



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J. Scopel

**Respondent:** Darker Enterprises Limited

**Heard at:** Birmingham

**On:** 23 January 2019

**Before:** Employment Judge Dimbylow

## Representation

Claimant: In person

Respondent: Mr D. Brown, Director

**JUDGMENT** having been sent to the parties on 28 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The claim

1. This is a claim by Mr John Wayne Scopel (the Claimant) against his former employer Darker Enterprises Limited (the Respondent).
2. The Claimant was born on 3 January 1970 and is now 49 years of age. He commenced work for the respondent on 30 May 2017 and the effective date of termination of his contract of employment was on 7 February 2018.
3. He contacted ACAS about the claim on 30 April 2018 and the second date on the early conciliation certificate is 24 May 2018.
4. He issued his claim form on 23 June 2018. The Tribunal gave notice of today's Hearing on 11 July 2018 when at the same time directions were given for the just disposal of the case.
5. The response form was lodged on 23 July 2018 and the claims were resisted. The Claimant lodged a schedule of loss with the Tribunal on 8 August 2018.
6. The Hearing was set up today to be dealt with by an Employment Judge sitting alone; but that was in error, as it required a Full Tribunal. I canvassed this point with the parties and they preferred for me to

proceed with the case today, rather than to have an adjournment, which may have taken some time to relist. I was prepared to deal with it on that basis, the parties signing a note of confirmation. I had to deal with another preliminary matter, this being an application by the Respondent to strike out the Claimant's claims. However, having heard from Mr Brown and then the Claimant on the matter, I rejected that application and determined that I should hear all the facts before deciding the case. This was just, fair and proportionate.

### The issues

7. There were effectively four claims: (1) breach of contract, (2) unlawful deduction from wages, (3) failure to provide pay slips – although I wasn't entirely sure what that claim was about, but certainly there was a suggestion that one or two were late - and (4) the main element of the claim, which was for automatic unfair dismissal. The last item was very important because the Claimant did not have sufficient continuous service of 2 years to bring a claim for what I might call "ordinary" unfair dismissal. This part of the claim is in two parts, with the claimant stating that he had made complaints about: (1) Health & Safety issues concerning: electric sockets, water leaks and of being threatened by other people, not employees of the Respondent, who were upset by the alarm being triggered at the Respondent's premises, and (2) asserting a statutory right or rights, with the Claimant stating that he had complained about his wages, the amount of them, including issues over a bonus, lateness of payment and payslips.

### The law

8. The law is set out in the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 for the Breach of Contract Claim. Sections 13 – 27 of the Employment Rights Act 1996 (ERA) provide the basis for the wages claim; and Section 8 and onwards of the ERA in relation to the pay slips issue. Section 100 ERA provides the right for a claim for automatic unfair dismissal for a Health & Safety case, and Section 104 ERA for asserting a statutory right. There are different rules which apply to automatically unfair dismissals as opposed to ordinary unfair dismissal claims. As with ordinary unfair dismissal the burden of proof, a technical point, lies with the respondent to show the reason for the dismissal, and where a dismissal is admitted the reason for it is usually one of the potentially fair reasons under section 98 (1) and (2) ERA. The case before me was no exception with the respondent asserting that it was the claimant's "unsuitability due to poor performance", in other words capability. In summary, the claimant has acquired an evidential burden to show, although without having to prove, that there is an issue which warrants investigation, and which can show the competing automatically unfair reason that he puts forward. Thereafter, should the claimant satisfy the tribunal that there is such an issue, the burden reverts to the respondent, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal.

The evidence

9. I received oral evidence from the Claimant and his witness Mrs Gerri Lisa Tracy Brookes-White. I also received oral evidence for the Respondent from Mr David Michael Brown, who is a Director, and Mr Stephen Leinster who is a District Manager. I received documentary evidence which I marked as exhibits as follows: -

C1 Claimant's witness statement

C2 Witness statement of Mrs Brookes-White

R1 A bundle of documents prepared by the Respondent. It was not agreed because the Claimant said there were other items that should have been included at his request, but weren't put in. However, for our purposes it was a working bundle which both sides referred to.

R2 A bundle of witness statements provided by the Respondent including their own and the Claimant's.

