



EMPLOYMENT TRIBUNALS

Claimant: Mr A Poznanski

Respondent: Exceed Logistics Limited

Heard at: Lincoln on 20 September 2018 and Nottingham on 14 December 2018

Before: Employment Judge K Ayre (sitting alone)

Representatives

Claimant: Mr Wilkshire (Counsel)

Respondent: Mr Gidney (Counsel)

Polish interpreters

Magdalena Johnson on 20 September 2018

Krzysztof Zielinski on 14 December 2018

JUDGMENT

1. The claim for a redundancy payment is dismissed on withdrawal.
2. The claim for unpaid holiday pay is dismissed upon withdrawal.
3. The claim for unlawful deduction from wages, with the exception of the claim for £80.13 in respect of a fuel deduction, is dismissed upon withdrawal.
4. The Respondent has made an unlawful deduction from the Claimant's wages and is ordered to pay the sum of £80.13 to the Claimant.
5. The Claimant was not dismissed by the Respondent. His claim of unfair dismissal fails.

REASONS

The Proceedings

1. By claim form dated 2 March 2018 the Claimant brought claims for unfair dismissal, notice pay, holiday pay, arrears of pay and 'other payments'. The claims were resisted by the Respondent.
2. The case was listed for a 1 day final hearing on 20 September 2018. There was an agreed bundle of documents running to 92 pages.
3. There were 7 witness statements produced at the hearing, although 2 of those statements were very brief and related to witnesses who were not in attendance, Zbigniew Pawlowski and Andrzej Klimek. I have read all of the witness statements including those of the 2 witnesses who were not in attendance. I have placed no weight on the evidence of the witnesses who did not attend to be cross examined.
4. The Tribunal heard evidence from the Claimant and from Lucyna Rejdych for the Claimant; and for the Respondent from Matthew Boulter, Phillip Evans and Mateusz Lotycz.
5. It was not possible to conclude the evidence and submissions on 20 September and a further date of 14 December was fixed. Oral judgment was given at the end of the hearing on 14 December. Written reasons were subsequently requested.

The issues

6. The issues that fell to be determined in this case were as follows:-

Unfair dismissal

- a. Was the Claimant dismissed? The Claimant asserted that he had been dismissed. The Respondent asserted that he had resigned. There was no assertion made on behalf of the Claimant that if the Claimant did resign he did so in circumstances such as would give rise to a claim of constructive dismissal. I have therefore not considered a complaint of constructive dismissal.
- b. If the Claimant was dismissed, was he dismissed for a potentially fair reason? The Respondent relied upon conduct as the reason for dismissal.
- c. In all the circumstances, did the Respondent act reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the Claimant?
- d. If the Claimant was unfairly dismissed, what sums, if any, should he be awarded by way of basic and / or compensatory awards, and should any reductions be made for Polkey and / or contributory conduct

Unlawful deduction from wages

- e. Was the Respondent entitled to deduct the sum of £80.13 from the Claimant's last salary payment in respect of the fuel lost from the lorry driven by the Claimant?

Findings of fact

7. The Claimant was employed by the Respondent from 27 April 2009 until 5 December 2017 as a LGV Class 1 Driver.
8. He was initially employed by a company called Benhaul (Immingham) Limited which is an associated company of the Respondent. In June 2017 he transferred to the Respondent's employment pursuant to a TUPE transfer and retained his continuity of service.
9. The Claimant was employed in accordance with a written contract of employment which did not contain any provision entitling the Respondent to make deductions or withhold sums from the Claimant's wages except in relation to excess holiday that had been taken on termination of employment.
10. The Respondent is a haulage company based in Stallingborough in North East Lincolnshire. At the relevant time it had 70 staff, 7 of whom were in administrative roles and 63 of whom were drivers. Each driver was allocated a vehicle to drive and was given a key to that vehicle. Drivers were not given keys to other vehicles.
11. The Respondent, over a period of time, suffered large losses of fuel from its vehicles. It suspected that there was theft of fuel taking place by both employees and non-employees.
12. Fuel can be removed from the tank of a lorry by somebody syphoning the fuel out of the tank using a pump or a pipe. In order to gain access to the fuel tank a key is required. If the individual does not have a key then it is likely that they will damage the fuel tank trying to get into it.
13. Theft is a common problem in the haulage business and the fuel which is stolen is used either for resale or for use in individuals' own cars. There is a micro economy in the sale of stolen diesel. At the same time, HGV drivers such as the Claimant are in high demand as there is a shortage of them in the area.
14. The Respondent became increasingly concerned about the amount of fuel that it was losing to theft. In September or October 2017 the Respondent installed a new TomTom Telematic system called Webfleet, which I shall refer to hereafter as 'the TomTom system'. The TomTom system was installed at a cost of approximately £3,000 a month to the Respondent. It is used worldwide by hauliers and has won numerous awards. It is ISO 27001 certified and DVSA approved.
15. The system works through a device which is inserted into the vehicle itself and which produces a large amount of data including information about fuel usage within the vehicle. It can also produce information about fuel efficiency, driving style and, importantly, fuel losses. If there is a sudden reduction in the amount of fuel in the tank the TomTom system picks it up

immediately if the loss equates to more than 5% of the fuel in the tank. If the fuel level in the tank drops suddenly, this is an indicator that a theft may have occurred.

