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EMPLOYMENT TRIBUNALS

Claimant: Mr Ashley Charles

Respondent: Steven Swaine t/a Airtec Plumbing & Heating

Heard at: East London Hearing Centre

On: 4 October 2018

Before: Employment Judge Ferguson

JUDGMENT having been sent to the parties on 18 October 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1. By a claim form presented on 21 February 2018 following a period of early conciliation from 20 December 2017 to 3 February 2018 the Claimant (whose date of birth is 27 November 1985) brought complaints of automatic unfair dismissal (health and safety, protected disclosures & minimum wage) wrongful dismissal, failure to pay holiday pay and unlawful deduction from wages. The Respondent defended the claims.
2. The issues were agreed at a Preliminary Hearing on 14 May 2018 but have been narrowed down during the course of the Final Hearing. The Claimant confirmed that he only relied on the National Minimum Wage matters for his unfair dismissal complaint. The holiday pay complaint was withdrawn and the wages complaint related to failure to enrol the Claimant into a pension scheme, which he accepted was not matter over which the Tribunal has jurisdiction.

3. The issues that remained in dispute are as follows:

Unfair Dismissal

- a. Did the Respondent dismiss the Claimant?
- b. If not, did the Claimant resign in circumstances in which he was entitled to terminate his contract without notice by reason of the Respondent's conduct (constructive dismissal)?
 - i. The Claimant contends that the Respondent breached the express terms of the Claimant's contract by unilaterally reducing his wages and that the Respondent breached the implied term of trust and confidence between the employer and employee by acting in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
 - ii. The Respondent contends that the Claimant resigned, having lost his temper.
- c. Did the Respondent breach a fundamental term of the Claimant's contract?
- d. Did the Claimant resign in response to the breach?
- e. Did the Claimant affirm the contract?
- f. If the Claimant was dismissed, was the principal reason for his dismissal one of the following:
 - i. The Claimant alleged that the Respondent had infringed the Claimant's statutory right not to suffer unlawful deductions from wages (s104 of the Employment Rights Act 1996 ("ERA"));
 - ii. Action was taken, or was proposed to be taken, by or on behalf of the Claimant with a view to securing the Claimant's right to the National Minimum Wage (s104A(1)(a) ERA);
 - iii. The Claimant qualified, or might have qualified, for the National Minimum Wage or a particular rate of it (s104A(1)(c) ERA).

Wrongful Dismissal

- g. If the Claimant was dismissed or constructively dismissed it is not in dispute that he was entitled to one week's paid statutory notice and that he was not paid any notice pay.

Remedy

- h. If the Claimant was unfairly dismissed, should any compensatory reward be reduced on the basis that he would have been dismissed in any event?
- i. The Respondent accepts that he did not provide the Claimant with a written statement of employment particulars. If any part of the Claimant's claim is successful, should he be awarded two or four weeks' pay pursuant to s38 of the Employment Act 2002?
- j. It was agreed to leave other matters on remedy, including mitigation, until after the liability judgment.

4. I heard evidence from the Claimant and his partner Kezia Fenwick. I also heard from the Respondent. The Respondent sought to rely on a signed witness statement from Ben Hinson but since he did not attend the Tribunal and the Claimant has not had the opportunity to cross examine him I have given it very little weight.

THE LAW

5. Section 95(1)(c) of the ERA provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—

...
(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.

6. Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

7. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

- 7.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- 7.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.
- 7.3 The employee must leave in response to the breach.
- 7.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

8. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

9. Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

10. Sections 104 and 104A ERA provides, so far as relevant:

104 - Assertion of Statutory Rights

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
 - (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
 - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
- (2) It is immaterial for the purposes of subsection (1)—
 - (a) whether or not the employee has the right, or
 - (b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
- (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
- (4) The following are relevant statutory rights for the purposes of this section—
 - (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal],
 - (b) ...

Section 104A - The national minimum wage.

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

- (a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employees to which this section applies; or
 - ...
 - (c) the employee qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.
- (2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—
- (a) whether or not the employee has the right, or
 - (b) whether or not the right has been infringed,
- but, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.
- (3) The following are the rights to which this section applies—
- (a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal; and
 - (b) any right conferred by section 17 of the National Minimum Wage Act 1998 (worker receiving less than national minimum wage entitled to additional remuneration).

11. The National Minimum Wage at the relevant time for workers aged 25 and over was £7.50 an hour. For apprentices it was £3.50 an hour.

THE FACTS

12. The Respondent operates three businesses: JB Spares, a plumbing and parts shop, Airtec Plumbing & Heating, which provides plumbing services, and Mersea Media, a newspaper business. Across the three, at the time that the Claimant worked for him, the Respondent had approximately eight or nine employees, one or two apprentices and a number of independent contractors. He candidly admits that none of his employees was provided with a written statement of employment particulars and no payslips were given unless an employee asked for one.

