



EMPLOYMENT TRIBUNALS

Claimant: Mr DE Lynch

Respondent: Harkers Transport Ltd

Heard at: Teesside Justice Centre

On: 7th January 2019

Before: Employment Judge AE Pitt

Members: Mrs S Mee
Mr R Dobson

Representation

Claimant: In person assisted by Ms Alderson (his daughter)

Respondent: Mr A Crammond of Counsel

JUDGMENT

- 1.The respondent did not breach the claimant's contract of employment
- 2.The claimant is not entitled to recover any wages from the respondent

REASONS

1. This is a further hearing in relation to the claimant's claims against his employer, Harkers Transport. At a previous hearing the Tribunal dismissed the claimant's claims for age discrimination and unfair dismissal. Outstanding was a claim for breach of contract namely unpaid wages.
2. The Tribunals first judgment was as follows:
The claimant appears to have understood that on 31 August he was dismissed. The Tribunal are not entirely satisfied with this argument because he then went on to produce the holding letter from DVLA; if he believed he was dismissed that would not be required. The Tribunal therefore concluded that the claimant was not dismissed on 31st August or at all. That being so the claimant is either still employed and available to work for the respondent at such a time he can establish that he has the requisite driving licence; or he resigned sometime later because of his letter dated; or the contract was frustrated by non-performance.

As the claimant was not on a zero hours contract and was not dismissed on 31st August, he is entitled to recover his ongoing wages. The Tribunal has not heard any argument advanced as to what date this should be; the Tribunal will leave the issue for the parties to resolve initially but if there is a failure to agree further argument will be required.

3. The Tribunal heard evidence from the claimant and Sam Wilson, Transport Manger for the respondent. The parties also provided the Tribunal with additional documents including correspondence with DVLA; correspondence between the respondent and the claimant and medical notes and occupational health reports for the claimant.
4. The Tribunal made the following findings in relation to the period from August to the ET1 being presented on 1st December:
 5. *On 31 August the claimant was asked about his driving licence by Ms Marr. It was agreed he would contact DVLA for an update. The claimant did this and asked DVLA to send a copy to the respondent. For several reasons DVLA could not send a copy direct to the respondent, a copy was however was sent to the claimant. At this time Mr Bruce had a conversation with Mr Wilson, the outcome of which was that Mr Wilson said the claimant could not drive until he could prove he could drive. Mr Bruce spoke to the claimant, again there is a dispute as to the content of the conversation. Mr Bruce asserts in his witness statement that he repeated the words of Mr Watson, whilst the claimant asserts that he believed he was finished; whatever the content of the conversation it is clear to the Tribunal that the claimant understood he had been dismissed and again this can be the only reason he acted in the manner he did.*
 6. *Following the events on 31 August the respondent did not offer work to the claimant nor did he ask for work. He did however contact the DVLA and the Tribunal accept he sent a letter to the respondent on 4 September which included a holding letter from the DVLA; the respondent's evidence is they never received this letter. The Tribunal has, however, seen a signed for receipt from the Post Office dated 5th September; this indicates that the letter was delivered to Harkers as the word Harkers is printed in the relevant box. The respondents evidence as to the non-receipt was unconvincing, none of the witnesses from whom we heard dealt with the post, this was obviously an administrative job. If there had been a going problem with the Post Office as the respondent asserts there was no evidence presented to the Tribunal of representations made to the Post Office of this or any attempt to resolve them themselves such as creating their own letter box or a bell to attract the attention of their administrator. We do not find it credible that so much correspondence in this claim goes missing. We note that the only correspondence that was delivered was that which was not sent by some form of special delivery. The respondents assert that as they have never received the letter the claimant could not be offered work. Mr Wilson is of the belief that the claimant is still employed at the date of this hearing.*
 7. *The claimant having heard nothing from his employer sent another letter on 2nd October querying why he was not been offered work despite the proof he had provided. He also asked for his P45. He received a response on 18th October*
 8. *It was only at the point of the second letter in October that the claimant was informed he had not been dismissed. The letter of 9th October is capable of being misunderstood as it does not directly refer to the holding letter or request that it be sent again. The letter refers to a letter from DVLA being requested and goes on, 'At current you are still classed as an employee and we have been awaiting a response from you' It goes on, 'we had no choice but to remove you from driving a company vehicle until such time as you could provide proof that you could legally drive an HGV It is also clear that Mr Wilson made no attempt to discuss the matter or resolve it or any anxiety about the claimants medical ability to drive. Indeed, Mr Wilsons evidence is that the claimant is still employed today.*
 9. *On 27th November that claimant again wrote to the respondent, having taken legal advice in this letter he comments: 'In the last letter I received on 18th October, Sam*

[Mr Wilson] mentioned that he was waiting for me to get in touch however I have been in touch once on 4th September and again on 2nd October surely once these letters were received then somebody should have called me to offer me, my duties of the next working say as is normal practice.'

