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## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr B Pauley

and

**Respondent**

Mr I J Cohen t/a  
Look New Dry Cleaners

**Held at Ashford on 25 January 2018**

**Representation**

**Claimant:**

Mr N Caidan, Counsel

**Respondent:**

Mr J Heard, Counsel

**Employment Judge Kurrein**

## JUDGMENT

- 1 The Claimant's claim alleging unauthorised deductions is dismissed on withdrawal.
- 2 The Claimant's claims alleging unfair and wrongful dismissal are not well founded and are dismissed.

## REASONS

### The Claimant and Issues

- 1 On 22 September 2017 the Claimant presented a claim to the tribunal alleging unfair dismissal, breach of contract in respect of notice pay and unauthorised deductions.
- 2 On 29 November 2017 the Respondent presented a response in which it contested those claims. In particular it denied that the Claimant had been dismissed, and asserted that he had resigned.

### Procedural Matters

- 3 I regret to record that the parties had not complied with the directions given for the further conduct of this on 1 November 2017. Disclosure had not been made of some important documents. The parties statements did not deal with all the matters they should have done.

### Evidence

- 4 I heard the evidence of each of the parties on their own behalf. I also gave limited weight to the content of an email from the Respondent's manager, Mr Frankel, of 24 Jan 2018. I considered the documents to which I was referred

in a small bundle and heard the parties' submissions. I make the following findings of fact.

### Findings of Fact

- 5 The Claimant was born on 22 May 1953. He started working for the Respondent on 1 September 1987 as a Hoffman presser. He travelled from his home in Belvedere, Kent, to the Respondent's premises in Golders Green, north London. That was a journey of approximately two hours each way every day. He worked five days a week, 9 am to 5 pm and alternate Saturday mornings. He earned £460 per week net and was also given £25 per week in cash as a contribution to his travel expenses.
- 6 The Claimant was 64 at the date of the events I am concerned with. He would have preferred to work fewer hours and disliked the travel, particularly when trains were late. He had some mobility issues, potentially needing a left hip replacement. His retirement would be at age 65.
- 7 I accepted the evidence given on behalf of the Respondent that over the long period of his employment there had been issues with the Claimant's conduct, some relating to his personal hygiene. This had caused a degree of friction between the Claimant and some of his colleagues, in particular, a Mr Hammad. Prior to the incident with which I am primarily concerned that friction culminated in physical contact between the Claimant and Mr Hammad in about October 2016, the Claimant alleged a head-butt, as a consequence of which Mr Hammad was suspended and disciplined. He was not dismissed because the Claimant expressed the view that the incident should not lead to Mr Hammad losing his employment.
- 8 On 13 December 2016 the Respondent gave the Claimant a formal written warning concerning these conduct and hygiene issues. It stated that his conduct, being rude and bad-tempered, was causing tension such that some staff refused to work with him. He was urged to improve his hygiene.
- 9 On 29 June 2017 the Respondent had to attend hospital for an operation under anaesthetic. Mr Frankel was in charge of the Respondent's premises that morning.
- 10 Not long after the Claimant attended for work that day a dispute arose between him and Mr Hammad, who accused the Claimant of having done a very poor job of pressing a dress. Mr Hammad told the Claimant he intended to wait for the Respondent's return to work so as to show it to him. The Claimant offered to re-press the dress, but Mr Hammad insisted that it should be shown to the Respondent in its then condition.
- 11 This was undoubtedly a heated discussion. On balance, I concluded that it was likely that the Claimant sought to physically retrieve the dress from Mr Hammad, to avoid his poor workmanship being exposed, and there was some physical contact between them at that time. It was the Claimant's case that he had been "pushed" by Mr Hammad. That was denied by Mr Hammad.
- 12 I thought this matter was probably six of one and half a dozen of the other. It was a storm in a teacup.