13. The Claimant began working for the Respondent in the shop on 10 June 2017. It was agreed that he would work 10am to 5pm, Monday to Friday with a one-hour unpaid lunchbreak each day. He would be paid £8 an hour. Soon after the start of his employment the Claimant was moved over to the plumbing business, Airtec. The Claimant states that in both business he witnessed very poor health and safety practice, including colleagues using dangerous methods for working at height. Those matters are not relevant to the Claimant's complaints so I make no findings about them.

14. On 1 December 2017 the Respondent called the Claimant into his office. There is a dispute about exactly what was said during this meeting. The Claimant's account is as follows: the Respondent said he wanted to take the Claimant on as a plumbing apprentice but that would mean that his pay would drop to £140 per week (from £280 net per week) as of 4 December. The Claimant said that he could not do that without more notice and the Respondent said that he would think about it over the weekend and get back to the Claimant. The Respondent told the Claimant that he could not afford to continue paying the Claimant £280 per week, so if he wanted to continue working for him he would have to accept the £140 per week. The Claimant says that as he did not agree to the reduction in pay and the Respondent said that he would think about it over the weekend, he assumed that he continued to be employed on the same terms as before i.e. £280 net per week. On 15th December however, the Claimant checked his bank account and saw that he had only been paid £140 per week. He texted the Respondent to query the amount and the Respondent replied saying that he had moved the Claimant onto an apprenticeship wage. The Claimant was shocked by this and sent the Respondent the following message:

"I don't see how I can on apprenticeship wage when I am not even in-rolled on the course yet, which means I'm still working for you 40hrs a week which means worse ways I should be on min wage which is £7.50 an hour, I also have a week in hand at £280.00 from when I started in July? And the last time we spoke about college you said u'd think about it over the weekend and nothings else has been said since, so I assumed I'd be starting after Xmas. I said to you money would be a struggle at late notice having four children to support plus bills..."

15. The Claimant and Respondent then had a discussion in the office in which the Respondent said that was the way it was and he told the Claimant he had two options: he could work the rest of the week on his usual pay of £280, and he would not have a job in the New Year, or accept the £140 a week and continue to be employed. The Claimant says he felt like the Respondent was exploiting him but he had a lot of bills to pay and the prospect of no income in the New Year was daunting so he reluctantly sent the Respondent a text message as follows:

"U alright Steve, I just spoke to the Mrs and we can muddle our way through this month only 2wks left. BUT! I do want this apprenticeship with you & obviously for the £140.00 a wk. Which I appreciate. Just wish i'd known sooner lol. So the £140.00 you've paid me so far is right as you paid me full last wk. When should I bring in my detail for you".

16. The Respondent accepts the gist of the Claimant's account, but claims that he put two options to the Claimant during the meeting on 1 December, i.e. continuing his existing wage but not be continue to be employed after Christmas, or move onto the apprenticeship wage from 4 December, and he claims the Claimant confirmed later that day that he was happy to move onto the apprenticeship wage. I do not accept that. The Claimant's account is consistent with the text messages that were sent. If he had agreed to the lower amount it would not have come as a surprise to him on 15 December and the text exchanges of that day would have not taken place. I accept the Claimant's version of events.

17. It is not in dispute that the Claimant was never enrolled in a college as an apprentice and never had an apprenticeship agreement. He was not under the supervision of a plumber and he continued to do the same work that he had done before, which was mostly clearing up at the shop and on site at plumbing jobs. He was also asked to do other jobs, including delivering newspapers for Mersea Media. The Respondent says it would have been difficult to get the Claimant enrolled before Christmas but that he would have sorted everything out in January.

18. The Claimant's evidence, which I accept, was that he began to worry about the arrangement over the weekend over the weekend of 16/17 December and decided to speak to the Respondent on the Monday about the apprenticeship scheme. On Monday 18 December the Claimant spoke to the Respondent, who said he had not yet spoken to the college and suggested that the Claimant might not need to go to college at all. He said that they would discuss it in the New Year. The Respondent denies saying that the Claimant might not need to go to college but accepts that he had not taken any steps to enrol the Claimant by this stage.

19. On Wednesday 20 December the Claimant was told by another employee that the Respondent wanted him to clear out and wash a van he was looking to sell. The Claimant's evidence is that "at this point, I felt like he was exploiting me beyond a point that I was happy to accept". The Claimant confronted the Respondent and said that he felt the Respondent was using him as a cheap labourer and he was not willing to work for £140.00 without any official apprenticeship scheme because the Respondent was just trying to get out of paying National Minimum Wage. The Respondent said that if the Claimant did not want to accept the £140.00 per week that was fine but the Claimant would not have a job in January. The Respondent does not dispute the content of the conversation but claims that the Claimant was aggressive and lost his temper. The Claimant's partner arrived and also discussed the matter with the Respondent. It is clear that the conversation was extremely heated. The Claimant said he was not willing to accept £140.00 per week whilst continuing to do the type of work that he was doing. The Respondent told him to return later that day to collect his outstanding wages.

20. The Claimant returned and was paid £420.00. It is agreed that that sum amounted to the wages owed to the Claimant until 20 December at a rate of £280 per week.

