EMPLOYMENT TRIBUNALS

Claimant: Mr J Worrall

Respondent: Salford Van Hire

HELD AT: Manchester **ON:** 17 October 2019

IN CHAMBERS: 6 November 2019

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: In person

Respondent: Mr B Williams of counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not dismissed;

2. The claim of unfair dismissal is not well-founded and is hereby dismissed.

3. The tribunal has no jurisdiction to hear the claim of failure to pay statutory sick pay and the claim of unlawful deduction from wages is hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was confirmed that the issues were:

   1.1. whether the respondent committed a fundamental breach of contract entitling the claimant to resign by:

      1.1.1. failing to keep the claimant safe from bullying and harassment;

      1.1.2. failing to deal with the accident on 28 June 2018 in a fit and proper manner;

      1.1.3. failing in the duty to maintain trust and confidence;

      1.1.4. failing to pay his wages and statutory sick pay on time

   1.2. whether the claimant resigned in response to that breach;

   1.3. whether, if there was a constructive dismissal, the dismissal was fair or unfair;

   1.4. whether the respondent had made an unlawful deduction from the claimant's wages by failing to pay the correct amount of statutory sick pay.

2. When identifying the issues, the claimant indicated that he wished to pursue a claim for accrued holiday pay. It was noted that:

   2.1. no such claim had been identified in the claim form;

   2.2. the claimant had not, prior to today, made any application for leave to amend the claim to include a claim for failure to pay accrued holiday pay;

   2.3. the claimant would be required to make application for leave to amend his claim, which application would be opposed by the respondent.

3. EJ Porter explained to the claimant that any application for leave to amend would be decided by applying the so-called Selkent principles. EJ Porter gave a brief summary of those principles, explaining that one issue would be the reason for the delay in identifying this new cause of action. EJ Porter gave the claimant the opportunity to consider whether he intended to pursue such an application, and to obtain legal advice on the point, while EJ Porter conducted her reading exercise for the claims of unfair dismissal and unlawful deduction from wages.

4. When the tribunal was reconvened after the reading exercise, the claimant indicated that he did not wish to pursue the claim for accrued holiday pay.

Orders

5. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

6. At the outset of the hearing the claimant asserted that he wished to call a witness to support his assertion that a member of staff had told him, prior to his resignation, that the respondent intended to "stitch up" the claimant, following the accident on 28 June 2018, when the claimant had been injured by another work colleague. It was noted that:

   6.1. the witness was not in attendance;

   6.2. the claimant did not have a witness statement from that witness.

7. EJ Porter advised the claimant that if he wished to rely on the evidence of that witness then he would need to make an application for a postponement of this hearing to try to secure the attendance of that witness. The tribunal would consider the application and would need to consider:

   7.1. the relevance of the evidence;

   7.2. whether it was in the interest of justice to postpone the hearing to secure the attendance of that witness.

8. EJ Porter gave the claimant the opportunity to consider whether he intended to pursue such an application, and to obtain legal advice on the point, while she conducted her reading exercise.

9. When the tribunal was reconvened after the reading exercise, the claimant indicated that he did not wish to pursue an application for postponement of the hearing and was ready to proceed on the basis of the witness evidence exchanged between the parties.

10. The claimant made application that the CCTV footage of the accident on 28 June 2018 be viewed by the tribunal as part of the evidence.

11. In considering the application it was noted that:

11.1. neither party had brought electrical equipment for the display of the CCTV footage;

11.2. the claimant challenged the evidence of a work colleague, P B, who, as part of an investigation of the accident, asserted that the claimant had been laughing and joking to the point of injury;

11.3. the claimant asserted that the CCTV footage clearly showed that he had not been laughing and joking prior to the accident. If the claimant had known that the CCTV footage would not be seen he would have considered calling witnesses to discredit the evidence of P B;

11.4. the respondent accepted that

11.4.1. on 28 June 2018, the work colleague (whom the tribunal shall hereinafter refer to by the initials SW) deliberately picked up the claimant;

11.4.2. the claimant was injured by the actions of SW;

11.4.3. the claimant was blameless in the incident.