My findings of fact

10. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.
11. The respondent is a retail company operating about 65 licensed sex shops ("Private Shops") throughout England, Scotland and Wales. The respondent employs about 180 workers. It has a turnover of about £5 million per annum. The respondent has to pay an annual license fee for every shop and the fees range from £500 to £13,000. The Claimant started work for the Respondent on 30 May 2017, and he was a full-time Sales Assistant at the respondent's Private Shop in Coventry. There was a written contract of employment which was signed by the Claimant and it was in the bundle, together with other accompanying documents. The contract provided for statutory notice, which in this case was for one week. The Claimant's salary was £315.00 gross per week. He was dismissed with effect on 7 February 2018, following an event which occurred on 6 February 2018.
12. On that day a person entered the Private Shop where the Claimant worked and walked out without paying for a number of DVDs, worth roughly £100.00. The Claimant was paid one week's money by way of payment in lieu of notice and he was dismissed on 7 February 2018 by Mr Maltby, who was his Local Manager. The Claimant had sent some texts to his managers about his pay and these were in the bundle. There were other items raised by way of complaint, for example, complaining about another member of staff, but that was a routine issue which would normally cause the parties no real concern. The Claimant had two work assessments with Mr Leinster, on 5 October 2017 and 29 December 2017, and these were recorded in documents which were produced to me in the bundle at pages 2 and 3. Stated

briefly, the Claimant was falling short of what was expected of him in the eyes of the Respondent.

13. The document at page 3 is notable because the Claimant was told this: "You have also been observed talking on your mobile phone when customers were in the shop and you must cease all telephone calls when customers enter". The Claimant said that these were fabricated and accused the two Respondent's witnesses of lying. No other notes of those meetings were made by Mr Leinster.
14. The Local Manager Mr Maltby, told Mr Leinster what had happened on 6 February with the apparent theft from the shop. Mr Leinster reported it to Mr Brown and a decision was taken between them that the Claimant would be dismissed. Mr Leinster told Mr Maltby to convey that information with the Claimant, which he did, and this was confirmed in writing in the letter which was before me at page 1 of the bundle. Stated shortly, the reason was unsuitability because of poor performance. The Claimant wrote back on the same day (at 5.26pm, page 190 in the bundle) and included this: "I was busy with ordering over the phone to the warehouse, I didn't see the guy steal, I had my suspicions". Mr Leinster had viewed the CCTV coverage and saw that the Claimant was on the phone before the decision was made to dismiss. He was able to observe the Claimant then, as he had done before, for the purposes of assessment. After the dismissal, for whatever reason, no appeal took place. These are the salient facts; although much other information was put before me by the Claimant; but it wasn't relevant to the decisions that I had to make. The Claimant told me he had raised various allegations to third party public bodies that the Respondent had behaved in ways which, stated briefly, would be illegal. Because of those allegations, there was a multidisciplinary visit by various forms of public authority, when eight people entered the Respondent's premises unannounced. There was a serious investigation into the Respondent, however, this did not reveal anything untoward. Thereafter, the Respondent received a letter exonerating it and indicating no further action would be taken.
15. In an email from the Claimant to the Respondent on 7 February 2018, at 17:26 (page 43) in the bundle, he said this: "Sadly, Because I was busy with ordering over the phone to the warehouse, I didn't see the guy steal the Dvd's, but made Barry aware of the situation immediately, because I had my suspicion. I only have 1 pair of eyes." The claimant also refers to the incident in his claim form (paragraph 15) when he said: "This guy came in when I was alone the day before I was dismissed. I was on the phone doing my orders. I asked my area manager to check CCTV. He had stolen Dvd's."

### The submissions

16. I heard from Mr Brown first. He started by reminding me of some of the facts that I should find, namely that the claimant had two assessments, the 1<sup>st</sup> included an oral warning on 5 October 2017 and the 2<sup>nd</sup> on 29 December 2017 included a specific instruction: "You had also been observed talking on your mobile phone when customers

were in the shop. You must cease all telephone calls when customers enter.” The letter confirmed the claimant’s promise to give receipts to every customer, “...and end all phone calls.” The Respondent sustained the loss of 6 or 7 DVDs the value of about £100. It was on the basis of this information that the decision was made to dismiss the claimant, and therefore the unfair dismissal claim should fail as the claimant has not proved any link with any health and safety or any other statutory right being asserted causing the dismissal. The claimant was paid the statutory minimum notice and the contract claim should fail. The claimant has made and continues to make spurious complaints to a number of public bodies which have found no case for the respondent to answer. Mr Brown repeated what he said in evidence, about being prepared to pay £159.88 to the claimant as a goodwill gesture in respect of the wages/bonus claim. This was in spite of the fact that the claimant had only been claiming £84.38 previously. The respondent would consent to a judgement in the greater sum. All of the claimant’s pay slips had been sent to him, including by recorded delivery and via ACAS and the claimant had failed to establish any claim in this regard.

17. The Claimant submitted that all the claims were made out and that I should find in his favour. He had made complaints and he was dismissed for that reason; not for what happened on 6 February 2018. At one point, he accepted the facts happened as the respondent’s witnesses described on that day. However, he then went on to submit that because the respondent did not report the theft to the police it meant that the event did not happen. He denied ever being instructed not to be on the telephone.

