



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr B Sekele

v

Boss Security Services Limited

Heard at: Watford

On: 10 July 2018

Before: Employment Judge Daniels

Appearances

For the Claimant: Mr Chukwudolue, Solicitor

For the Respondent: Mr A Otchie, Counsel

JUDGMENT UPON RECONSIDERATION

1. Following reconsideration, the prior judgment is varied in full and replaced by the following:
 - 1.1 The claim for unlawful deductions from wages in respect of the claimant's pay for September 2016 is well founded.
 - 1.2 The claim for unlawful deductions from wages in respect of the Claimant's complete pay for 1-8 October 2016 is well founded.
 - 1.3 The claim for unlawful deductions in respect of pay for 9-30 October 2016 and November 2016 pay is dismissed.
 - 1.4 The claimant's claim for holiday pay is well founded in relation to 3 days' pay (rounding up as per the Working Time Regulations).
 - 1.5 The claim for unfair dismissal is dismissed.

Remedy

2. The Respondent agreed to pay the Claimant the sum of £1243.52 in respect of unpaid September pay (after deductions as appropriate for tax and NI).
3. The respondent is obliged to pay the Claimant three days holiday pay in the sum of £233.16 (after deductions as appropriate for tax and NI).

REASONS

Unlawful deductions from wages

1. The tribunal was invited, on reconsideration, via written submissions and oral evidence to find that employment ended by resignation on 8 October 2016 and no further work was provided to the Claimant.

2. The letter of resignation dated 6 October 2016, which was not provided by the Claimant at the prior hearing stated:

“it has been a pleasure working with you and the rest of the team, as I am writing this email I am taking the opportunity to resign from the company because I am looking into another opportunity else where (sic)....

Thank you for your co-operation at all times and I wish you all the best for the company.

3. Having considered the clear terms of the resignation letter, the timesheets of the Company that were produced to the tribunal and the evidence of the Respondent as to the date of termination of employment, the tribunal finds that the claimant resigned on 6 October 2016 and he worked until 8 October 2018. The Claimant did not attend work thereafter and so there were no deductions from wages after that.
4. Unfair dismissal

Relevant law

Constructive dismissal

5. The statutory definition is found in section 95(1)(c) of the Employment Rights Act 1996 (ERA 1996) which provides:

“(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. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

7. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in Waltham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- (5) Did the employee resign in response (or partly in response) to that breach?

Test is objective

8. Western Excavating v Sharp established that the test for whether or not there has been a repudiatory breach is an objective one; whether or not the employer intended to break the contract is irrelevant (Bliss v South East [1987] ICR 700 (CA)).

Employee must resign in response to breach

9. To establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. The breach does not have to be the only cause of the employee's resignation. It was previously thought that it had to be a significant or effective cause of the resignation (Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493). However, the Court of Appeal in Nottinghamshire County Council v Meikle [2004] IRLR 703 questioned this approach. It held that the resignation must be in response to the employer's repudiation, but that the fact that the employee also objected to other actions of the employer will not exclude the acceptance of the repudiation.
10. Therefore, the employee must resign in response, at least in part, to the employer's fundamental breach of contract, but it does not have to be the effective cause of the resignation.

Does employee have to make clear their reason for leaving?

11. It has previously been suggested that a departing employee had to make their reason for leaving clear to the employer if they wanted to rely on it as a ground for a constructive dismissal claim (see Holland v Glendale Industries Ltd [1998] ICR 493). However, the Court of Appeal in Weathersfield Ltd v Sargent [1999] IRLR 94 has disapproved of this reasoning and held that the issue of whether the employee had "accepted" a repudiatory breach by their employer is a question of fact for the employment tribunal.

Conclusions

12. Following reconsideration of the first Judgment the claim for unfair dismissal is dismissed. The claimant was not dismissed on October 2016 but resigned. The terms of the letter of resignation are clear. It makes no reference to any issue about working hours or non payment of pay. It speaks in glowing terms about the employer and that there was another reason for leaving, another job to go to. It is very disappointing that this key letter was not provided at the prior hearing.
13. Following the above case law, there must be some evidence that the employer's breach was at least a factor. The case law suggests that in a case where there is no cogent evidence that any employer breach was a factor in the resignation, the tribunal may be entitled to dismiss the constructive dismissal claim, unless the circumstances are such that the tribunal can safely infer the reason in the absence of any direct evidence.
14. In all the circumstances, and following a review of the facts, the Claimant did not have grounds to resign by reason of constructive dismissal and/or his letter of resignation made it clear he did not resign in relation to any breach of contract, not even partly.
15. Further, in the light of the above findings and the letter of resignation this was such a case where in all the circumstances, there was no basis for safely inferring the reason was as alleged by the Claimant. The unfair dismissal claim is without foundation and is therefore dismissed.

Employment Judge Daniels

Date:12.09.18.....

Sent to the parties on:

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For the Tribunal Office