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EMPLOYMENT TRIBUNALS

Claimant: Mr G Young
Respondent: Source Personnel Limited
Heard at: East London Hearing Centre
On: 9 December 2019
Before: Employment Judge Burgher

Representation

Claimant: Mr D Olins (FRU Representative)
Respondent: Mr S Morley (Consultant)

JUDGMENT

The judgment of the Tribunal is that:-

1. The claimant's claim for wrongful dismissal succeeds.
2. The respondent is ordered to pay the Claimant the sum of £2153.84 in respect of his claim.

REASONS

1 The Claimant commenced employment with the Respondent as a recruitment consultant on 7 August 2017. The Claimant was summarily dismissed on 1 March 2019 as a result of failing to attend for work on 28 February 2018.

2 The Claimant claims wrongful dismissal and payment of four weeks' notice pursuant to clause 13.1.2 of his contract of employment. The Respondent denies the claims stating that it was entitled to summarily dismiss the Claimant without notice on the basis of his refusal to attend for work and unauthorised absence.

3 The issue that I was required to determine was whether the circumstances were such that, objectively considered, the Claimant had acted in repudiatory breach of

contract. If this was the case the Claimant's claim would fail, if not the Claimant's claim would succeed.

Evidence

4 The Claimant gave evidence on his own behalf. The Respondent called Miss Beth Harvey, former head of operations and dismissal officer, Mrs Angela Banno – Creagh, the Claimant's line manager and Mrs Annika De Friend, founding director and appeal officer.

5 I was also referred to relevant pages in the agreed bundle consisting of 130 pages.

Facts

6 I found the following facts from the evidence.

7 The Respondent was established in 2004 and is a recruitment company that places staff at organisations.

8 The Claimant commenced employment with the Respondent on 7 August 2017. At the time of his dismissal the Claimant worked on his own dealing with recruitment. There were other teams in the business that had 2 to 4 people who were able to work on recruitment together and achieve higher commissions. The Claimant was frustrated by this and sought to secure opportunities where he could work with a team to try and compete with other agencies and secure higher commissions.

9 Prior to his dismissal the Claimant was seen as a good employee and he was able to secure promotion in 2018 which reflected his hard work and consistent work towards the Respondent's values.

10 The Respondent's disciplinary policy states that gross misconduct includes, amongst other things serious acts of insubordination.

11 When considering unauthorised absence, the Respondent's policy states unauthorised absence without good cause is a serious disciplinary matter and will be dealt with in accordance with the company's disciplinary procedure. Depending on the circumstances of the case, it may amount to potential gross misconduct rendering you liable to summary dismissal.

12 The Respondent has a policy entitled duvet days.

After 12 months continuous service, employees are entitled to an additional day on top of the annual sick leave entitlement, which is called a 'Duvet Day'.

Duvet days do not have to constitute a sick day but in order to take it, you need to contact your line manager by no later than 8:30am on the same morning and request a 'Duvet day'. The Company will try to co-operate to allow you to take the day off where possible, but this will always be subject to the requirements of the Company's business and staffing levels being maintained at all times.

Duvet days are noncontractual and the company reserves the right to withdraw them at any time at its absolute discretion.

13 The Claimant asserts, and I accept, that duvet days were seen as an entitlement for employees. He could recall no prior example of requested a duvet day being refused. The emails within the hearing bundle demonstrate that the Respondent usually adopts a cooperative and affirmative entitlement to duvet days.

14 On 9 February 2018 the Claimant requested have a duvet day on 12 February 2018 in order for internet to be connected to his home. This was authorised.

15 On 27 March 2018 Brook Strachan emailed all staff stating that there would be a employee of the quarter presentation on 13 April 2018 followed by drinks. It was stated to please try and avoid booking any holidays on this day and any requests for duvet days on the day will be refused.

16 The email of 2 July 2018 from Lisa Emmings:

"if you are going to be sick, late or wish to take your duvet day please call me and your manager before 8:30am."

17 The email of 27 September 2018 from Mrs Banno- Creagh states if you are sick or want to take a duvet day – please let Lisa know before 8:30am.

