



EMPLOYMENT TRIBUNALS

Claimant: Mr M Goodall

Respondent: Webster (Farmers) Ltd

Heard at: Middlesbrough

On: 22 August 2018

Before: Employment Judge A.M.S.Green

Representation

Claimant: In person

Respondent: In person

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Respondent is ordered to pay the Claimant unfair dismissal compensation totalling £887.75 comprising a basic award of £471.51 and a compensatory award of £416.24. The latter sum including an amount equal to two weeks pay under section 38 of the Employment Act 2002.
3. The Recoupment Regulations do not apply.

REASONS

1. The Claimant worked as a farm worker for the Respondent. The Respondent is a company. Mr Sam Webster is the proprietor. The Claimant commenced employment on 12 October 2011 and resigned with immediate effect on 26 March 2018. Following a period of Early Conciliation through ACAS between 28 March and 3 April 2018, he presented a claim to the Tribunal claiming constructive unfair dismissal. The claim form was received by the Tribunal on 16 April 2018. The claim was presented within time and the Tribunal has jurisdiction to hear his claim. The Respondent has defended the claim.

2. In his claim form, the Claimant sets out the following averments of fact:

- a. On 24 March 2018, he had an accident with a tractor and trailer. He was driving with a load of silage and drove onto a grass verge causing the trailer to tip over into a ditch.
- b. He telephoned his boss, Mr Sam Webster to tell him what had happened. Mr Webster came to the accident site and asked him to go to another farm to feed some cattle.
- c. When the Claimant got home, he called Mr Webster to apologise and stated that he totally understood if he wanted to sack him.
- d. Mr Webster said that he would speak to the Claimant on the following Monday.
- e. On 26 March 2018, the Claimant met Mr Webster and his insurance broker, Mr David Broadley. During the meeting, the Claimant alleges that Mr Webster gave him three options:
 - i. He would sack him for gross misconduct;
 - ii. He could leave with immediate effect;
 - iii. He could stay for a while whilst looking for another job under strict rules about what he could or could not do on the farm.
- f. The Claimant thought that he was simply being asked to attend a meeting with the insurance man. Had he known about what would have happened, he would have wanted a representative or work colleague with him. He felt intimidated and pushed into making a decision. Mr Webster said that it would be better for him if he did not get sacked for his new job.
- g. The Claimant had no option but to resign with immediate effect. He did not want to leave his work because he loved his job. He had never received a verbal or written warning and had been a reliable employee. He did not think this would happen especially as Mr Webster had asked him to work that morning straight after the accident.

3. The Respondent defended the claim as follows:

- a. The Claimant had driven the tractor for approximately 40 yards along the grass verge as evidenced by the tyre tracks on the grass.
- b. The Claimant sent a text to Mr Webster admitting the accident was caused by his lack of concentration and was fully aware that he could be dismissed.
- c. Mr Webster did not make a hasty decision following the incident and waited for the meeting on the Monday and sent him a text that was his intention.

- d. On 26 March 2018, Mr Webster asked the Claimant to do some work before the meeting.
 - e. During the meeting with Mr Broadley, Mr Webster went through the insurance claim form with him and the Claimant. The Claimant was happy with Mr Broadley being a witness. The Claimant did not ask for a different witness.
 - f. Mr Webster gave the Claimant three options:
 - i. He could dismiss him for gross misconduct;
 - ii. The Claimant could resign giving 2 weeks' notice;
 - iii. The Claimant could remain working on the farm whilst he looked for alternative employment albeit with restricted duties.
 - g. The Claimant had a similar accident in 2016 with a trailer having knocked over a wall. Mr Webster was reluctant to allow the Claimant to drive the tractor again until he could be trusted to concentrate again.
 - h. Mr Webster assumed that the Claimant was staying and asked him to clean a trailer. The Claimant refused, describing it as a "shitty" job and he would just go. Mr Webster asked the Claimant again to think about it and to talk to his wife before making the decision. The Claimant said that his wife was out and he declined to take up his offer.
 - i. The Claimant submitted his written resignation on 27 March 2018.
 - j. The Respondent gave the Claimant alternatives to ensure his employment.
4. The parties prepared an indexed and paginated hearing bundle. The Claimant and Mr Webster adopted their witness statements and gave oral evidence. I heard closing submissions.
5. The Respondent does not accept that it dismissed the Claimant. The Claimant must establish his claim on a balance of probabilities.
6. In reaching my decision, I have considered the oral and documentary evidence and my record of proceedings.
7. There was disputed evidence about whether Mr Webster told the Claimant during the meeting that he was going to dismiss Claimant for gross misconduct. In his resignation letter [HB 28], the Claimant states that Mr Webster informed him that he had three options. The first was "I sack you under gross misconduct". The second was "you leave with immediate effect". The Third was "you work on the understanding that you are looking for work and getting another job elsewhere, this will be on the understanding of strict rules, what you can and cannot do on the farm". The third option meant changing the Claimant's working conditions. In his oral evidence,

Mr Webster said that he told the Claimant that he could dismiss him. He disputed the allegation that he said that he would sack him. He pointed out that he would not have given him other work to perform if he intended to sack him. I took Mr Webster to an unsigned letter purported to have been written by Mr Broadley which recorded what was said at the meeting [HB 71]. As Mr Broadley was not present at the hearing to give evidence I asked Mr Webster whether it was an accurate record of what was said at the meeting. He said that it was except that Mr Webster had not said that he was going to terminate the Claimant's employment. I also noted at paragraph 19 of his witness statement, that Mr Webster had said that he could have dismissed the Claimant for gross misconduct.

