



EMPLOYMENT TRIBUNALS

Claimant
Mr D Mafham

Respondent
J Lochner Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Middlesbrough

On 15th January 2019

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances

For Claimant: in person

For Respondent: Ms H Hogben of Counsel

JUDGMENT

The claims of unfair and wrongful dismissal are not well founded and are dismissed.

The claim for compensation for untaken annual leave is well founded. I award compensation of £ 297 gross of tax and National Insurance (see also paragraph 2.12. of the Reasons)

REASONS

1 Claims, Relevant Law and Issues.

1.1. On 29 August 2018 the claimant presented claims of unfair dismissal, wrongful dismissal and failure to pay compensation for untaken annual leave . He worked for the respondent as a butcher, for 44 hours spread over 6 days a week, latterly earning £396 from 2011 until he says he was dismissed without notice on 20 June 2018. The respondent says he was not dismissed but resigned on that day.

1.2. Section 95 of the Employment Rights Act 1996 (the Act) includes:

(1) .. *an employee is dismissed by his employer if ..*

(a) *the contract under which he is employed is terminated by the employer (whether with or without notice),*

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

1.3. Martin –v- MBS Fastenings, held, whatever the respective words and actions of the employer and employee at the time, the question remains, “ Who really terminated the contract?” If the respondent’s words and conduct show it was terminating the contract there will be dismissal under 95(1)(a). Where words are ambiguous , it is neither the subjective intention of the speaker nor the subjective interpretation of the person to whom the words are spoken which is determinative of the question. It is what, objectively, an onlooker with knowledge of the facts and background would have taken the words to mean. Context is important. The burden of proving it is more likely than not there was a dismissal rests with the claimant .

1.4. Section 98 of the Act sets out the law of unfair dismissal. A contract of employment may be brought to an end only by the respondent on reasonable notice so unless it shows on balance of probability gross misconduct has occurred, the dismissal is wrongful and damages are the net pay for the notice period.

1.5. The Working Time Regulations 1998 say in Regulation 14 that where a worker's employment is terminated during the course of his leave year, and on the date on which the termination takes effect the proportion he has taken of the leave to which he is entitled in the leave year differs from the proportion of the leave year which has expired. his employer shall make him a payment in lieu of untaken leave calculated by a formula. Such sums are awarded gross of tax .

1.6. The full liability issues in a case of this nature would be:

1.6.1. Was the claimant dismissed ?

1.6.2. If so, what was the reason, or if more than one the principal reason, for the dismissal? Was it related to the employee’s conduct?

1.6.3.If so having regard to that reason, did the employer act reasonably in all the circumstances of the case:

- (a) in having reasonable grounds after a reasonable investigation for its beliefs
- (b) in following a fair procedure
- (c) in treating that reason as sufficient to warrant dismissal ?

1.6.4. Was the claimant in fact guilty of gross misconduct ? .

1.6.5. Has the claimant been paid correct compensation for untaken annual leave ?

1.7. Rule 2 of the Employment Tribunal Rules of Procedure 2013 provides their overriding objective is to enable Employment Tribunals to deal with cases fairly and justly, which includes, in so far as practicable –

- (a) ensuring the parties are on an equal footing
- (b) dealing with a case in ways which are in proportionate to the complexity or importance of the issues
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings
- (d) avoiding delay , so far as compatible with proper consideration of the issues
- (e) saving expense

I must seek to give the effect to these aims in interpreting, or exercising any power given by the Rules. I could see from reading the pleadings and the witness statements the main dispute was what happened on 20 June 2018. If the claimant failed to show it amounted to a dismissal, his claims of unfair and wrongful dismissal must fail. I took care to ensure he understood and freely consented that issue be decided first . It would help him to focus on one thing at a time and move on to the other issues, and the law they involved, only if he crossed the first hurdle.

2. Findings of Fact and Conclusions

2.1. I heard the evidence of the claimant and on behalf of the respondent Mr David Crone .I read the statement of his brother Mr Leo Crone (both are directors to whom I shall refer by their forenames only) and of their father Mr Leo Crone Senior (to whom I shall refer as Leo Senior). I had a small bundle of documents.

2.2. The statement the claimant emailed to the Tribunal contains some errors of spelling and grammar but , more importantly , as he accepted the dates in it were one week earlier than they should have been . When corrected it reads:

On Saturday 16th June 2018 I arrived to work under the influence of Drink and Drugs to the point where I was unsure what state of mind I was in.

Early that morning I got in to a disagreement with Leo Senior which led to raised voices in front of customers. Dave the Co-Owner who is responsible when Leo junior is away, did not step in to calm the situation down. Nothing else was said that day, I carried on working as normal until 5pm for the whole of Saturday 16th June 2018 Dave didn't mention anything about my behaviour or foul language or the fact that he knew I was under the influence of Drink and drugs.

