



EMPLOYMENT TRIBUNALS

Claimant: Miss V de Souza
Respondent: The Whiter Smile Limited
Heard at: East London Hearing Centre
On: 18th March 2021
Before: Employment Judge McLaren

Representation

Claimant: In Person

Respondent: Mr. R O'Dair, Counsel

JUDGMENT having been sent to the parties on **22 March 2021** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1. The claimant was employed as a dental nurse working 21 hours a week from 19th February 2019 until her dismissal on the 8th of June 2020.
2. I heard evidence from the claimant and Mr Sadler and was provided with a written witness statement from Dr Sohi. For the respondent I heard evidence from Mr Boulis and Ms Smith. I was provided with a bundle of 472 pages.
3. In reaching my decision I considered all the evidence I heard and those parts of the documents in the bundle to which I was directed.

The issues

4. At the outset of the hearing, I clarified the issues in dispute. The claimant

suggested that her dismissal was not only because she complained about not being paid, but also because she had raised an earlier complaint about a dentist, and possibly was based on a prior disciplinary warning.

5. After discussion, the claimant confirmed there was no whistleblowing detriment or discrimination being pursued (reference to this was in the schedule of loss but not the ET1). I invited the parties to discuss the question of any outstanding wages claimed as the respondent believed these matters had been paid in full. After discussion this was confirmed so there is no outstanding claim for monies owed.

6. The issues to be decided at today's hearing are therefore as follows.

The respondent accepted that the claimant asserted there had been a breach of a statutory right, that her wages had not been paid, she had asserted her right not to suffer unlawful deductions from wages s13 ERA 1996 and that such assertion was made in good faith. The claimant says that this assertion was the reason or principal reason for the dismissal. The respondent says the claimant was dismissed because she indicated she would not return to work and had not booked holiday.

Finding of facts

7. The claimant was employed as a dental nurse by the respondent which operates from four dental branches. The general manager is Mr Boulis, and it is his role to take care of the financial operations of the business as well as having responsibility for many other functions. This included delegating certain functions to others, including Ms Smith who was responsible for HR, although not for decisions to dismiss staff.

8. All four branches of the respondent's business had to be closed by the second week of April 2020 upon the instructions of the care quality commission (CQC). As a result, the claimant and many of her fellow dental nurses were placed on furlough. The furlough agreement that the claimant signed was at page 73 of the bundle. It confirmed that the respondent will endeavour to make payments on the usual salary date. The period of furlough started in April 2020 and continued until 8 June.

9. It was common ground that neither the claimant nor any of the furloughed staff received their wages or any furlough payment during this period. It was also common ground that many of the staff were unhappy about not being paid and raised complaints about this on the WhatsApp group which was set up and used by staff to communicate with each other and by the respondent to issue messages as well. This was in addition to emails that continued to be sent by the respondent and, on at least one occasion a zoom call. The claimant also continued to communicate with her manager, Ms Smith by telephone.

10. The claimant raised her concerns and unhappiness on a number of occasions. On 7 May when the claimant was meant to receive the first furlough payment for April Ms Smith put a message on the WhatsApp group announcing that due to delays in government payment it was not possible to pay everyone that day. On 14 May Ms

Smith again had a message on the WhatsApp group stating that only those who worked in the first and 17th of April 2020 would be paid again because of delay in receiving government funds.

11. Ms Smith gave further reassurance on 21 May saying that Mr Boulis was doing all that he could and had been in constant contact with HMRC. The claimant sent private messages to Ms Smith on 26 May and on 28 May in which she asked for information about the payment and asked her if she, Ms Smith, could talk to Mr Boulis, or to the accountant. The claimant did not receive any specific reassurance or answers to her questions.

12. On 29 May Ms Smith sent a group WhatsApp message which stated that everyone had to be available to work from 8 June and, if they were not available for any reason, they had to inform her immediately and send a holiday request form for the period they would not be available that would have to be approved as per their contract. Following this, a further email was sent to the group to let them know that they will be contacted by the practice to answer a return-to-work questionnaire. This email reiterated that if anybody was unable to start working for any reason, they must inform management immediately. The claimant did not respond to this. In her evidence she explained that she wanted to go back to work and did not want to take holiday, particularly as she had not accrued very much because she was a part-time worker.

