



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON

BETWEEN:

Mr S Busuttil

Claimant

AND

Brooknight Security Limited

Respondent

ON: 12 July 2018

Appearances:

For the Claimants: In person

For the Respondent: Ms K Head (Finance Director)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not dismissed by the Respondent.
2. The Tribunal therefore has no jurisdiction to determine a claim of unfair dismissal.

REASONS

1. The case involves the following issues:
 - a. Has the Claimant's employment terminated?
 - b. If so was the Claimant dismissed or did he resign?
 - c. If he was dismissed was the dismissal fair or unfair?
2. The relevant law is contained in s95 (1) Employment Rights Act 1996 ("ERA")

which states as follows:

95 Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
3. I make the following findings of fact based on the brief witness statement of the Claimant, his oral evidence and the small number of documents made available to me.

Findings of fact

4. The Claimant was employed by the Respondent as a security guard at the Primark store in Northampton. Primark is the Respondent's main customer. The Claimant is employed on a zero hours contract, but the Respondent does not dispute that he is an employee.
5. The claim arises out of an incident that took place on 12 January 2017. The Claimant had an accident and injured himself whilst trying to apprehend shoplifters outside the store. He was exasperated by the lack of support he had had from his colleague Samantha Cowie, whom he regarded as incompetent, and went to complain to the Store Manager Tracy Fagg. The Claimant described the incident to me in detail. He said that he had remained calm whilst talking to Ms Fagg and had then spoken to his manager Scott Thurston who had agreed that he and Ms Cowie should work on different floors for the time being. Later that afternoon Mr Thurston called the Claimant and told him that he was suspended from his employment as Ms Fagg no longer wanted him in the store. He queried this and Mr Thurston told him to go home. He then went to see Ms Fagg again. I asked him what he had said and he said that he had called her two faced and a "mong" and accused her of going around spreading other people's business. However he said that he not been angry, but had been confused as to why he had been suspended. He admitted, when I asked him a specific question, that a third party might have thought that he had been shouting but that they would not have thought that he was angry and that he did not swear.
6. I saw from the bundle of documents that a very different account was given at a later date to the police by three Primark employees, Tracy Fagg, Zoe Bush and Klara Wydzgowska. I was not given all of the pages of the statement to the police, but all three accounts describe the Claimant as having used extremely intemperate language and one of them describes the Claimant as having thrown a radio in the direction of Ms Fagg. The Claimant denied having thrown an object

and maintained that all three individuals had something to gain by creating difficulties for him. He thought it not credible that he would have shouted at Ms Fagg the first time he entered the room, but the accounts do not in fact suggest that he shouted at her, but that he complained loudly and in intemperate language about Ms Cowie's competence.

7. I find as a fact that on a balance of probabilities the Claimant conducted himself inappropriately on both occasions that he went to see Ms Fagg. I find as a fact that during the first encounter with Ms Fagg, something happened that was of sufficient seriousness that Ms Fagg had had cause to complaint to Mr Thurston about him. I make limited findings as to exactly what he said or did save that he was on his own admission speaking so loudly at the first meeting that observers would have thought that he was shouting. He also on his own admission called Ms Fagg "two-faced" and a "mong" and levelled an accusation that she was "spreading other people's business". An employer would be entitled to treat such conduct towards an employee of its main customer as an extremely serious matter.
8. I therefore find that there was serious misconduct on the part of the Claimant on 12 January 2017. It emerged later in the Claimant's evidence as a result of Ms Heard putting to him the contents of a letter dated 27 January 2018 from an organisation called Voice for Victims and Witnesses to Ms Cowie, that the Claimant had also pleaded guilty to sending a letter/communication/article conveying a threatening message after being charged by the police in connection with the incident (I understood this to have been a text message sent to Ms Fagg). The Claimant accepted in his evidence that this was the case. This made his inclusion in his witness statement for today's hearing the sentence "I was found not guilty in court" an only partially true account of events and affected my assessment of his credibility as a witness.
9. It is the Respondent's case that later the same day, 12 January, there was another conversation between the Claimant and Mr Thurston during the course of which the Claimant resigned from his employment. The Claimant denies that this was the case. There was a further conversation between them the next morning lasting about 25 minutes which the Claimant understood to have been Mr Thurston taking down his version of events having suspended him. Later that day the Claimant received a visit from the police who were arresting him in connection with a racially aggravated assault arising from the incident on 12 January at the Primark store. He was later charged, and later acquitted of that particular charge, although as already noted he did plead guilty to a lesser offence.

Conclusions

10. Based on these findings of fact I conclude that the Claimant did not resign. I have accepted the Claimant's evidence on this for several reasons, although not without some difficulty. Firstly, the Claimant has produced a phone record that suggests that there was no phone call on the evening of 12 January between him and Mr Thurston. His account of his conversation with Mr Thurston on 13 January

is consistent with a belief that he was suspended and being investigated by his employer. He also denies receiving the letter from the Respondent dated 17 January accepting his resignation. I had particular difficulty with that point because the Claimant accepts that he received his payslip, but denies receiving either the 17 January letter or his P45, despite not ordinarily having problems with his post. His subsequent conduct however was consistent with his believing that he was suspended for the duration of the criminal proceedings. In his claim form he states that during the course of the criminal proceedings in October 2017 he learned that Mr Thurston had said that he had sacked the Claimant. At that point, he says, he realised that he was not simply suspended but had been sacked. Whether or not he was correct in the conclusion that he drew, that is consistent with the timing of his contact with ACAS and his presentation of his claim to the Tribunal. The burden of proving that the Claimant resigned lies on the Respondent and in my judgment it has not proved it on a balance of probabilities. There was no witness evidence to support the assertion and the documentary evidence is both inconclusive on its own and contradicted by the Claimant's evidence and his phone records.

11. I also find however that there is no evidence that the Claimant was dismissed. As Mr Thurston did not give evidence I have accepted the Claimant's version of events as regards his resignation. I do not know what Mr Thurston told Mr O'Brien, but plainly Mr O'Brien thought that there had been a resignation and emailed his colleagues accordingly. It is therefore not surprising that the Respondent took no steps that would have amounted to the clear and unequivocal indication that it was bringing the Claimant's employment to an end that is required to terminate a contract of employment in accordance with s 95(1) ERA. The sending of a P45 in the (mistaken) belief that the Claimant had resigned would certainly not be enough. There was no other evidence that would support a contention that the Claimant was dismissed. The note in the bundle to the effect that Mr Thurston had told Primark that he had dismissed the Claimant is not evidence that he or anyone else actually did so.
12. If the Claimant did not resign and was not dismissed, his employment under his contract with the Respondent is still active and he cannot bring a claim of unfair dismissal.
13. However even if he were to consider doing that at a later date I consider it likely that on these facts there would be a finding either that the dismissal was fair, or that the Claimant had very significantly contributed to his own dismissal through his conduct on 12 January, in particular by sending a threatening message to an employee of his employer's most important customer, a matter to which he later pleaded guilty in criminal proceedings and in the matters I have referred to in paragraph 7.
14. However for present purposes there is no dismissal on which a claim can be founded and the claim is dismissed.

Employment Judge Morton
Date: 12 July 2018