10. The ETI was present on 1st December.

5. To conclude the history; on 30th March the DVLA informed the claimant that his HGV licence was revoked/refused because of his health. The Tribunal hearing took place on 25th and 26th May. The claimant appealed the decision of the DVLA and on 8th June sent further medical evidence to DVLA. His appeal was successful and his licence to drive HGVs was restored on 27th July 2018. On 16th August the respondent contacted the claimant asking if he had heard with regard to his appeal. There was a delay in the judgment being sent out which was sent to the parties on 21st September. On 3rd October the claimant, having had his licence restored sent a copy via ACAS to the respondent. The claimant was offered employment by the respondent by letter dated 11th October 2018. Unfortunately, as of the date of the hearing the claimant had been unable to return to work due to a medical problem with his hands, he was being paid sick pay by the respondent.

6. In his witness statement Mr Wilson told the Tribunal that even if he had seen the holding letter from DVLA he would have concerns about the no renewal by DVLA. That despite the assertions of the claimant that he could have been employed using his non-HGV licence in the removals section of the business, Mr Wilson told the Tribunal that this was a very small part of the business and he had concerns with regard to the claimant's driving licence, in addition the claimant never asked to work in that part of the business.

7. The issues

Did the claimant's employment with the respondent continue?
What was the reason for the employment coming to an end?
If not, what was the effective date of termination?

8. Submissions

The claimant's case was that his employment was continuing, and he is therefore entitled to his wages until such time as he was paid his Statutory Sick Pay.

Mr Crammond submitted written submissions in which he set out in detail, with supporting documentation the relevant law, but in summary the respondent's case is that the contract was terminated by the claimant failing to perform his duties under it.

9. The Law

The general principle in relation to a contract is that a person (a) receives consideration from person (b) for supplying goods or services. In the employment context this translates as person (a), the employee, receives wages from person (b), the employer in return for carrying out his duties under the employment contract. That may be refined to say that an employer has a duty to pay wages if the employee has carried out his duties.

9.1. However, the claimant may not have a right to work and this will depend upon the terms of the contract of the employment contract itself. For example, where there is a garden leave clause, or a short term lay off clause.

9.2. The employee must be ready and willing to work, that is to perform his duties under the contract.

10. Discussion and conclusions

10.1. The Tribunal broke the circumstances down into 4 periods' first, 31st August to 1st December; 2nd December – 31st March 2018; 31st March 29th June; 30th June- 7th October.

10.2.1 Period One

In relation to this the respondent points to Clause 24.2 of the employment contract that a driver must comply with all relevant road traffic legislation and Clause 30 the right to suspend an employee from work. The claimant's ability to work during this period was conditional upon him satisfying the respondent that he had a valid licence for driving HGV's. The claimant's case is that the holding letter was sufficient to do that. Whilst the Tribunal is satisfied that the letter was delivered to the respondent it is clear that Mr Wilson never saw, or he would have responded as he had earlier in the year. The claimant did not pursue the respondent, that is to say he did not contact them within a short period of time to clarify his position, the respondent likewise was waiting contact from the claimant. There is clearly a breakdown in communication between the parties at this time.

10.2.2. The Tribunal asked itself who's responsibility it was to contact the other? The practice was that at the end of any working week the claimant would be told by the respondent his duties for the following week; the burden would therefore seem to be upon the respondent to contact the claimant, however, in this unusual situation, where the claimant considered himself dismissed, or, as the Tribunal found, unable to work until he could clarify the position as to his ability to drive legally and where the claimant considered he had provided the information, having not heard from the respondent the Tribunal considered there must be an obligation on the claimant to contact the respondent to clarify his situation position and in particular to check his duties for the following week.

10.2.3. The claimant did not contact the respondent for four weeks in the first instance and having received its response in October didn't reply until 27th November. The Tribunal asked itself why the claimant did not contact the respondent to 'clarify the position' as set out in the November letter.

10.2.4. The Tribunal concluded that the claimant was not offering himself for work; first he considered himself dismissed; secondly, he did not contact the respondent to clarify the position; thirdly, the Tribunal concluded it is not just a question the respondent offering the claimant work he must inform that he is available and legally able to carry out his work.

10.2.5. In these circumstances the Tribunal concluded that the claimant should have contacted the respondent no later than Friday 8th September to check his duties for the following the week; as he didn't, and as he clearly considered himself dismissed, the Tribunal concluded he was not offering himself for work and is therefore not entitled to be paid for the first period.

10.3. Period two

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The Tribunal concluded that the claimant by issuing his ET1 on 1st December indicating he was dismissed considered himself no longer bound by the terms of the contract of employment and again was not available for work. The Tribunal also asked itself, is the employer obliged to keep the position open for an employee where an ET1 has been issued with a clear indication that the employee considered himself no longer an employee. The Tribunal concluded that the respondent had no such obligation. Taking all these factors together the Tribunal concluded that the was not claimant not actively pursuing the respondent he was not offering himself for work and therefore he was not ready and able to work for the respondent, in such circumstances he was not entitled to wages.

10.4. Period Three

Clearly during this period, the claimant was not able to legally work for the respondent during this period.

10.5 Period Four

The claimant did not inform the respondent his licence had been revoked until the end of this period so again was not available for work.

10.6. The Tribunal therefore concluded that by 1st December the contract of employment between the parties no longer existed due to non-performance. The claimant is therefore not entitled to any wages from the period following 31st August 2017.

11. The Tribunal concluded that the claimant's contract of employment terminated on 31st August because the claimant was not ready and able to work.

Employment Judge Pitt

Date 1st February 2019