- 13 The Claimant's response to that incident was to "get his things together" and leave the premises to go home.
- 14 At about 10 am that morning, Mr Frankel phoned the Respondent to inform him of the incident, giving both sides of the story, and of the Claimant having left the premises.
- 15 Later that day the Respondent was in hospital and about to have his pre-operation medication when he accepted a phone call from the Claimant.
- 15.1 It was his case that the Claimant told him he had left work because he was unwell. The Claimant had not said anything about being pushed by Mr Hammad or offered to return to work the next day. The Respondent doubted that the Claimant had left simply because he was unwell in light of what he had been told by Mr Frankel and because in the past, in such circumstances, the Claimant had always raised the matter with him, or a manager. He informed the Claimant that he would speak to the manager and come back to him.
- 15.2 It was the Claimant's case that he had clearly told the Respondent that he had left because he was unwell and had been pushed by Mr Hammad and asked if he could return to work the next day. The Respondent had replied, "leave it, I'll sort it out at the weekend."
- 15.3 The Respondent told me that was not the sort of language he used.
- 16 On balance I preferred the evidence of the Claimant as to the content of this conversation because:-
- 16.1 There was no reason for the Claimant not to have told the Respondent of the events that morning: he would know that they would come to the Respondent's attention shortly, if they had not (as was in fact the case) already done so.
- 16.2 The Respondent was undoubtedly in an unfortunate position at the time he received the call in hospital. His operation was imminent. He was also under considerable pressure from his wife, who was far from happy that he accepted the call.
- 16.3 The content of the text messages received by the Respondent on Sunday 2 July 2017 at 16:04 corroborated the Claimant's evidence.
- 17 I did not, however, accept that the Claimant was unwell. Had that been the case he would have told Mr Frankel, as he had in the past.
- 18 Those text messages, one immediately following the other, were as follows,  
"hi ian, just to confirm im  
sorry about yesterday i  
wasnt feeling well what  
with ali sHouting and also  
pushed i was under stresr  
will you let me know if you want  
me back in."  
"Sorry ian i forgot you said on  
the phone on thurs u

would let me know over  
the wkend”

- 19 I concluded that although those messages were not received by the Respondent until the Sunday they had been composed, and quite possibly sent, on Friday 30 June 2017. It is not unusual for texts to be delayed or not received. The content of both texts clearly refers to events that took place on 29 June 2017. I also thought the Claimant lacked the wit or guile to create false messages.
- 20 I accepted the Respondent’s evidence that at the time he replied to the Claimant, at 17:38 on 2 July 2017 he was angry with the Claimant for having left the shop understaffed and honestly believed that the Claimant had resigned. His text was as follows,
- “Barry there is nothing to confirm, by walking out and showing lack of regard to us, made me realise that after all these years you are not happy working for look new, you need to understand that this was your choice and I do not accept your explanation that you were ill. This was not the end of your employment I expected, but one I know is mutual. Of course I will sort out holiday entitlement due and wages plus references. Ian”
- 21 At the time this text was sent the Respondent was still recovering from an adverse reaction to the anaesthetic he had been given. He was not discharged from hospital until the following day.
- 22 It was the Claimant’s case that when he received this text he was shocked: he thought himself to have been summarily dismissed. He went on to assert that he did not have any further contact with the Respondent until he received a letter from the Respondent dated 16 August 2017 enclosing his P45, which also said,
- “I am sorry you that you have come to this decision to leave, but if you change your mind in the future, please do not hesitate to contact me.”
- 23 The Claimant was clearly mistaken as to there having been no contact between him and the Respondent from 2 July to 16 August 2017.
- 24 In fact, the Respondent having thought things over prior to his return to work that day, telephoned the Claimant on 4 July 2017. They spoke for over 25 minutes. The Claimant did not remember this. I accepted the Respondent’s

evidence, which was unchallenged, that in the course of that conversation he expressed regret at what had happened, referred to the Claimant as “family”, and pressed him to return to work, saying he would be welcomed back. The conversation ended with the Claimant stating he would think about it.

- 25 On the 5 July 2017 there was an exchange of texts, initiated by the Claimant re-texting one of his earlier texts. The exchange was as follows,

“hi ian, just to confirm im  
sorry about yesterday i  
wasnt feeling well what  
with ali sHouting and also  
pushed i was under stresr  
will you let me know if you want  
me back in.”

“That’s the same message  
as Sunday?”

“As per our discussion.  
yesterday, you are  
welcome”

“hi Ian with ref to our  
telephone conversation.  
yesterday when u offered  
to reinstate me i have  
given this my utmost  
consideration and  
unfortunately feel that due  
to what has happened.  
there are certain parties  
that I cannot work with as  
you I feel this would occur  
again regards barry.”

### Submissions

- 26 I heard the submissions of the parties, having also received an “Opening Skelton” from the Claimant. It is neither necessary nor proportionate to set them out here.