I arrived at work on Monday the 18th June 2018 where Leo junior had returned from his holiday. I was spoken to in the shop by Leo Junior and Dave about my behaviour on Saturday which ended with them telling me I had received my first verbal warning for my foul language which was unusual as I have never changed my behaviour or attitude over the last 7 years I had been there. I worked the rest of Monday as usual and nothing else was said.

I worked all day Tuesday 19th June 2018 as normal and Dave picked up on my foul language on one occasion.

Arrived at work on Wednesday 20th June 2018, as normal having a bit of a laughter with Jason which led to us both swearing. Immediately Dave picked up on me. He pulled me to one side and that's when he said he doesn't think it's working for me here. I asked if he wanted me to leave and his reply was "I think it's for the best".

Under no circumstances did I resign.

2.3. The claim form differs as to the end of the exchange. Again with grammar spelling and date corrected, it says on Wednesday 20 June: *"I got told I was being given a written warning. When I asked what for, he said it was the same thing as Monday. So I told him I had a verbal for that and he said I was getting it . I asked what his problem was and he asked me to leave so I left."*

2.4. The respondent says the claimant was warned on 18 June about his language in the public area on 16 June . On Wednesday, 20 June when he did the same again he was told a formal disciplinary process was to be initiated at which point *he took off his apron indicating that he was resigning and requesting his P 45 be sent to him.*

2.5. The claimant was at pains to emphasise he had always used bad language at work but not been disciplined for it until the week in question .The workplace is an open plan area with only five employees but to which members of the public have access. The claimant accepts he had drink problem. The respondent too accepts he has frequently come to work under the influence of drink but not in such a bad state as to be stopped from working. They deny they knew he was also using illegal drugs .

2.6. Be that as it may, they had given him considerable leeway in the past but say his use of bad language had become louder and more in the hearing of people whom it may offend. Bad language can be used in many workplaces simply as an expletive figure of speech but there is a difference between that and it being used in a way which may offend. In his oral evidence the claimant said Leo Senior had been picking on him not only about his language. Leo Senior works on a casual basis for his sons

2.7. When David gave his evidence, on all material points he was not very far away from the evidence of the claimant. He accepted he probably did say something to the effect "it isn't working" but referring not to the relationship as a whole but the fact informal warnings seemed to be having no effect at all on the claimant's behaviour. He then said he was going to ask his brother Leo to get the paperwork to give the claimant a first written warning. At that point the claimant said "if you don't want me here perhaps it's best I should leave" to which David replied "I accept that".

2.8. Ms Hogben in cross examination took the claimant to a letter he wrote the day after, which does not even mention dismissal but is simply asking for his final payslip and holiday pay. She suggests the claimant has made up this claim. I believe that, looking back on it, his recollection is wrong and he is reading into what was said something which was not only not the intention of David but not anything any objective observer would view as termination by the employer.

2.9. My conclusion is there was no such dismissal. On 20 June the claimant was annoyed he was being confronted again about his language and told a formal disciplinary step would be taken. He felt he was not wanted and said, impetuously, he would leave. In colloquial terms, he jumped long before he was pushed.

2.10. The claimant's alternative was to argue s. 95 (1) (c) applied but, correctly in my view, he did not. An employee is "entitled" to terminate only if the employer has committed a fundamental breach of contract Western Excavating Ltd v Sharpe [1978] IRLR 27. Taking issue with an employee's behaviour and even threatening disciplinary action will only be a fundamental breach of contract if done without reasonable and proper cause. In this case they clearly did have such cause to tell the claimant he would be given a written warning for repeated misconduct of the same nature as he had been verbally warned for less than a week earlier.

2.11. As for the claim for holiday pay, the response form said the money was awaiting collection, not that the claim is wrong. The leave year started on 1 April so 81 days of the year had elapsed by the date of termination. A year's entitlement would be 5.6 weeks and the proportion to which he was entitled by the date of termination was 1.24 weeks which converts, on a six-day week, to 7.5 days. In 2018, 2 April was Easter Monday and there were two bank holidays in May so he had 3 days paid leave. That apart he took no paid leave. 4.5 days based on a six-day week is three quarters of a week. That comes to £297 gross.

2.12. The parties agree a payment has been made to him since the proceedings were issued. It is correct tax and national insurance were deducted. As nobody today had details of how the final holiday pay was worked out, they agreed I should give a judgment for the full amount but note any net sum already paid to the claimant should be set against the sum I have awarded.

Case Number: 2501666/18

TM Garnon Employment Judge
Date signed 15 January 2019



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2501666/2018**

Name of case(s): **Mr D Mafham** v **J.Lochner Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **23 January 2019**

"the calculation day" is: **24 January 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.