



EMPLOYMENT TRIBUNALS

Claimant: Mr S Hussain

Respondent: Kashmir Crown Bakeries Limited

HELD: By CVP

ON: 8 and 9 December 2020

BEFORE: Employment Judge Rogerson

REPRESENTATION:

Claimant: Neil Sharples (union representative)

Respondent: Paul Smith (counsel)

JUDGMENT

The complaints of unfair dismissal and accrued unpaid holiday pay outstanding on termination of employment fail and are dismissed.

REASONS

Issues

1. For the claimant to succeed in both his complaints of unfair dismissal and unpaid holiday pay, he must prove an express dismissal by the respondent on 16 March 2020. The 'dismissal' was disputed by the respondent and it was the sole issue to be determined in this case, because if dismissal was proven, no potentially fair reason for dismissal was advanced by the respondent and the claim would succeed.
2. The claimant asserts the dismissal falls within the circumstances set out in section 95 (1)(a) Employment Rights Act 1996 which provides that "*an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice)*". The claimant also asserts under regulation 14(b) of the Working Time Regulations 1998 that on the termination date, he was entitled to be paid compensation for

156.49 hours accrued but outstanding leave. The claimant asserts the termination date was 16 March 2020.

3. I heard evidence for the claimant from the claimant and for the respondent evidence from Mr A. Saleem (Managing Director), Mr M. Ifzal (Bakery Department Manager) and Mr A. Khan (factory worker). On the disputed dismissal the evidence of the claimant and Mr Khan fell to be considered to resolve the dispute. I found Mr Khan gave his evidence truthfully and honestly and preferred his evidence to the claimant for the reasons I will set out in more detail below. I also saw an electronic bundle of documents produced by the parties and additional documents produced by the claimant. From the evidence I saw and heard I made the following findings of fact.
4. The claimant was employed as a machine operator from 4 April 1998. He was absent from work due to sick leave from 25 October 2019 until 15 March 2020.
5. In the claim form prepared by the claimant (with the assistance of his Union (GMB)) he states that on 16 March 2020 he attended work after a period of sick leave and *“shortly after arriving he was met by his departmental manager Mr A. Hussain and told that he was being sacked with immediate effect and that physical violence would be taken against him if he came anywhere near the factory again. The claimant believes that he was dismissed on the instruction of the business owner and director of the company Mr A. Saleem”*.
6. Attendance records at the factory show the claimant clocked in at 4:02 AM and then clocked out at 4.10 AM. Although there was a great deal of dispute about what happened in those eight minutes, what was missing from the claimant's account are the words communicating a dismissal. Mr Sharples concedes in his written submission (paragraph 6) that *“it is true that there is no statement from Mr Khan, even on the Claimant's version of the transcript definitely stating the claimant has been dismissed”*.
7. Mr Smith has seized on that concession, which he submits, is fatal to the claimant's claims. Dismissals are only effective once communicated to the employee (Fitzgerald -v- University of Kent at Canterbury 2004 IRLR 300 Court of Appeal). He submits and I agreed, that absent the communication of words which could be construed as amounting to a dismissal there can be no dismissal. He submits the claim fails at this initial stage and there is no need to make any other finding based on that concession properly made on the evidence presented.
8. Looking at that evidence, the claimant states that he arrived at work on 16 March and after changing into his overalls, he went to find Mr A. Khan in the pastry department to receive instructions about where he would be working that day. The respondent had no prior notice the claimant was returning to work and had already organised the shifts for that day. The claimant says that when he spoke to Mr Khan he was told that the boss, Mr Salim had given instruction that the claimant was not to be allowed to work and no longer had a job.
9. To support his account the claimant relies upon a 'covert' recording of his conversation with Mr Khan. Although he says that he took his phone out and asked Mr Khan to repeat what was said I accepted Mr Khan's evidence that he was unaware the conversation was being recorded at the time. The transcript produced by the claimant of the conversation between himself and Mr Khan (translated into English) was at page 35C. From that transcript I asked the claimant to identify the words he said were spoken by Mr Khan which he

understood as a dismissal. The claimant said it was when he asked Mr Khan the question “*do you have the authority*”. Although the transcript of the recording produced by the respondent and the claimant differed in parts that part of the transcript was not disputed. The claimant asks the question and Mr Khan’s reply is “*what authority do I have*”.