12. Having considered submissions from both parties EJ Porter ordered that, in light of the respondent's concession, as set out at paragraph 11.4 above, the viewing of the CCTV evidence was not necessary for a fair hearing. The claimant could raise any relevant questions about the CCTV footage and the evidence of PB with the respondent's witnesses.

13. After the lunch break, and after the claimant had given evidence, he sought to introduce new documents in to the bundle. The claimant asserted that the new documents were original payslips received by the claimant, which differed from the copied pay slips which were contained within the bundle. It was noted that:

13.1. the parties agreed that the difference in the payslips was that the original payslips had the additional letter "W" appearing;

13.2. the tax code number and all other information contained in the original pay slips were the same as the copies contained in the bundle;

13.3. Mrs Bacci could answer questions about the copies of payslips which appeared in the bundle and the claimant's assertion that the copies had been deliberately falsified to hide the fact that the respondent had changed the claimant's tax code for payments made during his sickness absence.

In these circumstances EJ Porter ordered that the claimant be allowed to introduce the original payslips as part of the evidence. She was satisfied that this did not adversely affect the respondent's right to a fair hearing.

14. There was insufficient time, at the conclusion of the Hearing, for the tribunal to reach its decision. It was ordered that the tribunal would make its decision after deliberation in chambers.

Submissions

15. The claimant made a number of submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

15.1. he was not treated fairly;

15.2. he did not get paid what was due and owing to him;

15.3. after the accident, while he was off sick, his colleagues told him that SW was still working there;

15.4. he did not feel safe; he felt let down - nothing had been done to protect him, his rights had not been followed;

15.5. he was not paid wages and sick pay due and owing on 17 July 2018;

15.6. his tax code had been changed and therefore he did not get a tax rebate on 17 July 2018;

15.7. he was let down by the respondent and the only way to resolve it was to resign. This was his only option. He could not return to work when he felt unsafe;

15.8. the respondent had failed to pay him for one day's statutory sick pay. He had been ill on 29 July 2018, he had informed his line manager of his absence. He had complied with all the conditions necessary to receive statutory sick pay. The respondent was aware that the claimant had been unfit to return to work after the accident. He should have been paid for the entire period of absence.

16. Counsel for the respondent made a number of submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

16.1. the claimant chose to listen to colleagues and to speculate; he could have spoken to the respondent about what was happening following his accident but chose not to do so;

16.2. until the claimant resigned there was no hint of any bullying and harassment having taken place in the workplace;

16.3. the claimant almost accepts that the respondent was not aware of any allegations of bullying and harassment - the claimant is saying that they should have known about it;

16.4. the claimant should have and could have spoken up. At no time did he tell the respondent that he was scared of SW, or was scared to return to work, he never asked for any adjustments to enable him to return to work;

16.5. The respondent reacted reasonably to the accident. It disciplined SW. An act of gross misconduct does not automatically mean dismissal - the respondent is obliged to consider all circumstances. The respondent was reasonable in choosing to issue SW with a final written warning bearing in mind that he had accepted his guilt and shown remorse;

16.6. there was no deliberate act by the respondent calculated to destroy trust and confidence. There was no change to the tax code. There was a delay in paying wages but it was a short delay. Things do go wrong on occasion this has happened in the past and it has been resolved. It does not justify a resignation;

16.7. there is no satisfactory evidence of any fundamental breach entitling the claimant to resign;

16.8. the claim is entirely misconceived;

16.9. the claimant was paid his full entitlement to statutory sick pay. The respondent's policy on payment of statutory sick pay is clear: the claimant must provide either self-certification or a fit note. If he had done so from his first day of absence he would have been entitled to a further one-day statutory sick pay. He did not.