CONCLUSIONS

21. The first issue is whether the Claimant was dismissed.

22. On the basis of the facts above I find that the Claimant agreed on 15 December to reduce his pay to £140.00, backdated to the 4 December, on the basis that he would be an apprentice. I also find that the Respondent had no genuine intention of enrolling the Claimant as an apprentice. His only motivation was saving money and he took no steps towards putting the Claimant on an official apprenticeship scheme at all. There is no reason why he could not have done that in early December, if, as he claims, he believed that the Claimant had agreed to the apprentice wage on 1 December. By his own admission the Respondent has failed to comply with even the basic requirements of employment law. He also admitted that he did not pay National Insurance in respect

of the Claimant until well after his employment had ended in or around July 2018. I consider that the Respondent has demonstrated a total disregard for his legal obligations as an employer and I find that he began to pay the Claimant £140.00 per week knowing that the Claimant was not an apprentice and with no genuine intention to sign him up to an apprenticeship scheme.

23. It is self-evident that the Respondent's conduct, refusal either to pay the Claimant the National Minimum Wage or to enrol him as an apprentice, amounted to a fundamental breach of contract entitling the Claimant to treat himself as constructively dismissed. The Claimant clearly resigned in response to that conduct. Having initially agreeing to the change in his salary he then realised that he was not in fact on any apprenticeship scheme and the Respondent confirmed that he would not pay the Claimant the National Minimum Wage. He left in response to that. It is possible that the Respondent's conduct in fact amounted to a dismissal, but it makes no difference to the outcome whether he was actually or constructively dismissed. I accept that he should be treated as having been dismissed on 20 December 2017.

24. I also find that the reason or principal reason for the Claimant's dismissal was the fact that he had alleged that the Respondent had infringed his right not to suffer unlawful deductions from wages and/or the fact that Claimant qualified for the National Minimum Wage at the ordinary rate of £7.50 an hour. Either reason or both renders the dismissal automatically unfair.

25. The more difficult question is what would have happened if the Claimant had not been dismissed. The Respondent says that he could not continue to employ the Claimant at the National Minimum Wage so he would have dismissed him. The Claimant has accepted that the Respondent said at the time that was the position. The Claimant does not accept, however, that that was the truth and claims that it was simply a device to keep the Claimant working at a lower rate of pay. I agree. I have found above that the Respondent had no genuine intention of enrolling the Claimant as a plumber's apprentice. The Respondent also repeatedly said that he wanted to continue to employ the Claimant. His argument was that the Claimant was not sufficiently valuable to him to justify his continued employment at £80.00 a day. He accepted in his evidence, however, that he had taken no other steps around that time to cut costs and indeed that he had recently recruited another member of staff.

26. Having said that, the Respondent also gave unchallenged evidence that he reduced his staff by three employees about six months later and he has not recruited anyone since the Claimant left. I consider that if the Claimant had not been unfairly dismissed he would have continued to work for the Respondent for some time, but not indefinitely. Doing the best, I can, I estimate that the Claimant would have continued to work for the Respondent on his original salary of £280.00 per week for a further six months. i.e. until the 20 June 2018.

27. The Respondent says he could not have continued to employ the Claimant because of his conduct on 20 December, but he cannot rely on the manner of the Claimant's resignation or dismissal as a reason why the Claimant's employment would have ended in any event. I must consider a hypothetical scenario in which the Respondent had not acted in fundamental breach of the Claimant's contract of

employment. In that scenario I consider that the Claimant would have continued in employment for a further six months.

Wrongful dismissal

28. As noted above it is not in dispute that if the Claimant was dismissed he is entitled to one week's notice pay. Although by the time of dismissal he had agreed to reduce his pay to £140.00 a week, that agreement was unlawful because it was below the National Minimum Wage he is therefore entitled to one week's pay at the National Minimum Wage.

29. It is also not in dispute that the Respondent failed to provide a written statement of initial employment particulars. He has given no excuse of not doing so and he clearly had no intention to do so at any stage. I consider it just and equitable to award the higher amount of four weeks' pay.

Mitigation

30. I accept that the Claimant has made reasonable efforts to mitigate his losses. He relocated in February 2018 as he was out of work and could not afford the rent in Colchester. That was not unreasonable and it meant that there was little point in looking for work until he had moved. Once he had moved, he applied for several jobs and he signed up with the job centre and one agency.

31. The Respondent has not produced any evidence of jobs that the Claimant could have applied for but did not. There is no evidence that the Claimant could have found work within the six-month period for which I have found he would have been working for the Respondent if he had not been dismissed.

32. There were no other matters on remedy in dispute.

33. The Claimant is therefore awarded a compensatory award of £7,280.00. That is 26 weeks at £280.00 per week. He is also awarded four weeks' pay under Section 38 of the Employment Act 2002. At the date of dismissal, he should have been receiving the National Minimum Wage so I calculate his gross pay at that rate. That would be £300.00 per week and the award is £1200. 00.

34. The Claimant is awarded £8480.00 in total

Employment Judge Ferguson

13 February 2019