



EMPLOYMENT TRIBUNALS

Claimant: Paul Bayley

Respondent: Lada Engineering Services Ltd

Heard at: Southampton (by cvp)

On: 13 October 2021

Before: Employment Judge Housego
Tribunal Member Paul Bompas
Tribunal Member P Flanagan

Representation

Claimant: Doug Frame, solicitor

Respondent: Did not attend and was not represented

JUDGMENT

The Claims are dismissed.

REASONS

Background

1. Paul Bayley resigned his employment. He says this was a constructive unfair dismissal. He says also that one of the reasons he resigned was that he was subjected to disciplinary proceedings for raising age discrimination. He says that means it was automatically unfair, as he was exercising a statutory right. He says that this dismissal was also age discrimination, and that his treatment before resignation was harassment. He claims also that he was not paid commission and expenses due to him.
2. The Respondent denies the claims, saying that Paul Bayley did not respond well to new management after the company was sold, and resigned because he did not like the changes required of him.

Claims made and relevant law

3. Paul Bayley claims unfair constructive dismissal¹ and that the dismissal, as well as being unfair² was automatically unfair as he was asserting a statutory right³ (lodging a grievance about age discrimination) and so his dismissal was also direct age discrimination⁴. He says that his treatment before dismissal was harassment⁵ related to his age (being over 60). He claims that he is owed commission and expenses⁶ of between £2,000 and £5,000.
4. The burden of proof for these claims is on the Claimant on the balance of probabilities.
5. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment tainted by such discrimination⁷. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show that it was not. The two steps are not hermetically sealed, and eliding them is not impermissible. The Tribunal has applied the relevant case law⁸, and has fully borne in mind, and applied S136⁹ of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter

¹ S95(1)(c) of the Employment Rights Act 1996

² S98(4) of the Employment Rights Act 1996

³ S104 of the Employment Rights Act 1996

⁴ Section 13 of the Equality Act 2010:

“13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

⁵ S26 Equality Act 2010:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

⁶ S13 Employment Rights Act 1996

⁷ Barton v. Investec Henderson Crosthwaite Securities Ltd [2003] UKEAT 18_03_0304, paragraph 25, guideline 10, citing the Burden of Proof Directive.

⁸ The law is comprehensively set out in Royal Mail Group Ltd v Efofi [2021] UKSC 33 (23 July 2021)

⁹ “136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...”

being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.

Issues

6. These are:

6.1. Unfair constructive dismissal:

6.1.1.1. did the Respondent act in such a way that the Claimant was entitled to terminate it without notice by reason of the Respondent's conduct (which must be a fundamental breach of contract showing that the Respondent no longer intended to be bound by the terms (express or implied),

6.1.1.2. that this was the reason for the Claimant's resignation,

6.1.1.3. and that he did so in good time,

6.1.1.4. and without affirming the contract of employment.

6.1.1.5. The reason for resignation need not itself be a breach of contract if it is "the last straw".

6.2. Automatically unfair constructive dismissal:

6.2.1. As above but dependent on the Claimant showing that in part this was because of age discrimination.

6.3. Direct age discrimination:

6.3.1. Was the resignation in part by reason of age discrimination by the Respondent?

6.4. Harassment on the basis of age:

6.4.1. Did the respondent engage in unwanted conduct?

6.4.2. Was that related to the Claimant's age?

6.4.3. Did it have the purpose or effect of violating the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him?

6.5. S13 Employment Rights Act 1996:

6.5.1. Is the Claimant due commission on sales made before he resigned?

6.5.2. Are any work related expenses incurred by him due to be paid by the Respondent?

6.6. Uplift:

6.6.1. If successful should any award be uplifted by up to 25%?

7. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might

approach a commercial contract or pleading¹⁰. Nor must a Tribunal stick slavishly to a list of issues¹¹. In this case this list of issues was clear early on, and set out in case management orders.

Evidence

8. There were witness statements from the Claimant, and for the Respondent from Brendan Wincott (external human resources adviser) and from Clayton Manley, managing director of the Respondent. There was an agreed bundle of documents of 292 pages. Only the Claimant gave oral evidence.

The hearing

9. Kevin Wincott (of the same human resources firm as Brendan Wincott) emailed the Tribunal on 30 September 2021 at 15:10 to state that the Respondent had ceased to trade on that date. For that reason he stated that his firm no longer represented the Respondent. He indicated that he would send details of an insolvency practitioner appointed, when that had occurred. No further email has been received, and a search of Companies House on 13 October 2021 does not show the appointment of a liquidator or administrator.
10. No one from the Respondent attended. The Tribunal heard the Claimant's oral evidence, in which he adopted his witness statement, and for an hour or more answered supplemental questions from his solicitor and then some enquiries from the Tribunal.

Submissions

11. There were none from the Respondent. The Claimant's solicitor submitted that the Claimant had old fashioned values and was disposed of for a younger person without his integrity and client centred approach: his long term relationship building replaced with a hard sell approach. The handling of the appeal against the disciplinary warning by the same person was unfair particularly as he then took the resulting grievance. Commission was due as in past quarters.