Evidence

17. The claimant gave evidence. In addition, he relied upon the evidence of his wife, Mrs Dawn Worrall;

18. The respondent relied upon the evidence of:-

18.1. Mr Samuel Francis Wilson, Workshop Admin Manager;

18.2. Ms Graziella Bacci, HR Director

19. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

20. An agreed bundle of documents was presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

21. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

22. The respondent is a family owned and operated vehicle rental company offering self-drive van and car hire services, including contract hire fleet and specialist vehicles. The respondent operates depots in Manchester and Leeds.

23. The claimant joined the respondent on 28 April 2016 as a garage office administrator. He was responsible for booking in vehicles and dealing with administration in relation to MOT's, inspections et cetera. Initially he worked Monday to Friday 7 am to 6pm.

24. Prior to the accident on 28 June 2018 the claimant raised issues about his pay, stating to Mr Sam Wilson, his line manager, that he needed to earn more money. It was arranged that the claimant should speak to the HR director, Mrs Bacci, to discuss his pay. During meetings with Mrs Bacci the claimant said that he loved his job, the people he worked with and the respondent company, but that he needed to earn more money. Following those discussions, it was agreed that the claimant should extend his working hours to 6am to 6pm Monday to Friday, and that he would provide cover on Saturdays when necessary. In addition, Mrs Bacci agreed to increase his hourly rate of pay. At no time during these discussions did the claimant raise any concern about his interactions with colleagues, in particular, with his work colleague SW.

25. The claimant, prior to the accident on 28 June 2018, challenged an inaccuracy in the payment of his wages and this was subsequently resolved to his satisfaction.

26. The claimant is 5'4" tall and weighs around seven stone. SW works as a mechanic on night shifts, with his shift starting at 6pm. He worked four days on, four days off. He would work on some of the days between Monday and Friday, depending on his shift pattern. SW would arrive at work at approximately 5:30pm. There was therefore, on some days, an overlap of attendance between the claimant and SW, of approximately half an hour, before the end of the claimant's working day. On these occasions SW would engage in verbal banter with the staff, including the claimant. SW is more than 6 foot tall and he is at least twice, if not three times, the weight of the claimant. SW would tell the claimant and others how he had just been to the gym, where he had lifted weights heavier than the claimant. The claimant's line manager, Mr Wilson and other work colleagues witnessed the verbal exchanges between the claimant and SW, which Mr Wilson categorised as immature banter/horseplay.

27. There was physical contact between the claimant at times. For example, it is the claimant's evidence that SW would often place the claimant in a headlock and the claimant would bite SW to secure his release. There is no satisfactory evidence to support the assertion that Mr Wilson or any other manager of the respondent was aware of this particular example of physical contact. The claimant made no complaint, formal or informal, in relation to this physical contact prior to his resignation.

28. The claimant was provided with a waterproof coat for carrying out his duties. The coat was too large for him. He pointed this out to the respondent, who told him that they had ordered the smallest size possible. The claimant raised no formal or informal complaint about the provision of this coat during the course of his employment.

29. Prior to his resignation, the claimant did not raise any complaint about the behaviour of SW. He did not, at any time prior to his resignation, say that he was frightened by SW, or that he was being bullied and/harassed by SW, or that he was not a willing participant in the witnessed banter/horseplay.

30. In February 2018 the workshop/garage manager complained to Mr Wilson that at times the horseplay between the claimant and SW was loud and could possibly be overheard by customers on the telephone. Mr Wilson therefore spoke to both the claimant and SW to say that their behaviour was not appropriate, and that it would end up going too far and needed to stop. It was noted that the claimant had hit SW with a book during one recent incident. Both the claimant and SW said that they were just joking with each other and having a laugh. The claimant did not at that time assert that he was being bullied and harassed by SW, did not say that he was an unwilling participant in the behaviours with SW, did not say that he had hit SW with a book to stop

SW from hurting him, that he had been subject to an unwanted assault by SW.

[On this the tribunal accepts the evidence of Mr Wilson.]