16. The Respondent has set up the TomTom system so that if there is a sudden drop in fuel in a tank the system generates a notification that goes to certain individuals including Matthew Boulter and Phil Evans.
17. When the system was introduced, the Respondent told its drivers about it and a large number of drivers decided to leave the business. The Claimant however, remained in employment.
18. Since the TomTom system has been introduced, the Respondent has identified 8 individuals other than the Claimant who were suspected to have stolen fuel from their vehicles. None of those 8 has been dismissed by the Respondent. The approach taken by the Respondent has been to speak to each of the individuals to see whether they admitted that they had taken the fuel. If they did accept that they had taken the fuel and agreed not to do it in the future then they would be allowed to remain in employment.
19. Of the 8 individuals, none have been dismissed, 5 chose to resign and 3 apologised and are still employed by the Respondent. The approach that was taken with the Claimant was the same as had been taken in other cases. The Respondent's position is that does not wish to lose drivers and therefore even if the driver admits to theft he would not be dismissed.
20. The Respondent's vehicles are kept overnight in the Respondent's yard if they are not out on the road. The yard is locked and drivers have to telephone to get access to it. The Respondent keeps records of access to the yard. Drivers are allowed to sleep in their cabs and the Claimant did so.
21. On the 27 November 2017 the TomTom report for the Claimant's vehicle showed that the vehicle was filled with fuel shortly before 7pm. The vehicle was then parked overnight in the yard and the Claimant slept in the vehicle.
22. At 04:49am on 28 November the vehicle was switched on again and it was recorded as idling. At 04:51am there was an unexpected fuel loss of 67.9 litres or just over 14% of the fuel in the tank. The loss of 67.9 litres of fuel is unusual and the Claimant accepted in his evidence that there could be no other explanation for such a drop in fuel than theft.
23. The Claimant's tachograph records show that the Claimant inserted his tachograph into the lorry at 04:36 that morning. The vehicle was only driven by the Claimant that day and the TomTom system picked up an unexpected fuel loss shortly after the Claimant began driving.
24. In light of these facts it was not unreasonable for the Respondent to consider that the Claimant may have been responsible for taking the fuel from the vehicle and to question him about it. There was no evidence of any leakages from the fuel tank, of any theft by a third party or of any damage to the fuel tank, and the Claimant certainly did not report any.

The fuel tank on the Claimant's vehicle was not damaged. Anybody without a key would have had to damage the tank to get access to the fuel. Only the Claimant had a key.

25. At the time that the fuel disappeared, the Claimant's car was parked in the yard/ The Respondent suspected that the Claimant may have taken the fuel to fill up his car as he was about to go on holiday.
26. On 5 December the Claimant was questioned about the loss of fuel. Matthew Boulter and Phil Evans met with him in the boardroom of the Respondent's offices in Stallingborough. They asked Mateusz Lotycz to be present as an interpreter.
27. Going into that meeting, there was absolutely no intention on the part of either Matthew Boulter or Phil Evans to dismiss the Claimant. The Claimant was a long serving and well respected employee who they liked and did not wish to lose. In addition, given the difficulties in recruiting and retaining good HGV drivers, the Respondent was willing to "forgive and forget" if the Claimant accepted responsibility for taking the fuel and agreed not to do it again.
28. The Claimant was asked about the missing fuel, and it was clear that he was offended by the suggestion that he may have stolen it. He told the Respondent that he had been driving for 40 years, had never stolen fuel, that the Respondent's computer systems lied and that what he was being shown was not proof of anything. He was shown the TomTom and tachograph records but refused to accept what they said and repeated "*no, no, no, I drive*", suggesting that because the tachograph record showed him as driving at 04:51 he could not have been syphoning off petrol at that time. There was however an explanation for this in that there was sometimes a delay of a few moments between the loss of fuel and the system picking it up.
29. The Claimant did not offer any explanation during the meeting as to how the fuel could have gone missing. At one point during the meeting there was a discussion about calling the police and Phil Evans left to call the police. The police however said that this was a civil matter and did not wish to get involved.
30. The meeting lasted on and off for several hours. There were a number of breaks in the meeting and at the end of the meeting the Claimant stormed out. He was found in the yard emptying his personal belongings out of the cab of his lorry. At this point the Respondent tried to demonstrate to him how the TomTom system works by asking engineers to take some fuel out of the truck and then showing how, after switching the engine back on and driving round the yard a couple of times, the fuel loss would then be picked up.
31. The Claimant would not wait for the results of this test and stated "*I go*" and "*I finish*" in English. He also told Mateusz in Polish that he was resigning.
32. There had been a discussion earlier about the Claimant being suspended on full pay if he was not willing to accept that he had stolen the fuel. This

was in my view an entirely appropriate option for the Respondent to consider in light of the potential theft.

