Case: 1809904/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Brigham**
Respondent: **Keith and Stuart Petty trading as J Petty Motors**

AT A HEARING

Heard at: **Hull** **On: 18th December 2018**
Before: **Employment Judge Lancaster**

Representation
Claimant: Mr S Pinchbeck, solicitor
Respondent: Mr T Wood, counsel

WRITTEN REASONS

1. The judgment in this case was given orally immediately upon the conclusion of the case.

2. The judgment in writing was dated 21st December 2018 and sent to the parties on 28th December 2018.

3. On the same day, 28th December, the Claimant requested written reasons, which are now provided.

4. The audio recording of the oral judgment has been inadvertently deleted. There is therefore no transcript available. The wording in these Written Reasons will, necessarily, therefore not be the same as in the judgment originally delivered.

5. The Claimant had been employed at the Respondent's garage as a motor mechanic and MOT tester from September 2002. This is a small family business: the Respondents are father and son.

6. The outstanding claims are for constructive unfair dismissal and for an unauthorised deduction from wages.

Unfair dismissal

7. It is, sensibly, conceded on behalf of the Claimant that his words when first entering Stuart Petty's office on 3rd May 2018 are an unequivocal resignation. He said: "Stick your job as far up your arse as you can stick it, Stu." It is no longer asserted that the effective date of termination was, as pleaded in the ET1, 8th May 2018.

8. The issue on the unfair dismissal claim is, therefore, whether or not prior to that resignation the Respondents had committed a fundamental breach of contract entitling the Claimant to resign without notice.

9. Anything which happened in the offices or workshop after that in respect of the Claimant removing tools from the premises is not relevant. Those later events cannot have had any bearing upon his decision to resign which had already been communicated in graphic language.

10. Within the Agreed List of Issues, the specific actions of the Respondent's which are relied upon are "granting the Claimant leave for week commencing 23rd April 2018 then contacted (sic) the Claimant's family to ask about his whereabouts on 21st April 2018" and "writing to the Claimant on 1 May 2018 requesting the Claimnt attend a hearing with regards to misconduct re unauthorised absence 23-27 April 2018."

11. This is said to be a breach of the implied term as to trust and confidence. That is that the Respondent must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or to seriously undermine the relationship of mutual trust and confidence which ought to exist between employer and employee. A breach of this implied term, if established, will be a fundamental breach of contract because it strikes at the heart of the employment relationship.

12. In early April it is accepted that the Claimant approached Keith Petty about the possibility of his taking holiday at the end of the month. I do not consider it to be material whether that was on 3rd April as the Claimant maintains or in fact slightly later on 5th or 6th April. The reference in the ET3 to this request for leave having been made in January 2018 is, I find, clearly a mistake and nothing turns upon that.

13. It is common ground that another employee had already booked leave for the start of May so that any holiday that the Claimant wished to take at bout this time would have to be before that.

14. At this time, early April, I find as a fact on the balance of probabilities that Stuart Petty's leave on Thursday 26th April will already have been recorded on the office planner. I accept his evidence that this family day trip to London had been arranged at about the end of March. This would therefore have ben a potential reason for not allowing the Claimant also to be off that day.

15. It is however clearly not correct, as Keith Petty says in his witness statement, that at this stage he too had planned leave for Friday 27th April to attend a friend's funeral. The friend in question did not in fact die until 1th April so the funeral cannot have been arranged until shortly after that date. I do not attach any importance to this error on the part of Keith Petty. A very close friend had died, relatively young aged only 59 and it must have been an extremely distressing time. In the circumstance Mr Petty can be forgiven for having made a mistake. By the time the Respondents began enquiring about the Claimant's intention to take holiday in the week commencing Monday 23rd April the date of the funeral would have been known. At that stage, therefore, it would have been apparent that if the Claimant took leave that week it would indeed mean both he and Keith Petty being absent on the Friday.

16. It is the Claimant's own case that, when the week of 23rd April was discussed as a possible holiday, Keith Petty made it clear that if he were to take that time of it would be conditional – even though this would not have been a normal working day for him - upon his coming in the following Saturday, 28th April, to cover, as he would do if required, for a fellow employee Pete Smith who had booked that time off. The Claimant did not ever agree to that condition: he had in fact already made arrangements to attend the Whitby Goth Festival, as he always did, on that particular weekend.

17. It is the Respondent's case that the Claimant was offered only the Monday to Wednesday of that week, 23rd, 24th and 25th April, as possible leave dates but that he never came back to them to confirm that this was acceptable. Just as the Claimant did not agree to the condition that e work the Saturday, nor did he ever agree or disagree with the proposal that he take only part of that week off.

18. On 10th April the Claimant was in text communication with his wife when he confirmed to her that he had been given the holiday requested. His wife did then book her own leave so that they could take time off together. I infer from the timing and content of this text exchange that the Claimant had not, however, already settled with Keith Petty the week before that he could definitely take this time off.

19. The Claimant's projected holiday for the week commencing 23rd April was never recorded on the office planner or in the work diary.

20. The Claimant was able to rearrange some planned work for that week by bringing it forward, but it still remained in the diary against his name for the time he was in fact on holiday.

21. It is accepted that on Saturday 21st April and Monday 23rd April the Respondent tried to make contact with the Claimant to ascertain his whereabouts. I accept their evidence that this was done after they were informed by another employee, Pete Smith, that the Claimant had left work at the end of the previous week fully intending to take following one as holiday.