31. At around 5:45pm on 28 June 2018 the claimant was walking through the garage towards the office when, without warning, SW picked the claimant up in a bench press move, trying to lift the claimant above his head, in an attempt to hold the claimant as if he were a set of weights on a bar. SW lost his grip and the claimant felt excruciating pain as his upper body hit SW's head or shoulder. SW lowered the claimant onto the floor and apologised. The claimant was in considerable pain. A first aider was called and stayed with the claimant until the ambulance arrived. The claimant was taken to hospital. An x-ray showed that the bottom three ribs on his left hand side were cracked. He was discharged at 11:30pm that night with painkillers and told to rest.

32. The claimant accepts that this was not a deliberate attempt by SW to cause injury to the claimant. SW had lifted the claimant from the ground and put the claimant down when the claimant made it known that he had been hurt. The claimant had not taken any part in any verbal or other exchange with SW prior to the incident: the claimant was taken by surprise.

33. The following day the claimant spoke to Mr Wilson by telephone and explained that he needed to take some time off to recover from his injuries. He did no ask what action, if any, was being taken against SW, did not ask to be kept informed of, and/or take part in, any investigation in to the accident, did not accuse SW of deliberately intending to hurt the claimant.

34. Mr Wilson commenced an investigation into the accident. He reviewed the CCTV footage and spoke to Mrs Bacci, who was on holiday at the time. They agreed that they would carry out an investigation and review findings and complete the appropriate accident records on her return to work, 16 July 2018.

35. As part of the investigation witness statements were taken from the first aider, who provided first aid at the scene, and SW. SW took responsibility for the accident, saying that it was an accident, and that no malice had been intended towards the claimant.

36. The respondent did not interview the claimant because he was absent from work by reason of ill-health

37. Mr Wilson considered suspending SW pending the outcome of the investigation. However, as SW had taken responsibility for his actions and shown significant remorse Mr Wilson decided that suspension was not

required, noting that the claimant was off sick so that there was no prospect of further interaction between them.

38. Mrs Bacci returned to work on 16 July 2018. An accident report form was completed at that time. Mrs Bacci questioned Mr Wilson and the workshop/garage manager about their experiences of the relationship between the claimant and SW. Witness statements were obtained from them (pages 67 – 68). The claimant was not aware of the delay in completion of the Accident Report Form until after his resignation.

39. Following HR advice, a decision was taken to invite SW to a disciplinary hearing. By letter dated 23 July 2018 SW was invited to a disciplinary hearing on 25 July 2018 to consider an allegation of gross conduct, namely, the allegation that he had caused injury to a fellow employee through horseplay. SW was warned that the conduct may amount to gross misconduct and that he may be dismissed without notice.

40. There was a delay in inviting SW to a disciplinary hearing because he was away from work on annual leave. A disciplinary hearing took place on 14 August 2018. Mr Wilson conducted that disciplinary hearing, finding that SW had been guilty of gross misconduct but, in light of SW's admission of guilt, apologies and expression of regret, decided to issue a final written warning, rather than dismiss.

41. After the accident on 28 June the claimant remained absent from work by reason of ill-health. He did not raise any complaint about the actions of SW with his line managers. He made no enquiry about any possible disciplinary action against SW, he made no enquiry as to whether SW would be suspended. At no time did the claimant tell the respondent that he was unable to return to work because he was too frightened to do so, that he was frightened that he would be injured again.

42. Several of the claimant's colleagues kept in touch with the claimant whilst he was off work recovering from his injury. The claimant's work colleagues told him that SW was still working and that no disciplinary procedures had been carried out against SW.

43. The claimant is paid at weekly intervals by reference to a weekly clock card. Mrs Bacci reviews the clock cards, checks and calculates the weekly hours and rates, and then passes the clock cards to payroll for processing. Employees are generally paid a week in arrears. Following the accident, the claimant submitted sicknotes for the period 2 July to 16 July 2018 and 13 July 2018 to 27 July 2018 .