### The Law

- 27 Where, as in this case, the fact of dismissal is disputed the onus is on the Claimant to establish on the balance of probabilities that he has in fact been dismissed.
- 28 If the Claimant succeeds on that issue the provisions of S.98 Employment Rights Act 1996 apply,

#### 98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) .....

(3) .....

(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

## Further Findings and Conclusions

### Resignation or Dismissal?

29 I have considered the following principal decisions,

Sothorn v Franks Charlesly & Co [1981] IRLR 278

B G Gale Ltd v Gilbert [1978] IRLR 453,

Martin v Yeoman Aggregates Ltd [1983] IRLR 49

J & J Stern v Simpson [1983] IRLR 52

Barclay v City of Glasgow District Council [1983] IRLR 313

30 I have come to the conclusion that I should apply the following test to this issue:-

30.1 How would the conduct or words have been understood by a reasonable observer or listener?

30.2 If the observer or listener honestly and reasonably construed them as a dismissal or resignation, he should be permitted to rely upon his construction even if that was not the intention of the actor or speaker.

The parties' conduct from 29 June 2017

31 The Claimant accepted that he had "got his things together" and left the premises. This was reported to the Respondent by Mr Frankel.

32 The Claimant, in his phone call to the Respondent later that day, confirmed that he had left the premises in fraught circumstances and specifically asked if he could return to work the following day.

33 His first text to the Respondent was as follows

"hi ian, just to confirm im  
sorry about yesterday i  
wasnt feeling well what  
with ali sHouting and also  
pushed i was under stres  
will you let me know if you want

me back in.”

- 34 I thought it significant that in both the phone call and the text the Claimant was asking the Respondent to let him return to work.
- 35 On the basis of all the evidence and the surrounding circumstances concerning the Claimant’s conduct on 29 June 2017 I have concluded that a reasonable observer would have understood the Claimant to be resigning. In the real world many employees, particularly in the heat of the moment, do not state that they are resigning or intending to do so: gathering up one’s possessions and walking off the job is a not uncommon way of expressing that intention.
- 36 I take the view that the Claimant confirmed that that had been his intention at the time, and he anticipated it would be understood by the Respondent as a resignation, by his subsequent telephone call and text. In both instances he apologised for his conduct and asked whether the Respondent wanted him to return to work.
- 37 In light of all my above findings I accepted that on 2 July 2017, when he sent his text, the Respondent honestly and reasonably believed that the Claimant had resigned.
- 38 That text read,
- “Barry there is nothing to confirm, by walking out and showing lack of regard to us, made me realise that after all these years you are not happy working for look new, you need to understand that this was your choice and I do not accept your explanation that you were ill. This was not the end of your employment I expected, but one I know is mutual. Of course I will sort out holiday entitlement due and wages plus references. Ian”
- 39 This text was, therefore, an acceptance of the Claimant’s resignation. It is clearly in response to the Claimant’s actions and communications.
- 40 I cannot accept that it was a dismissal. It is not in appropriate terms. No reasonable person in the Claimant’s position, in all the circumstances of this case, particularly having acted as he had, could have honestly understood that text to be a dismissal. It tells the Claimant of the respondent’s view that the parting of their ways is of the Claimant’s doing.
- 41 I have also reached the conclusion that neither at this time nor later did the Respondent understand the Claimant’s telephone call or text to be a request to

withdraw his resignation. In any event, the Claimant did not advance such a contention.

- 42 It is clear that the Respondent reflected on the position that had been reached by 2 July 2017, which both parties asserted as the effective date of termination. On 4 July 2017 he made a conciliatory phone call to the Claimant and sought, at length, to persuade the Claimant to return. That was rebuffed by the Claimant.
- 43 I should add, for the sake of completeness, that if the Respondent's text of 2 July 2017 was in fact a dismissal:-
- 43.1 I am quite satisfied, in the circumstances of this case, that he had acted with sufficient alacrity to be entitled to retract that dismissal and offer to reinstate the Claimant.
- 43.2 The Claimant's refusal of that offer was wholly unreasonable: he had expressed a willingness to return to work on 2 July 2017. It seems internal relations were no bar to that.
- 43.3 The Claimant had wholly failed to mitigate his loss by refusing that offer and/or by admitting to me that he was not looking for work. It appeared that he was happy taking it easy and living on Pension Credits.
- 44 I have therefore determined that the Claimant was not dismissed: he resigned. His claims must be dismissed.

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Employment Judge Kurrein

26 January 2018