10. If clear and unambiguous words of dismissal (no longer had a job/sacked) had been communicated by Mr Khan to the claimant, you would expect that the claimant would be able to identify those words from his transcript. On the claimant’s account of the discussion this was the second time in the conversation that the words were spoken. He says Mr Khan had already confirmed the instruction to dismiss before the recording was made and was simply repeating the message for the purposes of the recording. Nowhere in the transcript does Mr Khan tell the claimant that Mr Salim had instructed him to tell the claimant that he no longer had a job and was sacked. The words the claimant has identified in his evidence to me do not support and were completely inconsistent with his pleaded case
11. Mr Khan explained the words he used about ‘authority’ in his evidence. Mr Khan is a more a younger and less experienced factory worker than the claimant. As a factory worker he understood that the claimant had arrived that day without any prior notice and that the shift for the pastry department had already been organised. Upon arrival the claimant had spoken to Mr Ifzal (department manager) and had been directed to work in the Savouries Department until he could be allocated back to the shift in the Pastry Department. The claimant was unhappy about being asked to work elsewhere and asked Mr Khan what authority he had, to which Mr Khan answered that he had no authority. He was not in any position to give the claimant any instructions at all because they were both factory workers.
12. The transcript also confirms that the claimant was not threatened with violence by Mr Khan. He did not speak to Mr A. Hussain who was away from the business in March 2020. It is odd that the wrong individual has repeatedly been named by the claimant in this claim given that he has worked at the factory for over 20 years and knew the names of the people he worked with and the positions they held. It would be reasonable to expect the claimant to be able to identify the person who dismissed him with some certainty given the importance of that conversation.
13. The claimant also admitted that he understood from previous conversations with Mr Salim in October 2019, involving a potential redundancy situation that the respondent would issue a letter of dismissal for a dismissal to take effect. The claimant had covertly recorded his conversation with Mr Salim in October 2019. The transcript records the claimant repeatedly requesting a ‘letter’ because he wanted to be dismissed. The claimant clearly understood that a letter of dismissal was required. His request was refused because Mr Salim was not dismissing the claimant. Mr Salim’s unchallenged evidence was that if an employee is dismissed by the respondent, as director he is the only person in the factory who has authority to dismiss. The method used to communicate dismissal (letter) was well known to all employees. A letter of dismissal would be issued by Mr Salim drafted with the assistance of the respondent’s solicitors.
14. Mr Smith invites me to find that the claimant has not been a credible witness in contrast to Mr Khan who was a credible witness. Mr Khan has not been employed at the factory, for as long as Mr Hussain. He had no idea the

conversation was being recorded. Why did the claimant introduce a question about 'authority' in a conversation with Mr Khan out of the blue? The honest answer given by Mr Khan is consistent with his role. As a factory worker he had no authority to communicate a dismissal. Why would the claimant expect such an important message about dismissal to be communicated in a different way to the established normal method of communication? I agreed with Mr Smith's assessment of the claimant's credibility. It was clear the claimant was trying to entrap Mr Khan into saying something incriminating on the covert recording so that he could use it to pursue this claim. I did not find the claimant to be an honest witness. He has deliberately made false allegations to pursue this claim.

15. Those false allegations were repeated in the letters the claimant sent subsequently on 4 June 2020 almost 3 months after his alleged dismissal. I agree with Mr Smith: Would the claimant after 20 years of employment keep quiet and just walk away without a word, if he had been dismissed in the manner he alleges? In that letter the claimant makes the same factual assertions as made in the claim form. He states "*on 16 March 2020 I attended work following a period of sickness and was told to leave immediately by my department manager. He informed me that I was sacked and that I could no longer work for you*".
16. On 30 June 2020, Mr Salim replied denying that the claimant had been dismissed. He invited the claimant to return to work so that he could investigate the alleged events of 16 March 2020 which included serious allegations of threats of violence. The claimant responded by a letter which states "*I was very surprised to read that you're encouraging this return to work and asking for further information regarding my dismissal as I was of the belief that my department manager sacked me on your instruction I am without doubt that A. Hussain told me that there was no work for me and that I was sacked*" (highlighted text my emphasis).
17. This is the third time the claimant names the wrong individual (Mr A Hussain) identified as the department manager. He accepts Mr Hussain was not at work on 16 March 2020. Mr M Ifzal was the Department Manager. In the letter, the claimant is emphatic saying he has 'no doubt' who dismissed him and he is clear about the words that were used. He was told he was 'sacked'. That word does not appear anywhere in the transcript of the claimant's covert recording. Mr Khan had no knowledge of the recording when he was answering the claimant's questions, only the claimant knew about the recording.
18. The claimant is a taxi driver and he accepted that a certain level of spoken English was required for him to obtain a licence. He could check the letters and the claim form. He was assisted by his Union and had access to interpreters. The claimant had the covert recording. Based on the case presented it has been conceded that "*even on the Claimant's version of the transcript there was nothing definitely stating the claimant has been dismissed*".
19. In June 2020, the claimant had the opportunity to return to work, to reflect and reconsider his position, to ensure his understanding about 16 March 2020 was correct. He could have checked his covert recording. He ignored that opportunity and continued to repeat the allegations in his claim knowing them to be false. Unfortunately, I agree with Mr Smith's submission that the entire claim is being pursued on a fundamentally dishonest assertion on the part of the claimant.

20. For those reasons the claimant has not proved that he was dismissed on 16 March 2020. His complaints of unfair dismissal and holiday pay based upon that purported dismissal fail and are therefore dismissed.

Employment Judge Rogerson

Date 8 March 2021

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