44. The claimant was provided with a contract of employment and statement of terms and conditions (page 36). Under the terms of the contract:

44.1. the claimant was required to inform his immediate supervisor of the reason for absence and anticipated length of absence;

44.2. Clause 9.2 states: In respect of any absence lasting seven calendar days (regardless of the number of days you were due to work during the seven-day period) you need not produce a medical certificate unless you are specifically requested to do so. You must however, complete the company's self certification form immediately on your return to work after such absence (regardless of the number of days you were due to work during the seven-day period) along with a “Return from absence form”;

44.3. Clause 9.3 states: In respect of any absence lasting more than seven calendar days (regardless of the number of days you were due to work during the seven-day period) you must (in addition to the provision of a completed self certification form) on the eighth calendar day of absence provide a medical certificate stating the reason for absence and thereafter provide a medical certificate each week to cover any further period of such absence (regardless of the number of days you were due to work during seven-day period);

44.4. Clause 9.5 states: You will receive no remuneration for any period of sickness except for any statutory sick pay (SSP) to which you may be entitled (subject to satisfying the relevant requirements) ;

44.5. Clause 9.6 states: The company operates the SSP scheme and you are required to cooperate in the maintenance of necessary records. For the purpose of calculating your entitlement to SSP, “qualifying days” are those days on which you are normally required to work .

45. The claimant was paid wages for previous weeks work on 3 July 2018 and 10 July 2018 in the usual manner. He raises no complaint about those payments. He was due payment for his one day of work on 28 June 2018, together with any SSP, on 17 July 2018. The claimant checked his bank account on the morning of 17 July 2018 and noted that he had not received payment for 28 June 2018, and was not paid statutory sick pay (SSP) for the fourth day of his sickness, that is, 4 July 2018. In addition, he had anticipated a tax refund. The claimant telephoned an employee of the respondent who processes wages and asked why he had received nothing in the bank.

46. The employee told the claimant that his wages had been suspended.

47. Later the same day Mr Wilson telephoned the claimant to enquire why he had rung payroll. The claimant explained that he had not received his wages that day. Mr Wilson said that he would investigate this.

48. Mrs Bacci was on annual leave until 16 July 2018. The claimant's first sicknote was received by the respondent during the second week of her annual leave. Mrs Bacci had put in place arrangements for payroll processing in her absence. However, the respondent's internal procedures require SSP payments to be reviewed and authorised by Mrs Bacci. Therefore, it was left for her return to approve the payment of SSP for the claimant's first week of absence.

49. For payments of wages due on 17 July 2018 the clock cards are processed on the previous Thursday (12 July) and the authorisation given to the bank on the Friday (13 July) to ensure that the money is in the accounts of the employees by midnight on 16 July. As Mrs Bacci was not in work on 12 July 2018, and was not available to authorise statutory sick pay, no payment of wages was made to the claimant on 17 July 2018. Mrs Bacci had not given any direction to suspend payments to the claimant. She returned to work on 16 July and therefore did not have time to authorise any payments to the claimant for 17 July 2018.

50. The claimant received some statutory sick pay and payment for the 28 June 2018 on 24 July 2018.

51. The claimant raised no complaint about that payment prior to his resignation.

52. The payslips copied in the bundle show:

    52.1. The claimant’s tax code remained the same throughout : 1006N;

    52.2. The claimant received nil pay on 17 July 2018;

    52.3. In July and August the claimant received tax refunds and sick pay

53. Statutory sick pay was calculated on the basis that sick notes had been provided from 2 July 2018. The claimant had not provided a sick note or a self-certification document for the first day of absence, 29 June 2018.

