



EMPLOYMENT TRIBUNALS

Claimant: Mr T Reeves

Respondent: The Grind Café Kelham Island Ltd

Heard at: Sheffield **On:** 7 February 2019

Before: Employment Judge Rostant

Appearances

For the claimant: In person

For the respondent: Mr H Wade, director

RESERVED JUDGEMENT

The claim fails and is dismissed

REASONS

- (1) By a claim presented to the tribunal on 10 December 2018, the claimant brought a claim of breach of contract or, in the alternative unauthorised deduction from wages.
- (2) The case came before me on 7 February 2019. The claimant gave evidence on his own behalf and Mr Wade gave evidence for the respondent. I had the benefit of documents presented by both parties.
- (3) The issue before me was whether or not the claimant was entitled to pay from the 22nd to 31 August 2018 inclusive.

The Facts

- (4) The claimant was employed by the respondent as deputy manager.
- (5) The claimant, and two colleagues also employed by the respondent, decided to set up in business on their own account.
- (6) That business was to be a rival cafe.
- (7) The claimant announced his intention to the respondent and, on 31 July 2018, handed in his notice, due to come to an end on 31 August 2018.
- (8) The respondent was content for the claimant to continue in employment and indeed to do work outside business hours to prepare for the new business venture. However, the respondent made it clear that the claimant owed a duty of faithfulness to the respondent business whilst he remained in employment

- and must do nothing to promote the new rival business until his employment came to an end. The claimant agreed to that condition.
- (9) on 21 August 2018, and article appeared on the website of Exposed Magazine. The article stated that a new independent cafe was to open at Site Gallery. It was to be called Kollektive Kitchen. The article identified Ms Glover, Owen, and the claimant (by his first name Tom) as the owners of the business. The article also said that all three 'used to work at the Grind cafe in Kelham Island'.
 - (10) Mrs Amanda Wade, one of the respondent's two directors, called the claimant into a meeting on that day. She made clear her displeasure and her view that that article breached the agreement between the respondent and the claimant that the business not be promoted whilst he remained employment.
 - (11) Later that day the claimant posted an advertisement for Kollektive Kitchen on his Facebook page.
 - (12) The following day the claimant updated his employment status to director of Kollektive Kitchen and a post appeared on the claimant's Facebook feed reading 'started new job at Kollektive Kitchen'.
 - (13) The claimant received a pay slip on 31 August for the week ending 24 August. The claimant was not paid for any work after 21 August.
 - (14) The claimant received a payslip the following week which contained no pay.

The Law

- (15) It is a breach of contract for an employer not to pay an employee wages to which they are entitled as a result of work done under the contract of employment or which are otherwise owed under that same contract. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, gives the Tribunal the power to decide claims of breach of contract where the contract has come to an end and the claim arises or is outstanding on the termination of the contract.
- (16) Section 13 Employment Rights Act 1996 makes it unlawful for an employer to deduct sums of money owed to an employee. An unauthorised deduction occurs when the employee is paid less than that to which he is entitled under the contract of employment.
- (17) I treated this complaint as bringing both claims in the alternative but did not consider that there was any difference in the issues that fell to be decided.

The issues

- (18) The key question in this case is how the claimant's employment came to an end and when. If the respondent dismissed the claimant on 21 August, the respondent has no defence to the claim of damages for unpaid wages unless the respondent can establish that the reason for that dismissal was an act on the part of the claimant which was a fundamental breach of the contract of employment, in this case the term of fidelity.
- (19) If, on the other hand, the respondent dismissed the claimant by the action of (wrongly) treating the claimant as having resigned on 22 August, the respondent did not communicate that to the claimant until, at the earliest, the payslip of 31 August which indicated the respondent's unwillingness to pay wages after 21 August. It again follows that the respondent would have no defence to the claim for wages between 21 and 31 August. Having chosen not

to dismiss the claimant in response to the advertisement, the respondent could not rely on that fundamental breach as a defence to damages arising from dismissal not effective until the point at which the claimant had already accrued entitlement to wages under the contract and/or when his contract had already ended by reason of his earlier resignation on notice

- (20) The third possibility is that the claimant resigned his employment. If that was the reason for the termination of the contract, then the claimant has no claim to outstanding wages for the balance of the original notice period since his resignation on 22 August was without notice and amounted to the act of terminating the notice period early.

