



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr K Molek

Respondent
Kaliber Marketing (Holdings) Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 21 August and 5 October 2018.

EMPLOYMENT JUDGE Warren

Representation

Claimant – in person

Respondent – Miss N Parker, Solicitor

REASONS

Background and Issues

1. By an ET1 presented on 10 April 2018, the claimant brought claims of constructive unfair dismissal. The respondent denied the same alleging that the claimant had resigned of his own volition.

The Evidence

2. I heard evidence from the claimant on his own behalf and from Mr. Goltman (the claimant's line manager) and Miss Richards (HR manager) on behalf of the respondent. I preferred the evidence of the respondent witnesses. The claimant asserted that he had both text messages and a

recording on his mobile phone which would have supported his case, but he had failed to retain the detail of that evidence, and had changed phones at some point prior to the case being heard.

3. Each party presented a bundle of documents. Page references herein are prefaced with C if from the claimant's bundle and R if from the respondent's bundle.
4. I have decided the case on the evidential test 'the balance of probabilities'

The Facts

5. The claimant was employed as a fabricator by the respondent from 21 December 2009. The business manufactured aluminium and pvc window and door products.
6. Each year the respondent shuts down for the Xmas period. For Xmas 2017, employees were notified that they would need to keep 3 days leave which would be taken between 27 and 29 December. The total shutdown was 23 December to 1 January 2018.
7. 21 and 22 December were always stock taking days, and all staff were needed. Leave would rarely be granted over this period.
8. The claimant did not attend work on either 21 or 22 December 2017, and did not report his absence.
9. On 2 January 2018 the claimant did not return to work. There was no contact from him.
10. On 4 January Ms Richards concluded, without making any enquiries with the claimant, that he must have resigned as he had not appeared for work, and she wrote to the claimant accepting his deemed resignation with effect from 21 December 2017 and sending his P45.
11. The claimant attended the factory on 9 January 2018. He asserted that he had been on pre - booked leave from 22 December 2017 to 5th January 2018, and that he had been unwell, and had texted in to say so, on 21 December 2017.
12. Mr Goltman checked both the leave forms, and his mobile phone. He had no message from the claimant about sickness and no evidence that the claimant had pre - booked leave.
13. Mr Goltman did suggest that the leave should have been booked

- through another manager who was in post for 6 months at around the time the claimant asserted he had discussed the leave. However the claimant was sure that he had discussed the leave with Mr. Goltman in October 2017.
14. The claimant accepted that he had not filled in any leave application form. Mr. Goltman explained that leave would be discussed verbally first and then a form completed and authorised by signature. The claimant did agree that he had always filled in a form. Mr. Goltman believed that the claimant had always completed a form in the past. The claimant left the meeting threatening legal proceedings.
 15. On 11 January Miss Richards (who had little HR experience, and admitted to carrying out no research on the law) wrote further to the claimant inviting him to a meeting on 16 January 2018 so that she could investigate further. She believed that the company had not terminated the claimant's employment, and that the claimant had resigned.
 16. Miss Richards invited the claimant to return to work whilst matters were resolved. The claimant did not return to work. The claimant did not acknowledge the invitation, nor did he attend the meeting.
 17. The claimant wrote to the respondent on 23 January with a subject access request, and a response to Miss Richards's previous 2 letters (R33 – 36) He accepted responsibility and apologised for failing to attend the meeting on 16 January and requested that the meeting be rescheduled. He asserted again that he had not resigned, he had been dismissed.
 18. The meeting was held on 30 January (R42 and 43) The claimant showed Miss Richards the message he asserted had been sent to Mr. Goltman about him being unwell – but said he no longer used the phone and it did not have a sim card in it. Without that, Miss Richards was unable to establish if the message had actually been sent. The meeting did not resolve any issues.

The Law

Resignation or dismissal?

19. This is a case of ambiguous conduct. The claimant did not say 'I resign' at any time. The respondent did not say 'you are dismissed' at any time. I am tasked to infer an outcome from the conduct of the parties.
20. *Harrison v George Wimpey and Co Ltd 1972 ITR 188* – Sir John Donaldson – where an employee so conducts himself as to lead a reasonable employer to believe that an employee has terminated the

contract of employment, the contract is then terminated.’ However the judgement continued to make the point that the employer was under a duty to make enquiries and to warn the employee of its intentions.

21. It is only in exceptional cases that resignation will be the proper inference from an employee’s conduct.
22. *Zulhayir v JJ Food Service Ltd 2014 ICR D3* Court of Appeal – Lord Justice Rimer – an employer cannot unilaterally deem an employee to have resigned when he has not. Removing an employee from the books by such deeming would arguably amount to a dismissal and that dismissal would be prima facie an unfair dismissal.

Representations of the claimant

23. Based on the ET1 and his evidence. I noted his comments with some sadness. The fall out has been that he and his family have returned to Poland and they are living with family as he could not continue to pay his way in the UK without work

Representations of the respondent

24. The claimant has not brought an unfair dismissal claim – but a constructive dismissal claim and then denied that he resigned, which makes little sense. He resigned and the resignation was accepted

Conclusions

25. I have examined the pleadings closely and noted that in his ET1 the claimant ticked the box to indicate that he was claiming for unfair dismissal
26. He headed his claim ‘constructive unfair dismissal’. He is a lay person, using a second language to bring his claim. He did not have legal advice. It matters little however as he ends his claim by saying that he was ‘unfairly dismissed’. It is clear from the issues at the start of the case that the respondent was saying that he resigned and he was saying he was dismissed.
27. It is hard to see how the respondent, a firm of solicitors, could misunderstand what he was alleging. This was clearly an allegation of unfair dismissal. I reject the respondent’s argument in this regard. The case was not actually pleaded as a constructive dismissal by either party.
28. The claimant was dismissed without notice by the respondent on 5 January 2018. He did not resign. There is no evidence of him

communicating any intention to resign. The respondent made an assumption that he had not returned to work when he should and issued his P45 indicating that it accepted his resignation. Such actions amount to ending the contract, and thus dismissing him.

29. The dismissal was for a potentially fair reason – conduct – as it was believed that the claimant had taken an unauthorised absence.
30. There was however insufficient investigation by the respondent before the dismissal for them to have a genuine belief in this reason.
31. It was therefore an unfair dismissal.
32. It was not suggested that this was an appropriate case for reemployment or reinstatement.
33. In breach of contract the respondent failed to give notice or pay notice pay in lieu.
34. Applying the principles in *Polkey v AE Dayton Services Ltd [1987] IRLR 50* – had there been an appropriate and fair investigation I consider that there would have been a 50% chance of the claimant being dismissed, taking into account that he and Mr Goltman his line manager no longer got along and he was unable to provide proof of his assertions about the text message and recording of the annual leave request, set against the fact that he had worked there for a number of years, and was a skilled workman, and at the time of his dismissal had a clear disciplinary record. The respondent could equally have considered the issues to be misunderstandings.
35. Contribution. The claimant contributed to his own dismissal by failing to communicate effectively with his employer. I consider a reduction of 25% to be appropriate to both the basic and compensatory award, and the amount of the deduction reflects the impact of my decision on *Polkey*.
36. The employer failed to undertake an appropriate disciplinary process before dismissing and I award an uplift of 25% to the compensatory award to reflect that had a procedure been followed the outcome may have been that the claimant kept his job, or to be dismissed fairly dependent on the outcome, and that at least each party would have been able to resolve the issues which have arisen in this case

The calculation of the Remedy is included in the Judgement.

Employment Judge Warren

Signed on 14 January 2019

Reasons sent to Parties on

16 January 2019