54. On 28 July 2018 the claimant hand-delivered to the respondent a letter of resignation (page 70) stating as follows:

    I am writing to inform you that I am resigning from my position of Garage Administrator with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I understand that this is not in accordance with my terms and conditions of employment, however, I feel that I am left with no choice but to resign in light of my recent experiences regarding;
    a) allowing the bullying and harassment at work leading to me being injured
    b) the suspension of my wages with no communication of this to me

55. Mrs Bacci replied by letter dated 2 August 2018 (page74) extracts from which read as follows :

> I am disappointed to note your intention to resign from your position as Garage Administrator with immediate effect.
> Your letter refers to bullying and harassment at work and to the suspension of your wages with no communication. These are not issues that you have raised with me previously either in writing or verbally. I would therefore like to meet with you to discuss these matters in more detail and also to invite you to reconsider your resignation.
>
> I would therefore be grateful if you would contact me to arrange a meeting.
> Alternatively, if I do not hear from you by Friday, 10 August 2018 I will accept your resignation (as of 27 July 2018) and process any final payments (accrued annual leave et cetera) and forward your P45.

56. The claimant refused the offer of a meeting and confirmed his resignation.

57. Prior to his resignation the claimant did not contact the respondent to tell them that he was too scared to return to work, or to ask for any adjustments to allow him to return, or to seek assurance that he would receive no further injury at the hands of SW

58. Mrs Bacci carried out an investigation of the allegations of bullying and harassment, interviewing a number of the claimant's former work colleagues, who reported that both the claimant and SW had enjoyed a good working relationship, albeit one of banter in which they both engaged. No employee reported that the claimant had made any complaint of bullying and harassment at the hands of SW.

59. The claimant attended an interview for different employment with a different employer on Friday 27 July 2018 and was told he could start work on Monday 30 July 2018. The claimant commenced work with that new employment, accepting a reduction in pay from that which he had enjoyed with the respondent.

The Law

60. The tribunal has considered the relevant law including in particular:

60.1. ss 95(1)(c) and 136(1)(c) Employment Rights Act 1996 (“ERA”); and

60.2. **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221;** and

60.3. the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**.

61. The first question is whether the employer committed a fundamental breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is a question of fact and degree.

62. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental. **Morrow v Safeway Stores plc 2002 IRLR 9**. Brown-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** EAT described how a breach of this implied term might arise: "*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".

63. The employers' repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause. **Jones v FSirl & Son (Furnishers) Ltd [1997] IRLR 493 EAT**. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation. It is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned in response to the employers' breach rather than for some other reason. **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 IRLR 94**.

64. Statutory Sick Pay constitutes wages for the purposes of S.27(1) Employment Rights Act 1996 (ERA 1996). However, employment tribunals have no jurisdiction to hear disputes regarding entitlement to these payments brought under the guise of unlawful deduction from wages claims, since such disputes fall under the exclusive jurisdiction of HM Revenue and Customs **-Taylor Gordon and Co Ltd (t/a Plan Personnel) v Timmons 2004 IRLR 180, EAT, *approved in* Hair Division Ltd v Macmillan EATS 0033/12 .**

Determination of the Issues

65. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

66. The tribunal has considered whether the respondent committed a fundamental breach of contract entitling the claimant to resign. The tribunal has considered all the circumstances and notes in particular the following:-

66.1. the claimant was injured by SW on 28 June 2018. The claimant was not at fault. He had played no part in any horseplay or tomfoolery leading up to this incident. The claimant was taken to hospital and was advised to rest. He remained off work providing fit notes from 2 July 2018 to the termination of employment;

66.2. prior to this incident the claimant's line manager and work colleagues witnessed what they believed to be consensual horseplay between the claimant and SW;

66.3. in February 2018 both the claimant and SW were told that this behaviour/horseplay was unacceptable and must stop because of the risk of injury. On this occasion the claimant had been seen, and admitted to, hitting SW on the head with a book. The claimant did not at that time assert that he was being bullied by SW, that he was an unwilling participant in this behaviour, that he had hit SW to release himself from SW's grip, from SW’s unwanted assault;

66.4. the claimant did not until his letter of resignation complain of bullying and harassment by SW, did not tell the respondent that he felt unsafe in the workplace;