#### My conclusions and reasons

18. I deal with pay slips claim first. It was baffling to follow, and I couldn’t really see what the judgment or order was that the Claimant wanted me to make here. All the relevant wage slips were in the bundle. I find on the balance of probabilities the Claimant has had them. There was no judgment or order I could make here, and therefore I find that this part of the claim is not well-founded, fails and is dismissed.
19. I then turn to the breach of contract claim. The Claimant accepted that his contract provided for one week’s notice in accordance with statute. Furthermore, he accepted that he had been paid in lieu of notice for one week. Therefore, this claim too is not well-founded, fails and is dismissed.
20. On the Claimant’s evidence, he has no further claim for breach of contract. In relation to the wages/bonus claim, I find that this claim was well-founded; and I made an order by consent that the Respondent pay the Claimant the sum of £159.88.
21. Finally, the most controversial part of the claim is that in relation to automatic unfair dismissal. The claimant was able to demonstrate that he had raised issues about shortfalls in his wages or bonus in text messages which appear in the bundle. This appeared to relate to

November, and December 2017, and possibly January 2018. This is evidence to support the claimant's case about asserting a statutory right. However, I do not come to the same conclusion about health and safety issues, as described in Section 100. The claimant made a number of complaints in his text messages, including about poor quality of cleaning and lack of ability by some of his colleagues. The claimant does not hesitate to put any complaints in writing and he did not do so on this subject. Had he raised the issue orally he would have followed it up by text or email. I do not find that any element of Section 100 ERA was engaged on the facts before me.

22. I then assessed the reasons put forward by the respondent, bearing in mind what the claimant said about them. The claimant has had the opportunity to test the respondent's witnesses in cross examination and challenge the reasons put forward. I have to come to a decision as to whether, on the balance of probabilities, the respondent has satisfied me as to the reason for the dismissal, and I find that it has. On the evidence before me, I find and conclude the facts demonstrate the Claimant was dismissed because he was not suitable for the job, in that he had been warned over the use of a telephone when a customer entered the shop, and he did not comply with that warning. The respondent was entitled to come to the conclusion that the claimant was unsuitable for his position due to poor performance. By his own admission, the claimant was on the telephone when a customer came in. He did not stop his telephone conversation. Whether it was his mobile or a landline is immaterial, he was told that he shouldn't be using a telephone, as set out in the note made after the second assessment. Accordingly, I find that both claims for automatic unfair dismissal are not well-founded, fail and are dismissed.
23. In coming to my decision, I had regard to how the witnesses presented to me. The respondent's witnesses were articulate and intelligent. I found they were open and honest, and they could see another view of things, for example, when presented with an up-to-date calculation of the wages/bonus claim Mr Brown was prepared to concede it. I found both witnesses for the respondent to be credible, but I am conscious of the fact that credible witnesses can be mistaken. I looked at that carefully; but concluded they were not mistaken, as much of what they said was supported by the documents and some admissions made by the claimant.
24. The claimant is also articulate and intelligent. However, he did not present well, adopting a very blinkered approach to the facts, being unable to countenance any other explanation than his own. He found it difficult to take directions from the tribunal. He repeatedly requested the use of lie detector equipment in the hearing. He had been told in advance that this would not be used but he would not let it go. The same trait appeared in his continued making of wild allegations against the respondent. The claimant was not a credible witness and was at least mistaken. He could accept no wrongdoing on his own part, in spite of the admissions that he made. The claimant asserted that Mr Brown had committed fraud or forgery by producing the 2 assessments signed by him on 5 October 2017 and 29 December 2017; but was

unable to demonstrate that fact. I concluded that they were prepared at the time. As far as the evidence of Mrs Brooks-White was concerned, she was unable to contribute to my understanding of the case. She was entirely open and honest, explaining that she could not give any evidence as to the reason for the claimant's dismissal, or contribute to the argument over any underpayment of wages/bonus. She presented as a friend to the claimant and thought I ought to believe him, in that if he said that he was not paid for something then I should accept that he wasn't; as she believed him.

25. In conclusion, therefore, wherever there was a conflict in the evidence on a material fact, I preferred the evidence of the Respondent's witnesses because they were credible, supported by the documents and admitted facts.
26. Finally, I would mention that the claimant has written to the tribunal making an application for a reconsideration of the judgment. I direct that if it is still the claimant's intention to proceed with such an application he must set out why reconsideration of the original decision is necessary; and he must do so within 14 days of the date these reasons were sent to him (see Rules 70 to 73 contained in Schedule 1 of the Employment Tribunals Rules of Procedure 2013).

Signed by Employment Judge Dimbylow

On: 20 March 2019