18 Whilst Mrs Banno Creagh correctly asserts that the duvet day policy provides no guarantee that it would be granted, I find that the policy was implemented in an employee friendly way and there was a reasonable expectation that the Respondent would try to co-operate with the employee to allow them to take the day off where possible. As such, the Respondent would have to have a good business reason why the Duvet Day was not to be allowed, such as the 13 April 2018 presentation.

19 In early February 2019 two of the Claimant's fellow employees had resigned. Mrs Banno- Creagh subsequently had a discussion with the Claimant and asked whether the Claimant was happy in his role and indicated that she did not want the Claimant to also quit.

20 On 28 February 2019 at 7.34 the Claimant emailed Lisa Payne stating:

'I am going to use my duvet day today. Is there anyone else I need to tell?'

Ms Payne responded

'Can you also let Ang, as she should be the one to authorise it for you'

21 Mrs Banno-Creagh called the Claimant at 8.33am the same morning and questioned the Claimant about the reasons for his request for duvet day. The duvet day policy did not require employees to provide the reasons for their requests. The Claimant initially provided evasive answers to the questions before admitting that he had an interview planned. Following this Mrs Banno-Creagh stated '*I thought that this was the case*' and refused his request by saying duvet days are a matter for the manager's

discretion. The call was cut short but shortly following this Mrs Banno-Creagh informed the Claimant by text or voicemail that he was required to come into work.

22 Mrs Banno-Creagh stated in evidence that the reasons for the refusal of the request was that on that particular day the needs of the business required the Claimant to be in work. I do not accept Mrs Banno-Creagh's evidence that she actually stated to the Claimant that that she needed him to come into work because of him being under target performance or for operational reasons. The Respondent's ET3 does not mention the Claimant being under target and I find the reason for her refusal was that she was aware that the Claimant was interviewing elsewhere. Otherwise there would have been no reason for her to question him about the reasons for his absence at all. Further, I accept the Claimant's evidence that whilst he was line managed by Mrs Banno-Creagh he worked alone, that he worked late on previous days to finish tasks that needed to be completed by the 28 February 2019 and that he had cleared his diary to prevent any meetings being booked for that day.

23 28 February 2019 was Mrs Banno-Creagh's first day back after 3 days absence and she had inductions with other members of staff to undertake. However, her evidence was conspicuous in its absence as to what she expected the Claimant to actually do on that particular day that required her to refuse to exercise her discretion to consider the duvet day policy in the employee friendly and cooperative way. Further there was no evidence of any adverse impact that the Claimant's failure to attend work on 28 February 2019 had on the Respondent.

24 At about 8.50am Ms Harvey called the Claimant and told him that his request for duvet day has been refused and he was required to come into work. Ms Harvey did not convey the reasons for the refusal of the duvet day request. The Claimant still wanted to attend the interview was concerned that a last-minute cancellation could adversely affect his chances of securing the role. He continued to discuss matters with Ms Harvey, he indicated that he had requested holiday a few days ago which had been signed off. Ms Harvey told the Claimant he should have just called in sick. The Claimant emphasised that he had to attend the interview and Ms Harvey notified the Claimant that his absence would be unauthorised. I find that the Claimant understood that the consequences of the absence being unauthorised would be that he would not be paid for the day. Ms Harvey did not indicate to the Claimant that if he chose to attend the interview instead of work as required that it could result in his dismissal.

25 At 9.29 Ms Harvey emailed the Claimant enclosing the duvet day policy and stated:

'As discussed, you are required to come into the office today as we are unable to authorise the duvet day as the request it (sic) subject to line manager approval. As you have advised you will not be coming in, I confirm that the absence will be classed as unauthorised and I will follow up with you tomorrow. Thanks'

26 Save for stating that the request was refused due to no line manager approval, the email does not provide the reason why the duvet day request was actually refused. The email does not indicate that dismissal could result from his non-attendance.

27 The Claimant asserts that he did not get this email but on balance I find that he was likely to have received the email as he had responded on his work email address less

than three minutes later to Anna Correia. However, by this stage the Claimant had made up his mind and was going to go to the interview.