66.5. during the claimant's four-week absence from work after the incident on 28 June the claimant learned from his colleagues that SW remained at work, had not been suspended from work, and that no disciplinary action had been taken against SW. The claimant accepted what his colleagues told him without investigation. He did not seek information from the respondent about what, if any, steps were being taken against SW as a result of the incident on 28 June 2018;

66.6. the claimant did not, prior to his resignation, make any complaint to the respondent about bullying and harassment, he did not enquire whether SW had been suspended and if not why not, did not tell the respondent that he was hoping to return to work but was too scared to do so because of the presence of SW at work, did not ask the respondent to take steps to ensure that the claimant and SW did not cross paths at work in the future;

66.7. the respondent did commence an investigation into the incident on 28 June 2018. Mr Wilson reviewed the CCTV footage. Witness statements were taken. SW was interviewed. SW took responsibility for the incident, saying that he had been engaging in horseplay with the claimant, that the incident was an accident and no malice was intended;

66.8. the respondent did not interview the claimant because he was absent from work by reason of ill-health and did not return prior to his resignation;

66.9. the respondent considered suspending SW pending further investigation and disciplinary action but decided that it was not necessary at that time because he had admitted responsibility, displayed remorse, and the claimant was not at work at the present time and there was no danger of recurrence;

66.10. The respondent did not inform the claimant, during the course of his sickness absence, of the investigation in to the incident or the decision to take disciplinary action against SW.

67. In all the circumstances the tribunal finds that:

67.1. the respondent was unaware of any allegations of bullying and harassment until receipt of the claimant's letter of resignation. Prior to receipt of that letter the respondent acted with reasonable and proper cause in treating the claimant as a willing participant in the exchanges with SW;

67.2. prior to the incident on 28 June 2018 there was no evidence before the respondent that the claimant was being bullied or harassed by SW;

67.3. the respondent had taken reasonable steps in February 2018 to stop the claimant and SW engaging in what the respondent reasonable believes was consensual behaviour;

67.4. the respondent's response to the incident on 28 June 2018 was reasonable. The respondent carried out a reasonable investigation, interviewing the first aider and SW, who admitted responsibility. The respondent was reasonable in accepting SW's evidence that he did not intend to cause the injury. There was no evidence that the injury to the claimant was intentional;

67.5. there was a delay in completing the Accident Report form. However, that did not affect the reasonableness of the investigation. Further, the claimant was unaware of any such delay until after resignation;

67.6. the respondent acted with reasonable and proper cause in making its decision not to suspend SW: the claimant was not at work, had not raised any concerns about the continued employment of SW, gave no indication that he would return to work if SW was suspended or removed from the workplace;

67.7. the respondent acted with reasonable and proper cause in failing to include the claimant in the investigation of the incident, in failing to advise the claimant of the investigation and the decision to take disciplinary action against SW. The claimant was absent from work and had raised no query with the respondent about the investigation or any action against SW, who had accepted responsibility for the accident;

68. The failure to pay to the claimant pay on 17 July 2018 was a breach of contract. The claimant was owed at the very least payment of wages for 28 June 2018. The question is whether this was a fundamental breach of contract entitling the claimant to resign. The claimant telephoned to complain about the failure to pay wages. The employee said payment of his wages had been suspended but this was clearly in error. Mrs Bacci had not given that instruction. Mr Wilson had telephoned the claimant on 17 July 2018 and told him that the non-payment of wages would be investigated. It was, and the claimant was paid the due payment the following week. The claimant accepts that this was not the first time that he had challenged an inaccuracy in his wages and this had been resolved. The delay in the payment of wages was unreasonable. There was no good reason for the respondent to delay payment pending Mrs Bacci's return from holiday. However, the breach was not so fundamental as to entitle the claimant to resign. There is no satisfactory evidence to support the assertion that the respondent deliberately withheld wages. The delay in payment clearly arose from the unfortunate timing of the accident and Mrs Bacci's holidays. There is no satisfactory evidence to support the assertion that the respondent changed the claimant's tax code, to ensure that he did not receive his tax refund/rebate earlier. The payslips copied in the bundle and the original payslips provided by the claimant all show that the tax code remained the same throughout. Further, and in any event, by the time of the resignation the outstanding wages, and statutory sick pay, had been paid. The dispute as to the calculation of the amount of SSP paid arose after the claimant's decision to resign and therefore did not form part of his decision to resign.

