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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr S Nicholson

and

Respondent

F M Conway Ltd

Held at Ashford on 19 January 2018

Representation

Claimant:

Mr S Perhar, Counsel

Respondent:

Mr D Stevens, Solicitor

Employment Judge Kurrein

JUDGMENT

- 1 The Respondent unfairly dismissed the Claimant. It is ordered to pay him:-
 - 1.1 A Basic Award in the sum of £958.00
 - 1.2 A Compensatory Award, including an uplift of 25% pursuant to S.207A TULR(C)A 1992, of £15,684.78.
- 2 The Claimant's claims alleging breach of contract and a failure to pay holiday pay are dismissed.

The above sums are calculated net and must be paid without any deduction.

REASONS

- 1 On 25 July 2017. The claimant presented a claim to the tribunal alleging unfair dismissal, breach of contract, unauthorised deductions from wages and a failure to make payment of holiday pay.
- 2 On 19 September 2017 the respondent presented a response in which it contended the claimant had resigned and was therefore not entitled to make a claim for unfair dismissal or notice pay.
- 3 The case has come before me today. I read the witness statement made on the claimant's own behalf and the statements of Mr Smith, former senior contracts manager; and Ms Costanza, former HR adviser; on behalf of the respondent. I considered the documents to which I was referred and heard the submissions of the parties.
- 4 The claimant gave evidence and was cross-examined extensively. The respondent did not call any witnesses. It relied on the signed witness

statements identified above, on the basis that I would give them such weight as was appropriate in all the circumstances.

- 5 I make the following findings of fact. The claimant was born on 27 July 1992 and started his employment with the respondent as a labourer on 1 March 2013. He was promoted to a position of trainee supervisor, and then supervisor, becoming salaried with gross pay of £2,600.00 a month. He also had the benefit of a company car, a laptop computer and mobile phone. In the course of his employment with the respondent the claimant had studied to gain a Level 3 NVQ certificate.
- 6 The claimant worked in the London Borough of Southwark supervising road tarmac laying gangs. His immediate supervisor was Mr T Omer. He, in turn, was managed by Mr Smith. The claimant and Mr Smith were well acquainted: Mr Smith's wife's sister was a former partner of the claimant.
- 7 I accepted the claimant's evidence that shortly before the events with which I am concerned he was the subject of a detailed appraisal by Mr Smith in which he performed well.
- 8 It was common ground that the claimant did not attend work when he should have done on the 15, 16 and 17 March 2017.
- 9 It was the claimant's case that he contacted his supervisor on his first day of absence to explain that he had personal problems and was not in a fit state to attend work.
- 10 It was the respondent's case that the claimant did not make contact until 17 March 2017 and then did not attend for work on Saturday, 18 March, when he was due to do so.
- 11 On Monday 20 March 2017 the claimant spoke to Mr Smith on the telephone. The outcome was that the claimant went to the office in the late afternoon that day to meet Mr Smith. What took place in that meeting is substantially in dispute.
- 12 It was the claimant's case that Mr Smith was aggressive and threatening: amongst other things he told the claimant he would, "fuck him up", and that the claimant would lose his job and never work in the tarmac industry again. According to the claimant Mr Smith concluded by stating that the claimant was suspended and confiscating his laptop, mobile and car keys.
- 13 It was the respondent's case that the claimant's attendance at work had been erratic for some time. In the course of the meeting on 20 March the claimant was told that his absence would be treated as unauthorised. The claimant became agitated and told Mr Smith, "You can shove your job up your arse, I resign." The claimant then left, leaving behind his laptop, mobile phone, car keys and car. Mr Smith took the view the claimant had resigned with immediate effect. He sent an email to his colleagues, shortly thereafter to inform them of the position.
- 14 By a letter dated 21 March 2017, received by the claimant on 24 March, the respondent wrote to the claimant to, "confirm receipt of your resignation" stating that his last day of employment was 20 March 2017. The letter went on to deal