8. The Claimant's position is that he felt pressurised and under extreme coercion to resign and had been told that he would be sacked. He also believed that the meeting on 26 March was a disciplinary hearing. Mr Webster denied this in his evidence.
9. I have two competing versions of what was said and done at the meeting on 26 March 2018 as to whether Mr Webster said that he would or that he could sack the Claimant for gross misconduct. As I did not have the benefit of hearing evidence from Mr Broadley, this boils down to credibility. Who should I believe? On this issue, I believe Mr Webster because I have concerns about the Claimant's credibility. In his witness statement and during his oral evidence, the Claimant stated that he had concerns about the safe working load of the tractor and trailer and suggested that it was overloaded. This was not set out in his claim form. He also said that he had swerved to avoid hitting a cyclist. This was not in his claim form. He made allegations about the lack of Personal Protective Equipment at the farm. This was not in his claim form. The claim form does not have to be an exhaustive pleading but it must set out the key facts of the claim. I regard these allegations and the claim involving the cyclist to be key facts. Indeed, if he had swerved to avoid a cyclist, this could have exonerated him altogether of responsibility for the accident. Furthermore, these allegations are not set out in the resignation letter. I also note that the Claimant sent a contemporaneous text message to Mr Webster on 24 March 2018 at 16:15 [HB 37] which says:

I'm sorry for what I have done today. It was lack of concentration I would understand if you want to sack me we can talk or you let me know today

10. I find that the Claimant accepted responsibility for the accident. He caused it because he was not concentrating. The further allegations and the claim that he served to miss a cyclist are his attempt to shift responsibility away from his own carelessness. This has damaged his credibility and I give the benefit of the doubt to Mr Webster. At the meeting on 26 March 2018, he told the Claimant that he could dismiss him for gross misconduct. There seems to be no disagreement about the other two options: resign or stay on whilst looking for other work albeit performing different duties.

11. Although I accept that Mr Webster did not say that he would dismiss the Claimant for gross misconduct at the meeting I believe that he clearly no longer wanted the Claimant to work for him. Mr Webster suggested to me that if the Claimant had not resigned it might have transpired that the Claimant could have stayed on a permanent basis. That does not sit well with what he says in his witness statement where he said that if he had not resigned he would have remained working on the farm "whilst looking for alternative employment". I think that the Claimant was effectively threatened with dismissal with gross misconduct if he did not resign or accept working on different conditions whilst being expected to find another job. The outcome of both options was the same: the Claimant would no longer work for the Respondent. The only difference between options was the mechanism or the timing of his departure.

12. It has long been established that if an employee is told that he or she has no future with an employer and is expressly invited to resign, then the employee is to be regarded as having been dismissed. In **Martin v Glynwed Distribution Ltd** 1983 ICR 511, Sir John Donaldson MR said:

Whatever the respective actions of the employer and employee are at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "who really terminated the contract of employment?". If the answer is the employer, there was a dismissal.

13. In reality, the Claimant was told that he had no future with the Respondent. He was in effect, dismissed by the Respondent for his conduct relating to the accident. This is, therefore, an actual dismissal as opposed to a constructive dismissal. Should I be wrong it was a constructive dismissal because the Respondent through its words and conduct stated that it no longer intended to be bound by the contract with the Claimant by saying that they would keep him on a temporary basis performing different duties whilst he looked for another job.

14. I also note that as a result of the accident, I heard evidence from Mr Webster that the Respondent has lost a contract worth £220,000 per year with a client in York. This was not challenged by the Claimant and I have no reason to doubt Mr Webster. This is a serious consequence for the Respondent as a result of the Claimant's negligence.

15. I find that there was no disciplinary procedure followed by the Respondent in respect of the incident on 24 March 2018. The hearing was not disciplinary in nature but a discussion about the Claimant's future with the Respondent. The dismissal was substantively unfair. Had there been a hearing, the Claimant could have put his side of the story across and offered mitigation. This is relevant to remedy which I discuss below.

16. I also find, having heard the evidence, that the Claimant was not given written particulars of employment as he was entitled to within the first two months of employment. This was accepted by Mr Webster. Consequently, the Claimant is entitled to a declaration to that effect and compensation. I have dealt with this below when discussing remedy.

17. In addressing remedy, I have to take account the Appellant's desire for compensation only. He did not ask for reinstatement or re-engagement. I have to award what is just and equitable under the circumstances. The Claimant has mitigated his loss and has found another job which he started on 9 April 2018 as per the schedule of loss. He told me that it was as well paid as his job with the Respondent. He received two weeks notice pay from the Respondent but would have been entitled to six weeks as the statutory minimum given his length of service (he has six complete years). I have awarded him four weeks pay as the balance owing given that he had already received two weeks' pay. As I have found that there was a conduct dismissal and there was no evidence of the Respondent following the ACAS Code, I can uplift compensatory award by 25%. I have chosen to do that. The Claimant has admitted that he caused the accident through lack of concentration. He was negligent. It was a serious accident. I have to consider whether if a fair disciplinary procedure had been followed, would there have been a different outcome? This is known as the "Polkey" deduction. Given that he had worked for 6 years and had a clean disciplinary there is every chance that a reasonable employer would not have dismissed the Claimant. However, there was equally a chance that he would have been dismissed given the severity of his negligence and I place this at 50%. Consequently, I have reduced compensatory award by 50%. There is also the question of the Claimant's contribution to his dismissal. He caused this accident and admitted it was through his lack of concentration. I think it would be just and equitable to reduce the basic and compensatory awards by 75% to reflect his contribution. Finally, for failing to provide the Claimant with written particulars of employment, I have awarded him two weeks' pay. The claimant has not received any welfare benefits. Consequently, there is no recoupment.

Employment Judge Green

Date 4 September 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.