69. Having considered the conduct of the respondent as a whole, the tribunal finds that:-

69.1. there was no bullying and harassment of the claimant by SW, who was a willing participant in horseplay with SW prior to the accident on 28

June 2018. There was nothing to alert the respondent to any such bullying and harassment prior to the resignation letter;

69.2. the respondent dealt with the accident on 28 June 2018 in a fit and proper manner;

69.3. the respondent did not, without reasonable and proper cause, conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee;

69.4. the respondent did fail to pay the claimant wages and statutory sick pay on time on 17 July 2018. However, this was not a fundamental breach of contract entitling the claimant to resign. The wages and an amount of sick pay were paid the following week, 23 July 2018. The claimant raised no complaint about the amount of SSP paid until after his resignation. The respondent did not change the claimant's tax code. The claimant received tax rebates in accordance with the PAYE system at a later date.

67. The respondent did not commit a fundamental breach of contract entitling the claimant to resign.

68. Further and in any event the tribunal has considered the reason for the claimant's resignation. The claimant's evidence as to the reason for his resignation has been unsatisfactory. The tribunal notes that the claimant asserts that he resigned because he could not face returning to work because:

68.1. of the bullying and harassment by SW;

68.2. the accident on 28 June 2018 made him feel too scared to return to work. He was frightened of a repeat of the behaviour by SW;

68.3. he was upset that no disciplinary action had been taken against SW, who had been allowed to remain in work;

68.4. he wanted the respondent to secure his safety for his return to work, for example, to make adjustments to shift times and/or working hours to ensure that the claimant did not meet SW at work;

68.5. the respondent had failed to pay his wages on 17 July 2018 and had changed his tax code

69. The tribunal has considered all the circumstances and notes in particular that:

69.1. There is no satisfactory evidence that the claimant was bullied and harassed by SW. The evidence supports the respondent's assertion that the claimant was a willing participant in the exchanges with SW. It is simply not credible that an employee who was prepared to go to the HR Director with a complaint about his level of wages would not, at the same, time, raise any genuine complaint of bullying and harassment;

69.2. The claimant made no enquiry of the respondent as to what, if any, disciplinary action was being taken against SW. The claimant accepted the words of his work colleagues;

69.3. The claimant did not, prior to his resignation, raise a grievance about the conduct of SW or the respondent's reaction to the accident on 28 June 2018;

69.4. The claimant did not, prior to his resignation, inform the respondent that he was too scared to return to work, did not ask for any adjustments to shifts or working hours, made no request for SW to be excluded from the building while the claimant was in work;

69.5. The claimant did not receive a due payment of wages on 17 July 2018. He raised a complaint about that and his wages were paid on 24 July 2018. He raised no further complaint about the amount of wages or SSP prior to his resignation on 28 July 2018;

69.6. The claimant sought alternative employment, was successful and informed at interview on Friday 27 July 2018 that he could start his new employment on 30 July 2018. The claimant handed in his resignation on 28 July 2018.

In all the circumstances the tribunal finds that the claimant has failed to give satisfactory evidence as to the real reason for his resignation. The tribunal is not satisfied that the claimant resigned in response to any breach of contract by the respondent.

70. The claimant was not dismissed.

71. The tribunal does not have jurisdiction to hear the complaint that the failure to pay one day's Statutory sick pay was an unlawful deduction from wages. Any complaint in relation to the amount of SSP properly payable should be addressed to The Commissioners for Her Majesty's Revenue and Customs (HMRC).

Employment Judge Porter

Date:29 November 2019

RESERVED JUDGMENT WITH REASONS SENT TO THE PARTIES ON

2 December 2019

FOR THE TRIBUNAL OFFICE

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