



EMPLOYMENT TRIBUNALS

Claimant: Mrs VJ Liu-Murphy

Respondent: Richard Johnson, Piccadilly Jewellers

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal by video conference

On: 1 Sep 2020

Before: EJ Kelly

Appearances

For the Claimant: In person

For the Respondent: Mrs O'Leary, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim is dismissed.

REASONS

1. By a claim presented on 18 March 2020, the claimant claimed a statutory redundancy payment.
2. The Hearing took place remotely by video conference, except for one witness (referred to below) who attended by telephone.
3. We had a bundle of documents.
4. We heard evidence for the claimant from the claimant and Julie Rogers (JR), former self-employed bookkeeper for the respondent. We heard evidence for the respondent from Richard Johnson (RJ), a partner in the respondent, Rosalind Johnson (Mrs Johnson), a partner in the respondent and wife of RJ), and, by phone, Barbara Bogulak (BB), an employee of the respondent.

5. We were not referred to any authorities during the course of the hearing. After the hearing, we noted that we had received by email from our clerk with an authority provided by the respondent. As the respondent did not refer it to it during the hearing and the claimant did not have chance to comment on it, we have not considered it.
6. At the start of the hearing, it was agreed that the liability issues in this case were:
 - a. Was the claimant dismissed or did she resign?
 - b. If the claimant was dismissed, was the reason for the dismissal redundancy?
7. It was agreed at the start of the case that, if the claimant were entitled to a statutory redundancy payment, this would be in the sum of £3086.
8. This was a fact dependent case in which there was little agreement between the claimant and the respondent as to what happened.

What happened

9. We find the following as the relevant facts in this case.
10. The respondent was in business as a jewellery retailer and the claimant was employed as a sales consultant, working in the respondent's shop. The claimant's contract of employment did not require notice of termination of employment to be given in writing.
11. The claimant worked four days a week and, in late summer 2019, asked the respondent if she could work an extra day a week. The respondent was unable to accommodate this.
12. The lease of the shop was due for renewal on 20 Nov 2019. The respondent received advice from consultants, Whitehouse Consultants, as to how to take the business forward. On their advice, the respondent decided to shut the shop premises and continue to run its business through a facebook page and by arranging individual meetings with its customers either in an office that it would rent by the hour or at their homes. The respondent was approached by a competitor which was interested in taking over the shop premises and staff, and entered into negotiation with it about this.
13. In a staff meeting on 16 October 2019, Whitehouse Consultants explained to the staff that the shop would close on 31 January 2021 and there would be a closing down sale to sell off all the stock before this. Staff were not informed about the possibility of a competitor taking over the business at this stage. BB asked whether staff would be made redundant. The consultants said that it was probable, but it was a matter for the respondent.
14. There is a key divergence of evidence as to what then followed. According to the claimant, RJ said that staff would be made redundant and would receive redundancy pay. The claimant's evidence failed to state that staff were told that the date of the end of employment would be 31 January 2020. She wrote "A staff member asked whether staff would be made redundant and whether we would receive redundancy pay and both questions received the answer 'yes'"
15. According to RJ and BB, RJ did not say that staff would be made redundant. Rather, he said that the business was not closing down and no decisions would be made about staffing levels until well into the new year. RJ's evidence was that, even with the shop closing on 31 January, he would need staff after that date as a minimum to sort out the shop.

16. According to the claimant, the following Saturday, she said to RJ that, as far as she was concerned, she was being made redundant and would receive a redundancy payment. RJ did not look at her and said "yes". According to the claimant, in December 2019, she asked RJ about receiving formal written notice of dismissal and RJ informed her that he did not have to provide this because she had already been informed at the meeting. RJ categorically denied that any such conversations took place.
17. Articles appeared in the local press saying that the respondent was having a closing down sale and that RJ was retiring. RJ gave evidence that it was not true that he was retiring, but that the idea of saying he was retiring had come from Whitehouse Consultants as a marketing ploy and they had issued the press release. We accept this.
18. The claimant informed the respondent that she was looking for new employment. It was the respondent's evidence that he understood this to be in connection with her wish to work five days a week. It was the claimant's evidence that it was because of what she understood to be her approaching redundancy with effect from 31 Jan 2020.
19. The respondent was supportive of the claimant's wish to find new work and said she could have paid time off for interviews, and she would not be required to work out her contractual notice period. The claimant kept RJ informed of the job interviews which she attended.
20. The claimant was due to go abroad in the second half of January on holiday. Her evidence was that she wished to see the question of the end of her employment clearly settled before she went as she would not return until after 31 January 2020 she understood her employment would end. The claimant said that she approached RJ in the week beginning 6 Jan 2020 to enquire about how her redundancy would be handled and if she would receive a written reference. Her written evidence was that RJ was very evasive but he finally spoke to her on the phone and said that he may need her to work after 31 January. There was some contradiction over details of these conversations between the claimant's written and oral evidence. Orally, the claimant did not mention the possible extension of employment until prompted, when she said it had been said to all staff and not to her on the phone. RJ denied that the claimant had at any time approached him to ask him about her redundancy.
21. The claimant asked for a meeting with RJ with her husband present and this took place after the shop closed for the day on 11 Jan 2020. The claimant's explanation for why she arranged the meeting with her husband present was that she wanted RJ to give her a reference and was scared he would not do so. The claimant's version of the meeting was that she informed RJ that she hoped one of her job interviews had been successful and that, when she had left the room, RJ said to her husband that he could not afford to pay any redundancy payment.
22. RJ's account of the meeting was that the claimant and her husband were both there throughout the material part of the meeting. He said that the claimant's husband had happily announced that the claimant had found a new job with a jeweller in Wolverhampton. RJ said to the claimant that she did not look too happy. The claimant responded that she was worried that she did not know enough about the watches which her new employer sold. RJ's evidence was that, at the end of the conversation, with the claimant present, the claimant's husband said "you do realise that next Friday will be the last day that [the claimant] will be working for you". RJ said he understood. RJ took this as notice that the claimant was leaving his employment.