My conclusions

- (21) I find that the claimant's employment came to an end by resignation on 22 August 2018.
- (22) I do not find that the claimant was dismissed by reason of any discussion that occurred between himself and Mrs Wade on 21 August. I did not hear from Mrs Wade and Mr Wade was not present at that meeting. There was no note of that meeting the claimant gave evidence to the effect that in that meeting he was told to leave work because Mrs Wade did not want him to discuss his new venture with customers. It was clear to him that he would not be welcome back at the cafe and he told Mrs Wade that he believed that he was still entitled to pay for the remaining shifts of his notice period. Mrs Wade agreed with that. In the absence of any evidence to the contrary, I accept that that is a true account of that conversation. Mrs Wade's agreement to the suggestion that the claimant was owed the balance of his notice period pay supports the idea that he was not expected to attend work after that point. Subsequently, after he realised he was not to be paid for the balance of his notice period, the claimant contacted the respondent by text referring to the period following his dismissal as a period of garden leave.
- (23) It is certainly not the case that the claimant's evidence refers to unambiguous words of dismissal on the part of Mrs Wade. Even if he understood he was not to return to work, that leaves open the possibilities either that his employment was ending on that day, or that he was to be on garden leave. Where the words said to amount to a dismissal are ambiguous, the question for the Tribunal is how those words would have been understood by a reasonable employee. The evidence shows that the claimant understood them to refer to garden leave. I have no grounds for concluding that that was an unreasonable understanding. It follows that the claimant cannot satisfy me that he was dismissed on 21 August 2018.
- (24) Even were I to find that, the claimant's employment had been ended by dismissal on 21 August, I would have found that the claimant's involvement in the article on 21 of August amounted to a fundamental breach of the contract of employment, justifying dismissal. Although the claimant did not give permission for that article to appear, he was a beneficiary of the article and the publicity resulting from it. The article was posted by a co-director and identified the claimant as having formerly been employed by Grind café. It was undoubtedly a promotion of the business which took place whilst the claimant was in employment and the claimant cannot escape responsibility for it by saying that he was not consulted by his partners in the new business. In any case, later the

- same day the claimant posted an advertisement for the new business on his own Facebook feed and there can be no doubting his involvement in that. Once that was discovered it would have been certainly cause for dismissal without notice.
- (25) The next question to be tackled therefore is whether the claimant's actions later on 21 August and on 22 of August, as described above, amount to a resignation. The first issue is the question of communication. Although a post on Facebook cannot be said to amount to a communication just to one's employer, where the directors of one's employer are able to read that post because of their status as friends, I find that, wittingly or not, communication to the employer has been made.
 - (26) Do the words and actions relied on by the respondent amount to an unambiguous resignation? I find that they do not. An unambiguous resignation would more certainly indicate an ending of an employment. It follows that the words said to amount a resignation are ambiguous and the question for me is whether a reasonable employer, in all the circumstances, would have understood them to be a resignation I conclude that not only were they so understood but that that was a reasonable understanding.
 - (27) The context is that the claimant had given an undertaking not to promote the business whilst remaining in employment. The claimant had told Mrs Wade at the meeting on 21 August that he had no part to play in the timing of the article and he was keen to make that point because of his earlier agreement not to promote the business whilst remaining in its employment. The claimant however cannot disavow involvement in the posting, at 17:12, on his own Facebook feed, an advertisement for the new venture. Whether or not limited to the claimant's friends, and whether there is an overlap between the claimant's Facebook friends and the clientele of Grind, I find that that advertisement was certainly a breach of the claimant's undertaking. The respondent was entitled to take into account the claimant's willingness to advertise the business, coupled with the bald assertion that he had started a new job at Kollektive Kitchen, posted on 22 August, as a communication amounting to a resignation.
 - (28) It follows that the claims fail for the reasons already explained.

Employment Judge Rostant

Dated: 7 February 2019

Sent to the parties on:

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For the Tribunal:

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