



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: Employment Judge Truscott QC

BETWEEN:

Mr N Winchester

Claimant

AND

Journeyman Pictures Limited

Respondent

ON: 15 October 2021

Appearances:

For the Claimant: Mr D Lemer of Counsel

For the Respondent: Ms A Richards employment consultant

JUDGMENT

The judgment of the Tribunal is that the claim that the claimant had been summarily dismissed in breach of contract is not well founded and is dismissed;

REASONS

PRELIMINARY

1. The claimant brought a claim for breach of contract on the basis that he was summarily dismissed for gross misconduct when he did not commit gross misconduct.

2. The claimant gave evidence on his own behalf and was represented by Mr D Lemer, barrister. The respondent was represented by Ms A Richards, employment consultant who led the evidence of Mr M Stucke, managing director.

3. There was a bundle of documents to which reference will be made where necessary. The electronic page numbers are used in this judgment. The relevant emails have been duplicated within the bundle.

Findings of fact

4. The respondent described itself as one of the leading independent suppliers of award-winning stories to the global theatrical, broadcast, digital and educational markets, and prides itself on a position at the forefront of the factual agenda. With a very successful catalogue covering a myriad of subjects and styles, from award-winning festival documentaries to topical new investigations and bold character stories, it keeps at the heart of its work, a central journalistic ethic that goes to the very roots of the company.

5. The claimant was employed by the respondent on 20 May 2019 as a Digital Media Executive. He has a contract of employment [30 – 36]. The notice period to be given to the claimant, given his length of service, except when gross misconduct was committed, was two months.

6. In early June 2020, the respondent was working on the distribution release of a documentary in relation to the 'Black Lives Matter' movement which was to be entitled 'Black Bias Matters'. This was a film produced by Swiss state TV with its subject matter based on US policing and its approach to black people.

7. On 11 June 2020, the claimant asked Mr Stucke if he could be released from working on the film. Mr Stucke asked why and he said that he did not like the title and didn't want to be associated with the documentary. Mr Stucke told him that he was critical to the release of this feature and that he was required to work on it and that a refusal to work on it would be considered potential gross misconduct. This is reflected in an exchange of text messages [132]. The claimant considered that the title was a serious statement being made into a pun. Mr Stucke replied "what shots need replacing, its really decided." The claimant replies "If we're definitely going to call that film Black Bias Matters then I'd rather not work on it, make any artwork using that title or post it. It might seem a small thing, but I am not comfortable undermining a serious social and racial issue to sell a film..." Mr Stucke replied "Well then you don't have a job....your refusal to work with it equates to gross misconduct...Unless you change your mind..." This was repeated in an email to the claimant [86A]. He said:

"This afternoon you refused to work with a project because you didn't like the title it was given. While your feelings on a name we give a film will always be taken into consideration, there will be times where I as your superior might disagree with you. Today you were not prepared to accept my decision regarding the title of the film in question and said you would rather not do any further work on it. I said that I'd made my decision on the title and if you therefore refused to work with the film I'd need you to consider your position and cease work with immediate effect.

An employee refusing to carry out tasks at the core of their role puts any employer in a difficult position and / therefore feel it necessary to tell you that you have until the end of today to decide whether this remains your position.”

8. The claimant replied to Mr Stucke by email on the 11 June 2020 asking for his refusal based on political belief not to be considered gross misconduct and to allow him to work or be paid for his two months’ notice period [89a]. Mr Stucke replied making clear that his position remained that unless he changed his mind there would be disciplinary proceedings [89a]. The claimant replied that:

“I asked that I not be involved with it based on my personal political belief...I was also advised to seek further confirmation as your decision could breach the Equality Act 2010 for indirect discrimination based on religion and belief” [89a]

Mr Stucke said that if the claimant was to change his mind then there would be no issue, especially as he valued the claimant as an employee and would be sorry to see him go [89b].

9. Later on the evening of 11 June 2020, the claimant said that his position had not changed. He disputed Mr Stucke’s view of gross misconduct and continued to assert his position that he had not refused to do the work, simply requested that he was not required to work on the film because he preferred not to do so. He said it would be a simple fix to allow him to duck out of work on the film which would amount to two or three hours work. He said that if they could not reach agreement, he would take dismissal from employment but dispute the summary nature of it [89b].

10. The next day, Mr Stucke said that he did not believe the claimant’s opposition to his choice of title for a film was sufficient grounds for his request [89c] The claimant reiterated that he was not refusing to do a task, it was Mr Stucke who had decided not to accommodate his request. The claimant asked him to stop giving him time to change his mind [89c]. Notwithstanding the claimant’s request, Mr Stucke wrote again restating his position giving him the choice of carrying out the work or being dismissed [89d]. He said:

“There is only one thing at play here, your refusal to carry out tasks asked of you. You have been instructed to, as you usually would for any film we handle, carry out various tasks associated with the release of the Swiss USA policing film with a title I have decided on. You have stated you don’t want to do the work for political/religious reasons.”

The claimant replied [89d]:

“I have made my decision and communicated that to you now in two or three emails. Please stop trying to twist my arm. I am taking your dismissal with immediate effect. You have forced me into this position without going through a defined disciplinary procedure. Although you state you are following statutory guidelines, I have been advised you are on shaky ground.