13. On 1 June 2020 the claimant then sent an email to Ms Smith asked her to contact the accountant on her behalf, partly because the accountancy firm had not responded to the claimant's emails despite her repeated attempts. Ms Smith simply replied saying lack of payments was not her responsibility, but she was happy to help, and she simply forwarded the claimant's email to the accounts department. The claimant did not receive any response.

14. On 3 June another dental nurse, Elena asked when the application for furlough had been made to HMRC. There was no response given to this. On 4 June, the WhatsApp chat shows that numerous dental nurses started asking questions about the delay of payments and again there is no management reply.

15. On 4 June the claimant emailed what she describes as a grievance letter to Mr Boulis asking questions about the furlough scheme. This was at page 101 of the bundle. It explained that she could not pay bills or rent when she wasn't receiving any money and also that she could be getting much less than she was expecting which was causing her considerable stress. She concluded by asking that the recalculated amount be paid to her within seven days of receipt of the email. She did not receive any reply.

16. The evidence of Mr Boulis was that he received many emails from staff complaining about the lack of payment. He was not able to reply to all of these because he had so much else to do given the crisis facing the business and the fact that most staff were not working. I was taken to emails in the bundle that he sent to the accountants asking for information. For example, on 26 May 2020 at pages 84 when he chases the accountant's firm for information explaining that this put him in a very awkward and difficult situation with his staff who are counting on the money for their

living. On 4 June Mr Boulis posted on the WhatsApp a photograph of his exchange with the accountancy firm as to what the position was. I accept that he was making genuine efforts to resolve the position and to find out why HMRC has not released the necessary funds. He did not, however, communicate this directly to the claimant who received no individual response to the complaints that she raised.

17. On 5 June there was a zoom meeting and following this Ms Smith sent an email to all staff letting them know they would reopen on Wednesday the 10th. This email again reminded staff that everyone had to be available to come back to work at any time from Wednesday onwards and “if any reason they were not available e.g. health reason, away abroad, looking after someone et cetera... Must send me an email requesting holiday subject to management approval. If I don’t get this by Monday morning, I will assume you’re ready to work and will be on the rota”. In cross examination Ms Smith said that the Monday deadline was for the submission of the holiday form. There had been previous opportunities for staff to say they were not able to attend work on the claimant had not done so. Looking at the wording on the face of this email I find that the Monday deadline is not limited to submission of a holiday form. It is reasonable for the claimant to have read it as giving her until Monday to confirm her position on return to work. I accept that she had been given other opportunities, but I find that this was a further deadline that the respondent set.

18. It was agreed that the claimant had replied to this email on 6 June at 11.55. The claimant explained that she had not seen the email sent the previous day until the Saturday just before midday. I conclude therefore that the claimant had met the deadline set by the respondent to set out her position before Monday. In her email she explained that

“as of the date of this email and despite being given country information I’m still waiting to be paid. As a result I am unable to commit to your request for confirmation of attendance and cannot make that decision by Monday morning I do not yet know if I will get paid. I’m sure you understand that without money is very difficult for me to get to work.”

19. The claimant was very clear in her evidence that this response did not amount to a refusal to attend work. She wanted to attend work. She did not want to take holiday. She did not want to take unpaid leave. Her email was explaining that she simply could not commit to returning to work because he did not have the money to do so. In her evidence today she explained that she could not afford the cost of a season ticket nor could she afford the daily train fare having not been paid for two months. I accept the claimant’s position. This is not an email in which she is refusing to come to work, it is an email which says she is unable to decide and gives the reason that without money is difficult for her to get to work. The claimant had flagged this to the individual who had phoned to carry out the survey but it appears this was not passed on.

20. Ms Smith did not see the email until Monday. When she did so she told me that she spoke to Mr Boulis. She did not send him the claimant’s email but described its contents. In doing so I find that she wrongly characterised the claimant’s email as

being a refusal to return to work instead, as I have found to be an expression of uncertainty because of an inability to fund the travel costs without wages.

21. Both Ms Smith and Mr Boulis confirmed that he was the decision-maker and I have no reason to doubt that this is the position. He was the senior employee. He told me that Ms Smith simply related to him that the claimant had refused to attend work. On that basis he therefore instructed that the claimant's employment be terminated because of this refusal. He made the same decision in relation to Irina because he understood that she had also refused to attend work.

22. Ms Smith wrote the reply to the claimant which was effectively her dismissal letter. This appeared to give two reasons for the dismissal it said

"your lastminute email and reason to not come back to work is unacceptable, therefore I am writing to inform you that your employment has been terminated with effect from today and I'm giving a week's notice starting from today".

23. In answer to my questions both Ms Smith and Mr Boulis confirmed that the timing of the claimant's response was not part of any decision. The decision was taken solely because as far as the decision-maker was concerned, albeit wrongly based on Ms Smith's incorrect analysis, the claimant had refused to attend work. Mr Boulis also said, however, that, had he been made aware on the Monday that the claimant could not afford to attend work because she had no money to pay the train fare, he would nonetheless still have made the same decision to dismiss her. This appeared to be despite the fact that other individuals had been given assistance with travel costs.

24. I accept that Mr Boulis was the sole decision maker and had not seen the claimant's email. I accept that he made his decision based on the way in which Ms Smith characterised the claimant's response to him, namely as a refusal to attend work. This was the reason in his mind for the dismissal.

25. During the claimant's employment there were two incidents to which she referred and which had been mentioned in the respondent's reply. One involved a grievance the claimant had raised against a dentist, the second was a disciplinary warning that she received. Neither are cited by the respondent as a reason for the claimant's dismissal and I accept that Mr Boulis decision to dismiss was not influenced by either of these incidents. I am not, therefore, make any findings of fact about what occurred in relation to either of these incidents.

Relevant law

26. The claimant has less than two years' service. Her claim is for automatic unfair dismissal under s104 of the Employment Rights Act 1996 for failure to pay wages. The section states

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

27. The burden of proof is on the employee to establish the reason for dismissal, on the balance of probabilities.

Conclusion

28. While this is a case of unfair dismissal it arises under section 104 of the Employment Rights Act 1996. It is not a question of whether the employer acted reasonably in making that decision, simply what the principal reason for that decision was. If it were a question of reasonable, I would conclude that the respondent had not acted reasonably or fairly. I have concluded that the claimant did not refuse to return to work but had explained she was not in funds to allow her to travel. Ironically, it was after her dismissal that same day that the funds arrived, and the claimant was in fact paid. She would therefore have been able to attend on the first day the practice opened on the 10th. She did not, however, have the chance because she had already been dismissed. This entire scenario could have been avoided and the claimant still employed if Ms Smith had properly considered what the claimant was saying and had accurately reported that to the decision maker and waited a matter of hours.

29. The issue in this case is, however, a limited one as to the reason for the dismissal. It is agreed that the respondent did not pay its staff 80% of their wages but waited instead for it to be put in funds by HMRC causing staff hardship. It is also accepted that the claimant raised complaints about this unlawful deduction from wages and that she raised such matters in good faith. However, what I have to determine is whether or not her raising this statutory breach of failure to pay wages, therefore making unauthorised deductions, was the reason or principal reason for her dismissal.

30. I have accepted that Mr Boulis was the sole decision maker and I have found that he made a decision because he wrongly understood the claimant had refused to come to work. That is the sole or principal reason for dismissal, his perception that she

was refusing to come to work. I conclude that the reason was not therefore because she had raised a complaint about unlawful deductions, but because she was understood to be refusing to return.

31. For this reason, I have therefore dismissed the claimant's claim of unfair dismissal. The claim for unlawful deductions themselves were withdrawn by the claimant this morning as they have been satisfied by the respondent.

Employment Judge McLaren

Date: 19 April 2021