Judgment sent to the parties on
20 July 2018

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For the Tribunal office