22. I accept the Respondent's evidence that after taking advice from their HR consultants they sent a pro-forma letter drafted for them, inviting the Claimant to a meeting to discuss his unauthorised absence. It had been intended that this letter be given to the Claimnt in person when he returned to work. In the event he did not attend the next week, because he was signed off sick.

23. The letter was therefore posted to the Claimant and received by him, recorded delivery, at 13.21 on Thursday 3rd May 2018.

24. It was within an hour of his receiving that letter that the Claimant attended the offices and told Stuart Petty what he could do with the job: the letter was clearly therefore the immediate trigger for the resignation.

25. In all these circumstances, whilst I am prepared accept that as at 21st April the Claimant had persuaded himself and therefore genuinely believed that his leave for the following week had been formally authorised, I find as a fact that there was not ever any concluded agreement that he could take this holiday.

26. I therefore find that, viewed objectively, the Respondents did indeed have reasonable and proper cause for questioning the Claimant's whereabouts and commencing the disciplinary process for unauthorised absence. The commencement of an investigative disciplinary process does not mean that the Claimant would necessarily have been sanctioned, let alone dismissed, particularly after his explanation had been heard. I do not accept that there is any substance in the Claimant's overarching assertion that this was a deliberate "set-up" purportedly to authorise holiday but without recording it properly and then to seek to discipline him when he actually took it.

27. The Respondent's actions are not a breach of contract. They are certainly not therefore a fundamental breach

28. The Claimant was evidently distrustful and highly critical of the Respondents and the way they conducted their business. particularly Stuart Petty. He was at this juncture extremely unhappy in his job and he resigned, but I am satisfied that nothing was actually done which necessarily entitled him to do so and the Claimant cannot in these circumstances claim constructive dismissal.

Unauthorised deduction from wages

29. It is not in dispute that the Respondent deducted from the Claimant's final wage packet the sum of £480.00 and that this was purportedly to cover MOT fees paid directly to him in the month of April.

30. The Respondents notified the Claimant in advance that they would be making this deduction and that communication was accompanied, on or about the same date, by an invoice demanding payment of the sum of £480.00

31. Nor is it disputed that there is a clause in the written contract of employment which entitles the Respondent to make a deduction from the Claimant's salary for monies owed by him to the Respondent.

32. The deduction is therefore one which is clearly authorised in as much as the formal requirements of section 13 Employment Rights Act 1996 have been satisfied.

33. The issue is whether or not the sum received is less that that properly payable to the Claimant after any such deduction which is justifiable on the facts.

34. Under his contract the Claimant was paid a salary only. Rather than the Respondents having sought unilaterally to reduce his salary, as he alleges, I am satisfied that the Claimant was in fact paid an additional bonus, but nothing turns upon this for present purposes.

35. Because the Claimant was a qualified MOT tester he also personally received the test fee, in cash, from those clients he himself had introduced to the business. The Respondents operated on a "friends and family" rate where the Claimant's contacts were charged by them £30 rather than the usual £40 fee. The Claimant was therefore liable to account to the Respondents for the £30 fee. This was not business which the Claimant conducted privately with his own clients, nor was he separately and additionally remunerated by reference to the number of such clients he introduced

(though the bonus was agreed in recognition of the value of the work he brought in). These sums are not themselves therefore any constituent part of the Claimant's wage.

36. Because it would be open to the Claimant to charge the full £40 fee but only be required to account to the Respondents for £30 of it there is the potential here for a fraud on the Revenue.

37. I did consider whether this might therefore be a contract which is void for illegality. On balance I am however persuaded that if there is any illegality it is outside of the contract of employment. It would be a matter solely between the Claimant and the Revenue as to whether or not he had made proper declaration of his income. In the event I have not made any ruling therefore as to whether or not the Claimant was in fact "pocketing" the excess £10.

38. The Respondent's issued the Claimant with an invoice at the end of each month charging him £30 for each MOT test he had conducted for his personal contacts. On all previous months before May 2018 the invoices are marked as paid on the same date that they are issued.

39. The Respondents' case is that their cashier having issued the invoice would then physically receive the cash as a lump sum due from the Claimant and then mark the invoice as paid accordingly.

40. The Claimant's case is that he had already deposited the cash received with the Respondents as and when the jobs were done and that the issuing of the invoices was therefore only a paper accounting exercise, with no further money actually changing hands.

41. On balance I consider that the format in which the invoices were issued is more consistent with the Respondents' version of events.

42. In this case therefore I do not accept the Claimant's account that he had already deposited all sums for which he was liable to account. If he were right it would mean that the Respondents would have had to falsify their records of cash receipts so as to facilitate the issues of an entirely fraudulent invoice suggesting that monies were still outstanding, when in fact they would have been present in the takings of the business over the preceding month.

43. The sum of £480 represents 16 MOT tests. Even allowing for the fact that the Claimant only worked up to 21st April so that it was a short month, this level of activity is entirely consistent with amount of such work the Claimant regularly says that he did and with the amounts claimed in the invoices for earlier periods.

44. I find therefore, on the balance of probabilities, that there was £480.00 still outstanding in MOT fees to be accounted for by the Claimant and that because the invoice was not paid the Respondents were duly authorised to deduct this sum from the final salary payment.

EMPLOYMENT JU DGE LANCASTER

DATE 10th January 2019

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