23. On 7 Jan 2020, JR asked RJ if she should work out redundancy payments for staff and he said she should do so. On 14 Jan 2020, RJ told JR that the claimant was not to have a redundancy payment. RJ's explanation for these conversations was that he was looking into matters in case he made redundancies and that the claimant would not receive a redundancy payment because she had already resigned by 14 January.
24. JR gave evidence that she had had conversations with employees about redundancy, with one telling her that RJ had told her he could not afford to pay her redundancy because he had to pay it to the claimant, and with two employees saying they had been trying to arrange a meeting with RJ to clarify their redundancies. JR said that she stopped working for the business on 25 February, at which date no employee (other than the claimant) had left the business, and one employee left at the end of that week.
25. The claimant went on holiday and did not return to work for the respondent. The claimant started the new employment on her return from her holiday, where her pay was lower than with the respondent.
26. On 12 Feb 2020, the respondent received a letter from the claimant dated 1 Feb 2020 stating that she had been made redundant with effect from 31 Jan 2020, and that she had been notified of this in the meeting on 16 Oct 2019, and claiming a statutory redundancy payment. She said that she had verbally asked for confirmation of her redundancy and was now putting this in writing. If she did not get a satisfactory reply within 7 days, she would take the matter to ACAS.
27. RJ's evidence was that, before he could take advice on this, he had a call from ACAS. He asked ACAS whether he should reply to the letter and was advised not to because he could respond to the tribunal proceedings. Therefore, he did not respond to the letter.
28. The store ceased trading on 31 Jan 2020 but there was still work to be done by the staff in sorting out its affairs.
29. RJ's evidence was that, by the Hearing, the business only had one employee, BB, who was on furlough. The three other employees (apart from the claimant) had all left voluntarily. One had caring responsibilities, one had left her employment in order to be eligible for a course in English which she had to pass to apply for British citizenship, and another had retired.
30. We found all witnesses to be credible in their demeanour. Mrs Johnson's evidence was brief and added little, and we do not place reliance on it as it would be likely to support the evidence of RJ, her business partner and husband. We place more reliance on BB's evidence, although we are conscious that, as the only remaining employee with the business, she had an interest in supporting her employer at the Hearing. JR's evidence was largely an account of what other people had said to her and she was not at the important meeting on 16 October 2019, which made her evidence of limited value in determining the issues in dispute.
31. There was no relevant contemporaneous written evidence other than the press reports and the claimant's letter to the respondent of 1 February 2020.

The law

32. The burden of proof is on the claimant to show she was dismissed on the balance of probabilities.

33. Under Section 95 (1) Employment Rights Act 1996 (ERA), an employee is dismissed by his employer if ... (a) the contract under which he is employed is terminated by the employer (whether with or without notice)....

The approach

34. In *Martin v MBS Fastenings (Glynwed) Distribution Ltd*, the Court of Appeal emphasised that the tribunal must decide whether the reality of the situation was that the employer terminated the employment or that the employee did.
35. A warning that dismissal is on the cards or is inevitable by a certain date will not amount to a valid notice of dismissal. In order for it to be effective, it must either specify the date of the termination of the contract or contain material from which the that date can be ascertained. Employees who jump the gun and leave their employment before proper notice has been given will be deemed to have resigned. This was held in *Morton v Sundour Fabrics Ltd v Shaw 1967 ITR 84, Div Ct*. In *Burton Group v Smith 1977 IRLR 351, EAT*, letters stating that redundancy would take effect no later than 26 December were insufficiently certain to constitute notices of dismissal.

Conclusions

36. We find that, even on the facts as put forward by the claimant, the claimant has failed to prove that she was dismissed. The evidence, as presented in her statement, of what the respondent said on 16 October 2019, shows a general intention by the respondent to make its employees redundant, but on an unspecified date. This was not sufficiently certain to constitute a dismissal. Even on the claimant's evidence, at no time thereafter, did the respondent clearly inform her that she would be dismissed with effect from 31 January 2020. Indeed, the claimant's evidence was that RJ said to her that he may need her to work after 31 January.
37. We consider that, in this case, the claimant jumped the gun and left employment before proper notice of termination had been given by the employer and that she is therefore deemed to have resigned, either through simply failing to return to work after her holiday or through, as per the respondent's evidence, her resignation being given in a rather unorthodox manner in the meeting on 11 Jan 2020, by her husband informing RJ that the claimant would not be returning to work after her holiday, in the claimant's presence, who did not dispute this. Either explanation results in the resignation and it is not necessary to determine which version of events of the meeting of 11 Jan 2020 is correct.
38. We consider that the claimant genuinely believed that she was to be made redundant with effect from 31 January 2020 and that she found a new job because of this; she did not move jobs in order to earn more money as she earned more in her position with the respondent. However, the claimant's belief that she had been dismissed was misplaced.
39. With our findings above, it is not necessary for us to state whether we prefer the claimant's or the respondent's evidence as to what happened when there is a divergence of account. However, although we do not consider it necessary to decide on this point, on the balance of probabilities, we prefer the respondent's account. This is because of the evidence of BB which corroborated the evidence of RB in relation to the meeting on 19 Oct 2019, and because of inconsistencies between the claimant's and written and oral evidence as identified above. On the respondent's evidence, no notice of termination was given to the claimant.

40. Therefore, the claimant's claim is dismissed.

Employment Judge Kelly

Signed on: 7 September 2020