28 Later that day the Claimant's access to the Respondents email and IT system was removed. He attended for work on 1 March 2019 and was required to attend a disciplinary hearing to address an allegation of wilful refusal to attend work without reasonable justification. He was provided statements from Mrs Banno-Creagh and Ms Harvey, Ms Harvey's email to him of 28 February and a copy of the staff handbook. The letter stated that the company views the issues as potential gross misconduct and if proven could lead to summary dismissal.

29 The Claimant attended a meeting and was provided with a letter of dismissal of the same date. There were no notes of the disciplinary meeting available for me to assess what the Claimant said during the meeting but the Respondent states that it fully considered the facts presented and Ms Harvey decided to dismiss the Claimant without notice.

30 The Claimant was provided a right of appeal which he exercised. His email of 5 March 2019 clearly specified that he was told by Ms Harvey that he would have to take 28 February as a day of unpaid absence. He wrote that he found frustrating as he was expecting to use his duvet day and be paid, but that he did not complain as I saw it as a level of compromise. The Claimant stated that he wanted to clarify there was no pre-warning of his dismissal for his actions and he thought with the days unpaid absence the head of operations had found a solution for both parties. He considered this the justification for his actions,

31 Mrs De Friend considered the Claimant's appeal at a meeting on 18 March 2019. The Claimant reiterated his understanding outlined in the appeal letter. By letter dated 22 March 2019 his appeal was dismissed. Mrs De Friend made was no separate enquiry into the central basis of the Claimant's case that he believed that he will was authorised by Ms Harvey to take unpaid leave.

Law

32 I am required to consider whether given the facts I have found, when objectively assessed, are such that the Claimant was repudiating the contract or one of its essential conditions.

33 I was referred to the case of Laws v Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698 where Lord Evershed MR stated at page 701 *one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract or one of its essential conditions.*

34 It is clear from the facts that I have found that the Claimant did disobey a clear instruction to attend work on 28 February 2019.

35 When considering whether this act of disobedience repudiated the contract I have considered the following matters:

- 35.1 Prior to his dismissal the Claimant was seen as a good employee who worked consistently with the Respondent's values;
- 35.2 The Claimant had a reasonable expectation that the duvet day policy would be implemented in good faith by the employer;
- 35.3 The Claimant was not provided with specific reasons why his request was refused, save for the discretion of the manager;
- 35.4 The Claimant had taken steps to ensure that workload had been properly managed and there was no evidenced impact by the Respondent of his failure to attend work on the 28 February 2019;
- 35.5 The Claimant reasonably believed that the refusal for his request was to prevent him attending the interview;
- 35.6 The Claimant could be reasonable in his belief that the Respondent was not applying the duvet day policy in good faith;
- 35.7 The Claimant was not informed in clear terms that the consequences of his failure to attend work on 28 February 2018 could result in his summary dismissal so that he could make an informed choice.
- 35.8 There was undoubted confusion in the Claimant's mind as the consequences of unauthorised attendance. Given the nature of his conversation with Ms Harvey, the Claimant understood that this would result in him being unpaid for the day.

36 These circumstances when assessed objectively assessed do not lead me to conclude that the Claimant acted in such a way to repudiate the contract. Whilst the Respondent was entitled to dismiss the Claimant for breach of contract, the breach was not sufficiently serious given the context and circumstances for the Respondent to conclude that the Claimant was repudiating the contract.

37 Therefore, the Claimant's claim for wrongful dismissal succeeds.

Remedy

38 The Claimant is entitled to 4 weeks' notice under his contract. His salary was £28,000 per annum and therefore is entitled

$$£538.46 \times 4 = £2,153.84$$

39 The Claimant's schedule of loss also sought £25 for mobile phone allowance and a further amount of £22.77 for interest. I do not order such sums to be paid as neither were pleaded or evidenced before me and I do not consider that it is in accordance with the overriding objective to seek further evidence or submissions to assess these sums.

40 The Respondent is therefore ordered to pay the Claimant the sum of £2153.84 in respect of his claim.

Employment Judge Burgher

10 December 2019