As I have also told you multiple times, I do not consider my actions as gross misconduct, so upon your dismissal, I will be applying to an employment tribunal to seek remittance for my two months notice.

Additionally, attached below is a formal complaint against unlawful victimisation at work.”

11. Mr Stucke invoked the disciplinary procedure and dismissed the claimant for gross misconduct on grounds of a refusal to carry out reasonable duties or instructions in relation to his work [93A].

12. The claimant appealed the decision to terminate his employment by email [102] and with a letter of appeal [103-108]. On 25 June 2020, Mr Stucke replied to the claimant's complaint of victimisation [96-97] and the appeal lodged by him setting out the factual background as he saw it [109-112].

13. The appeal proceeded on 2 July 2020, the claimant attended accompanied by his Trade Union representative. Minutes of the appeal hearing were taken [116-126]. Neither side had changed their position. Mr Stucke reached the decision that the decision to terminate Mr Winchester's employment on grounds of gross misconduct was fair and reasonable [127-128].

Submissions

14. The Tribunal received oral submissions from the parties.

Law

DISMISSAL FOR GROSS MISCONDUCT

15. The test to be applied is helpfully summarised by Mrs Justice Collins Rice in paragraph 42 of **Palmeri v. Charles Stanley & Co Ltd.** [2020] EWHC 2934 HC as follows:

The test I am required to apply for that is variously formulated in the authorities. It includes considering whether, objectively and from the perspective of a reasonable person in the position of Charles Stanley, Mr Palmeri had "*clearly shown an intention to abandon and altogether refuse to perform the contract*" by repudiating the relationship of trust and confidence towards Charles Stanley (*Eminence Property Developments v Heaney* [2011] 2 All ER (Comm) 223). In a case like this "*the focus is on the damage to the relationship between the parties*" (*Adesokan v Sainsbury's Supermarkets Limited* [2017] ICR 590 per Elias LJ paragraph 23). There is relevant analogy with the formulations in the employment cases: "*the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.*" (*Laws v London Chronicle* [1959] 1 WLR 698, pages 700-701) It must be of a "*grave and weighty character*" and "*seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged*" (*Neary v Dean of Westminster* [1999] IRLR 288, paragraph 20), or "*of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment*" (*Ardron v Sussex Partnership NHS Foundation Trust* [2019] IRLR 233 at paragraph 78).

16. On the issue of management instructions, reference was made to **Petrofac Offshore Management Ltd v. Wilson** UKEATS 0013/11.

DISCUSSION and DECISION

17. The respondent accepted that the relevant period of pay in lieu of notice was not paid to the claimant on account of his refusal to carry out his duties or instructions in relation to the documentary entitled '*Black Bias Matters*'.

18. The claimant confirmed at the hearing that he was not relying on any procedural points in relation to the disciplinary hearing which did not take place and the appeal. Although not relevant to this judgment, the original decision having been taken by Mr Stucke, it would be difficult to justify his conducting the appeal. The respondent relied on the contents of the contract of employment and in particular, Employee Handbook [37-78] with the disciplinary procedure [63-66]. There is a subsection dealing with 'Gross Misconduct'. At the outset of this subsection, it makes it clear that gross misconduct will result in summary dismissal which means that the claimant will lose the right to notice or pay in lieu of notice. It then lists a number of potential gross misconduct examples, one of which refusal to carry out reasonable duties or instructions. The Tribunal did not consider that the contents of the contract and handbook were relevant to its decision, as the question was for the Tribunal not as designated by the respondent. The question for the Tribunal was whether this refusal justified summary dismissal.

19. The Tribunal examined the exchanges between the parties from which it was clear that both parties adopted entrenched positions from the beginning. The claimant's initial request turned into an entrenched position because of Mr Stucke's strong reaction to it. The Tribunal did accept that Mr Stucke realised he had overreacted when he immediately threatened termination and accepted that he was willing for the claimant to continue in employment provided he carried out the required work. It is unfortunate that the claimant was not equally open to step back to resolve the matter. The claimant says:

"I wanted to open up a conversation about the appropriateness of the film's title and wanted to engage in a discussion with Mark about it and reach a mutual agreement, but this did not happen."

The Tribunal considered that the conversation would more likely arise during the period of the work being carried out than by a stance being adopted at the beginning. The claimant makes reference to the Equality Act, political beliefs and religious discrimination but in the context of this employer and his employment duties, he had received a reasonable managerial instruction with which he did not want to comply then said he would not comply. The claimant considered that he should be removed from the obligation to work on the film but was not aware or concerned whether his work could be done by others. In submission, it was said that Mr Etienne could have carried out the work and it was not of a long duration. Whilst this was not explored at the time, it was Mr Stucke who knew what his employees were doing. It was submitted that there was no urgency about this work but again, it would be for Mr Stucke to decide what time scales had to be adopted. The Tribunal heard evidence that the title of the documentary was changed in the process towards release and it may have been the claimant's input which contributed to this. That input could have been made whilst the claimant continued in employment. Whatever his personal view, the respondent was not requiring him to do anything inappropriate, it just wanted him to do his work on the documentary and the claimant said he would not.

20. The respondent was entitled to dismiss the claimant summarily because he refused to carry out work on the documentary. That constituted gross misconduct. The claim is dismissed.

Employment Judge Truscott QC

Date 20 October 2021