- with associated matters and concluded by stating that if the claimant had any queries or concerns, he should contact the respondent's HR department.
- 15 By email of 29 March 2017 sent to the respondent's HR department the claimant acknowledged receipt of the letter supposedly acknowledging receipt of his resignation, and stated that he had not resigned. He went on to state that he believed there to have been some confusion and was emailing to confirm that. He stated that he had spoken to Ms Costanza, who had suggested a meeting should take place in order to resolve any issues. The claimant asked for such a meeting.
- 16 Ms Costanza's statement suggested that another member of staff made attempts to contact the claimant without success and as a consequence no further action had been taken by the respondent.
- 17 I heard the submissions made on behalf of the respondent. Having done so. I thought it unnecessary to hear the submissions of behalf of the claimant.
- 18 I preferred the evidence of the claimant which, although it may have contained some discrepancies by comparison with the claim form, was cohesive and believable. I took the view that such contemporaneous documentation as did exist supported his version of events. In addition, his evidence had been tested by extensive cross examination and had remained substantially intact.
- 19 I could only give limited weight to the written statements presented on behalf of the respondent. The witnesses had not made themselves available to support the statements they had made. Their evidence had not been tested. I thought Mr Smith's statement concerning the meeting of 20 March 2017 to lack detail. I also thought it unfortunate, to say the least, that the respondent had not evidenced any attempt to make contact with the claimant by responding directly to his email.
- 20 I concluded that the claimant did not resign: he was dismissed.
- 21 The onus is on the respondent to establish a potentially fair reason for that dismissal. It has wholly failed to establish any reason for the dismissal. I therefore find that the dismissal was unfair.
- 22 I accepted the claimant's evidence that following his dismissal, he sought to obtain employment in the tarmac industry. He did so because he had devoted himself to it for several years and had gained qualifications to work as a supervisor. His evidence that positions in that industry are more often gained by word-of-mouth than any other means rang true. He had been unsuccessful and attributed that to Mr Smith having bad-mouthed him. I am quite unable to make any finding as to that.
- 23 The claimant also sought employment in another field in which he had experience, that of repairing automatic gearboxes. There was documentary evidence of those attempts which, to date, had proved fruitless.
- 24 The claimant had not claimed any benefits at any time following his dismissal. I put that mostly down to pride. The claimant also told me that he was concerned that if he did start claiming benefits he might, as he had witnessed

with others, become dependent on them. He had been living with his mother whilst looking for work.

- 25 I accepted that it was not unreasonable for the claimant to have sought new employment in fields in which he had experience and which were likely to pay him better than anything else readily available. I also accepted that it was not unreasonable for him not to have claimed benefits for a period.
- 26 However, I concluded that the period during which those actions might not be unreasonable could not extend beyond a period of six months from his dismissal. After the expiry of that period, the claimant who is young, fit, personable and intelligent should have claimed benefits or found alternative employment, even as a tarmac labourer, in which he could earn almost as much as he had as a supervisor, albeit working physically harder and for longer hours.
- 27 In the above circumstances, I make the following awards in favour of the claimant.
- 28 At the time of his dismissal. The claimant had two years' service over the age of 21. He is therefore entitled to a basic award of 2 weeks gross pay, subject to the statutory cap, amounting to £958.00
- 29 I award the claimant the sum of £300.00 in respect of the loss of his statutory rights. I award him 26 weeks net pay, a total of £12,247.82, in respect of loss of earnings.
- 30 The recoupment regulations have no application: the claimant did not claim benefits.
- 31 I make no separate award for the claimant's claim for breach of contract in not receiving notice or pay in lieu. That is subsumed by the compensatory award.
- 32 The claimant gave no evidence of not being paid holiday pay to which he was entitled.
- 33 The Respondent followed no procedure at all in dismissing the Claimant, far less the ACAS Code of Conduct. In the circumstances it is just and equitable to increase the compensatory award by the maximum factor of 25%, £3,136.96.

Employment Judge Kurrein
22 January 2018