33. The Claimant clearly was not interested in working for the Respondent any longer because he felt he had been called a liar. The Claimant walked out of the Respondent's premises having taken all of his personal belongings out of his cab and put them into his personal car. He did not return to work. He made no further attempt to contact the Respondent after 5 December.
34. The Claimant suggested that during the meeting on 5 December Mr Evans had become angry, had banged the table and had indeed kicked the table over. I do not accept his evidence on this point. Rather, I prefer, and accept, the Respondent's evidence on this point. I find that Mr Evans did hit the table when becoming frustrated that the Claimant would just not accept the evidence before him. I also find that he shouted at the Claimant to calm down, but this was in response to the Claimant shouting during the meeting. I do not find that Mr Evans kicked the table over.
35. Two days after the meeting on 5 December, Mr Evans wrote to the Claimant. The letter stated that the Claimant had been found to be stealing fuel from the company. The letter also referred to the Claimant having been given every opportunity to admit the theft but having refused, quoting *"You do not care and that it is of no use to you"*.
36. The letter went on to say that the company had offered to suspend the Claimant on full pay whilst a full investigation took place and that the Claimant had refused that. It finished with a rather unfortunate comment *"You have left the company with little option other than to terminate your contract with immediate effect and notify the police forthwith"*.
37. In evidence Mr Evans said that the reference to the company terminating the contract had been included by mistake. Mr Evans had previously been involved in a Tribunal where somebody had walked out and no such letter had been sent, and he was concerned to avoid any uncertainty as to whether there was an ongoing employment relationship between the Claimant and the Respondent. I accept his evidence on that point.
38. The Claimant was paid up to 5 December and a deduction was made from his pay of £80.31 in respect of the cost of the fuel.

The law

Unfair dismissal

39. The relevant law is set out in Section 94 of the Employment Rights Act 1996 ("**the ERA**") which provides that an employee has the right not to be unfairly dismissed by his employer. Section 95 of the ERA sets out the circumstances in which an employee is dismissed. The one relied upon by the Claimant in this case is Section 95 1(a), namely that the contract under which the employee is employed is terminated by the employer whether with or without notice. The Claimant did not seek to rely in the alternative on Section 95 1(c) constructive dismissal.

40. The Respondent's representative had helpfully prepared written submissions for which the Tribunal is grateful. The Claimant's representative equally helpfully accepted that the legal principles to be applied were as set out in the Respondent's submissions.
41. In relation to the key issue of whether the Claimant resigned or was dismissed, I was referred to the case of *Martin v Glynwed Distribution Ltd [1983] IRLR 198* in which Sir John Donaldson held that whatever the respected actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, namely 'who really ended the contract of employment?'. I was also referred to *J&J Stern v Simpson [1983] IRLR 52* in which the test was expressed as being 'to construe the words in all the circumstances of the case in order to decide whether or not that there has been a dismissal'; and to the Court of Appeal decision in *Willoughby v CF Capital Ltd [2011] IRLR 1985* as authority for the position that a notice of resignation or dismissal (whether oral or in writing) has effect according to the ordinary interpretation of its terms.
42. A resignation is a termination of contract by the employee and can be communicated either by words or by conduct. It need not be expressed in a formal way - see *Johnson v Monty Smith Garages Ltd EAT657/79*.
43. In order for there to be a dismissal there needs to be an unambiguous communication by the employer, either through words or, of a termination of employment.
44. In a case such as this in which dismissal is disputed, the burden of proving that there has been a dismissal lies with the employee.

Unlawful deduction from wages

45. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

46. I find that the Claimant, through his conduct on 5 December, resigned from his employment. He walked out of the meeting with the managers, he removed his personal belongings from the cab and he refused to engage in any further dialogue with the Respondent. He told Mateusz Lotycz that he was resigning in Polish and told the others present in the meeting in English "I go" and "I leave" or words to that effect.
47. I do not consider that he was forced to resign or encouraged to do so. There was no evidence of any dishonesty or deception on behalf of the Respondent. Rather, he resigned because he was not happy that he was being asked about suspected theft in the meeting. There was no dismissal by the Respondent. The Respondent went into the meeting on 5 December with the intention of clearing the air with the Claimant and seeking an acceptance from him that he had taken the fuel, so that he

could then remain in employment. This was the approach that had been taken with 8 other employees.

48. There were no words of unambiguous dismissal, nor did the Respondent dismiss the Claimant through its conduct. The wording at the end of the letter that was sent after 5 December is unfortunate in that it refers to termination of contract, but I accept the explanation given by the Respondent for the use of those words. On balance therefore I find that the Claimant resigned on 5 December with immediate effect.
49. In relation to the claim for unlawful deduction from wages, I find that the Respondent was not entitled to make a deduction from the Claimant's wages in relation to the cost of the fuel that disappeared from the tank of the Claimant's lorry. The Claimant's contract of employment does not contain a provision which authorises the Respondent to make such a deduction. I have not seen any other evidence that the Claimant had previously agreed in writing for the deduction of the fuel costs from the Claimant's final salary.
50. I therefore find that the deduction was unauthorised. There was therefore an unlawful deduction in the sum of £80.13 from the Claimant's wages, and the Respondent is ordered to pay that sum to the Claimant.

Employment Judge K Ayre

Date: 24 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE