



EMPLOYMENT TRIBUNALS

Claimant: Mr P Buckingham

Respondent: West-O Hygiene Solutions Ltd

Heard at: London South Employment Tribunal (By CVP)

On: 6 April 2021

Before: Employment Judge Keogh

Representation

Claimant: In person

Respondent: Mr J Thomas, lay representative

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is unsuccessful and is dismissed.
2. The Claimant's claim for unlawful deductions from wages and breach of contract is successful. The Respondent shall pay to the Claimant the gross sum of £811.55, subject to deductions for tax and national insurance.

REASONS

1. This is a claim for unfair dismissal, unlawful deductions from wages and breach of contract brought by Mr Paul Buckingham against West-O Hygiene Solutions Ltd.
2. In advance of the hearing I received a bundle of documents from the Claimant, additional documents from both the Claimant and Respondent, a witness statement from the Claimant and Respondent and a supplemental statement from the Claimant. The Claimant represented himself and the Respondent was represented by Mr J Thomas, lay representative. I heard evidence from the Claimant and Mr Thomas.
3. At the outset of the hearing we discussed the list of issues which had been set down by Employment Judge Martin at a hearing on 25 February 2020. I

noted that the Claimant's statement went some way beyond this, including a purported claim for 'Breach of legal obligation' relating to the alleged illegal status of the company. This had not been included in the list of issues as a matter to be determined by the Tribunal. No application had been made to Employment Judge Martin to review the list of issues she had recorded. In those circumstances the Respondents would be prepared to deal only with the list of issues set out by Employment Judge Martin. In any event, I could not see that there was any claim disclosed which the Tribunal had jurisdiction to hear. There is no free standing claim for 'breach of legal obligation'. The time allocated to deal with the hearing was one day, for liability only. Applying the overriding objective, I determined that it would not be proportionate to hear evidence relating to this part of the Claimant's statement.

Facts

4. The Claimant was employed by the Respondent as a Business Development and Marketing Manager from 24 January 2019 to 22 March 2019 when he was dismissed.
5. The Claimant's contract of employment provided for a probationary period of three months, terminable by one week's notice. It also provided that the company was authorised at any time during the Claimant's employment to deduct from his salary payment and any sums the Respondent was liable to pay to him any amount from time to time which was owed to the company, including but not limited to any outstanding loans, advances, payments for excess holiday and overpayment of wages and he expressly consented to any such deductions pursuant to Part II of the Employment Rights Act 1996. It provided that on termination of employment or at the Respondent's request the Claimant would immediately return to the Respondent all property belonging to or relating to the Respondent in his possession or control, including but not limited to keys, security cards and all documents, records, correspondence, papers and other materials.
6. The Claimant worked 6 days in January 2019 for which he was not paid. The Respondent contends that this was time spent training, and that an agreement was reached with the Claimant that he would not be paid for these days and would start being paid in February 2019. I find that this agreement was reached with him. There is contemporaneous evidence in the form of an email to the Respondent's accountants confirming the position. There is also an email from the Claimant to the Respondent dated 3 February 2019 where he provides his bank details and sets out the sum he expected to receive per month. If he expected to be paid for January it is likely that he would have mentioned it in this email.
7. It is clear from the questions put by Mr Thomas on behalf of the Respondent that there was a dispute as to what the Claimant's job role entailed. Mr Thomas contended that this was primarily sales and dealing with the port side of the importation process, whereas the Claimant considered his role

was much wider and that, amongst other things, he needed to liaise with the exporter of products and logistics providers.

8. The Claimant contends that in around the 4th or 5th week of his employment (i.e. around the end of February 2019 or start of March 2019) he had a conversation with Mr Tomichan Thomas in relation to the importing of hazardous materials. He was concerned that the correct legal processes were not being complied with as one of the companies from whom samples were being imported was not providing required information. He states that Mr Thomas removed him from this process, instructing him to stop discussions with logistics providers.
9. I find it is likely that this conversation took place. The Claimant was able to recall it in some detail. I did not hear evidence from Mr T Thomas so only have second hand evidence of Mr J Thomas that the conversation did not occur. In questions it was suggested that the conversation cannot have occurred because it was not part of the Claimant's role to deal with that area of the business. However, that is also consistent with the conversation occurring and Mr T Thomas telling the Claimant that he did not need to be involved.
10. There was a dispute as to how much work had been done by the Claimant during the course of his employment. The Respondent's main issue was that during his employment the Claimant had not generated any sales. The Claimant showed evidence that he had produced a pricing structure for the Respondent and had compiled a database of potential customers. He did not dispute that he had not generated any sales. He said this was because no stock arrived at the Respondent's warehouse until 13 March 2019. He was dismissed on 22 March 2019 so had no opportunity to generate any sales in that period. The Respondent's position is that there did not need to be stock present for sales to be generated. Service contracts could have been entered into with companies with a date of installation to be agreed once stock had been received.
11. The Respondent had also issues with the Claimant's conduct. The Claimant would not comply with the Respondent's administrative system of signing in each day he was in the office. The Claimant did not appear to dispute this. The Respondent also took issue with the Claimant using foul language. The Claimant did not dispute that he used swearing in one email.
12. The Respondent wrote to the Claimant by letter dated 21 March 2019 inviting him to a meeting where he could potentially be dismissed for not meeting targets and for poor performance. He was invited to attend a meeting the following day at 11am. He was given the opportunity to provide a written statement in advance of the hearing, to be accompanied, and to reschedule if he was unable to attend. The Claimant replied by email with a lengthy response. He did not attend the meeting on 22 March 2019.
13. The Respondent wrote to the Claimant on 22 March 2019 terminating his employment for not meeting targets, poor performance and being rude to

staff. He was asked to return a number of items to the Respondent. He was asked whether he would like to leave the company that day or with a week's notice. This was accompanied by a letter in response to the Claimant's email of 21 March 2019. The Claimant replied, stating that the Respondent had failed to meet its contractual and legal obligations.

14. On around 25 March 2019 the Claimant arranged to meet a representative of Discovery Park, the estate where the Respondent's business was situated. He gave to them his security lanyards and a suitcase of materials to be returned to the Respondent. It appears that it took until around June 2019 for the return of the lanyard to be registered by Discovery Park's security team.
15. The Respondent did not receive the suitcase and were charged for replacement lanyards. They did not receive a key back from the Claimant and had to change the locks to the premises.
16. The Claimant was paid £700 of his salary in March 2019.

Issues and law

17. The issues to be determined in this matter are as set out in the Case Management Summary of EJ Martin on 25 February 2020:

Unfair dismissal:

- (i) The Claimant must show he made a protected disclosure. The Claimant relies on a conversation with Mr T Thomas in the 4th or 5th week of his employment in which he said that hazardous materials were unlawfully being brought into the conversation (having discussed this with the Claimant I believe this should say 'into the country') and that Mr Thomas should contact the supplier company to make sure he had the correct information for the hazardous materials and that failure would have legal ramifications.
- (ii) Was information disclosed which in the Claimant's reasonable belief tended to show that a person had failed to comply with a legal obligation to which he was subject?
- (iii) If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

Breach of contract/unauthorised deduction from wages

- (iv) Did the Respondent deduct pay from the Claimant for 6 days in January 2019? The Respondent says this was part of an agreement between the parties.
- (v) Did the Respondent deduct pay for March 2019? The Respondent seeks to offset a sum because the Claimant had not returned company

property on the termination of his employment and the Respondent relies on the contract of employment.

18. The Claimant does not have a claim for ordinary unfair dismissal as he does not have the requisite two years' service. However under section 103A Employment Rights Act 1996 ("*ERA*") a dismissal is automatically unfair if the reason, or, if more than one, the principal reason, for dismissal is that the employee made a protected disclosure. It is for the Claimant to show the reason for dismissal was the protected disclosure.
19. A protected disclosure is defined in section 43A ERA as a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H, which includes disclosure to the employer. Under section 43B a qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out at section 43B(a) to (f), which includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
20. Under section 13 ERA an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a provision of the employee's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. A relevant provision of a worker's contract can be an express or implied term and can be written or oral, provided it is notified to the worker.

Conclusions

21. I am satisfied that the conversation the Claimant had with Mr T Thomas at the end of February or beginning of March 2019 amounted to a protected disclosure. While the Claimant was unable to specify precisely which legal obligation was being breached or was likely to be breached, I am satisfied that there were complex legal provisions which needed to be satisfied for hazardous goods to be imported and that the Claimant was reasonably concerned that a breach may have occurred. I am also satisfied that it was in the reasonable belief of the Claimant that the disclosure was in the public interest. The Claimant believed that the breach of importing requirements could have serious consequences for the health and safety of the public, and this was not challenged by the Respondent.
22. However, I find that the protected disclosure was not the reason or a principal reason for dismissal. The Claimant gave no evidence as to why he contended there was a causal link between the disclosure made and the dismissal, and did not challenge the Respondent as to the reason it gave for dismissal, namely his conduct and performance, other than to suggest that the Respondent's view of him was unwarranted.
23. I find that it was a genuine concern of the Respondent that no sales had been generated in the period of the Claimant's employment. It is not in

dispute that the Claimant had been given a sales target of £10,000 by the end of April and by the date he was dismissed had not generated any sales. There were also concerns in relation to the Claimant's conduct. It is not necessary for me to consider whether those concerns were reasonable or not, only whether they were the real reason for dismissal as opposed to the protected disclosure.

24. I could not find any causal link between the protected disclosure at the end of February or beginning of March 2019 and the dismissal some three weeks later. I find it more likely that in the conversation which took place Mr T Thomas told the Claimant he did not need to be involved in this part of the importation process because the Respondent did not think that was part of the Claimant's job remit, and that was the end of the matter.
25. In the circumstances I do not find that the protected disclosure was a reason or a principal reason for the dismissal, and the claim for unfair dismissal fails.
26. In relation to the pay for 6 days in January 2019, I have found that there was an agreement between the Claimant and the Respondent that he should not be paid for those days. This in my view amounted to an oral variation of contract in respect of the initial period of 6 days. In the circumstances the Claimant was properly paid according to the varied contract and there was no unlawful deduction from his salary or breach of contract in respect of that period.
27. In relation to pay in March 2019, the Respondent contends it made deductions totalling £437.38 in respect of the items which were not returned to it and for changing the locks, the key to the premises having not been returned. It was further contended in the hearing that the Claimant was only paid for 9 days for which he signed to say he attended work.
28. It was not a provision of the Claimant's contract that he was required to sign in each day he worked for the Respondent. Further, the Respondent was aware that he was not signing in and that there was one week in March where the Claimant was not attending the office as he was intending to visit potential clients.
29. In the circumstances I find that the Claimant was entitled to be paid for the 22 days he remained in the Respondent's employment rather than only 9 days. He was also given one week's notice. At a gross salary of £2,083.34 per month this would mean he was entitled to gross pay of £1,948.93 (for 29 out of 31 days).
30. The next question is whether the Respondent was entitled to make deductions for the items which were not returned. While the Claimant made an attempt to return these items by delivering them to the business park I find that he was in breach of his contract of employment by failing to return the items to the Respondent itself, which could easily have been arranged.

Case No: 2301212/2019

In the circumstances there were sums owing to the Respondent and it was, under the contract of employment, entitled to deduct those sums.

31. The claimant was paid £700 for March 2019. He was entitled to £1,948.93 and was paid £700, leaving a balance of £1,248.93. After deductions of £437.38 this leaves an outstanding balance of £811.55 gross salary, from which the Respondent will be entitled to deduct tax and national insurance if applicable.
32. In the circumstances I find that the Respondent did unlawfully deduct wages of £811.55 and was in breach of contract in respect of the same sum.

Employment Judge Keogh

Date 8 April 2021