Facts found

12. The Respondent is, or was, a firm making parts for manufacturing companies. The Claimant worked for them from 2013 - 31 October 2019, when he resigned with immediate effect. He was sales manager. He had worked in the industry for 30+ years, and at one time had his own company.
13. The firm was set up by Alan Saith. Sometime in 2018 he sold it to James Wooster. He stayed on the board (and today is the only director). James Wooster was not a hands-on owner. There were 3 interim mds and then Clayton Manley was appointed to the role permanently.

¹⁰ Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN

¹¹ Saha v Capita UKEAT/0080/18/DM

14. The Claimant did not like the direction of travel. The conclusions section of this judgment sets out why. There was a difference of opinion with Clayton Manley. In August 2019 Clayton Manley gave the Claimant a written warning about not following instructions. The Claimant appealed. Clayton Manley decided that he would hear that himself. Plainly that was not fair. The appeal was heard on 25 September 2019, and the letter dismissing the appeal was sent on 30 September 2019.
15. On 03 October 2019 Clayton Manley set out performance objectives for the Claimant. On 07 October 2019 he called a second disciplinary hearing. On 08th he emailed another person in the company stating that if the Claimant did not attend he would be dismissed for gross misconduct. The Claimant went off sick. Before the meeting was held, he resigned. The email doing so is set out below. Clayton Manley asked him to reconsider. This was unlikely to have been a genuine attempt to get him to stay. The grievance was dismissed, in December 2019.

Conclusions

16. The whole of Paul Bayley's oral evidence was about how the Respondent was failing to meet client needs. They were expensive, but the delivery times were too long, and were not met. The product quality was inferior. He was embarrassed to see his clients. There was no point in driving him to get more orders when the Respondent could not fulfil them to the required standard in a reasonable time. They had let experienced people go, and not replaced them or got in agency workers, as he had suggested. The factory used to work 24/7 and they stopped that, to save money and it was unsurprising that delivery times slowed. All this happened after the man who set up the company sold it. The new owner was not hands on. There were a few interim managing directors before Clayton Manley was appointed permanently. He wanted to sweep away the incumbents and replace them with his own team from past jobs. His workload, along with everyone else's, had been greatly increased as the number of people declined. Then a new sales person arrived, also called sales manager, which was confusing. That new person had the approach that he should not leave without an order – an aggressive approach to sales, and not his morality. He nurtured client relationships and that led to some big orders with household name big manufacturers, but the Respondent blew all that with its aggressive sales techniques and a collapse in delivery times and quality that destroyed his credibility with his customers.
17. None of that has anything to do with age, and despite frequent promptings from his solicitor while giving evidence, Paul Bayley could say only that it was his age, without suggesting any causative link between what he was complaining about and that age. The things he was complaining about were nothing to do with anyone's age. The Tribunal did not accept that older people have, by reason of their age, higher moral values than the young, which was the purport of the submission. That a new manager wanted to bring in his own team, and to change the approach to sales, is not related to the ages of the existing team (although it is possible to envisage a situation where the motive for doing so was that they were judged to be too old).
18. The holding of the appeal against the disciplinary warning by the person giving it, he also taking the grievance about the same thing was plainly unfair.

19. The resignation email of 31 October 2019 starts off by setting out the concerns set out above.

“... I have said for some time and its not much point in us winning new business if we are not able to supply on time and correctly. I say this because I was again let down by production for a new client order which is now a week overdue. I have always enjoyed a good reputation within the industry and clients value my expertise and my word that I would deliver. However, since the new structure has been put in place, I have been let down left right and centre with the vision of get new leads and do not worry about customer service. Put simply, I am being set up to fail and it is with regret that I now formally tendered my resignation with immediate effect, this being the last straw.”

20. The email then mentions the grievance and says that he will be instructing his solicitor to bring employment tribunal proceedings for unfair dismissal and (unspecified) discrimination.

21. The reason he resigned was nothing to do with his age or anyone else's. He did not like the way the company was being run. He may well have been right in what he said, as it has now ceased trading, although that may be for any number of other reasons in today's world. But whether right or wrong, the resignation was solely because he was not prepared to see his personal credibility eroded by the way he was now being required to work, and by the fact that he was not able to deliver on a quality product in a reasonable (or promised) timeframe. He was also unhappy at the amount of work he was being asked to do, along with everyone else. None of that is a breach of mutual trust and confidence by the Respondent.

22. For these reasons the Tribunal finds that the resignation was not related to age, and while there was a breach of a fundamental term in the mishandling of appeal and grievance that was not a reason for the resignation.

23. The pre-dismissal detriment alleged was about the warning and appeal and grievance. The Tribunal decided that Paul Bayley was not performing the role in the way management wanted. There was nothing wrong with the way management asked him to do this, simply that Paul Bayley found difficulty with modern IT (he said as much in his witness statement) and found the work load too much. While he complained about being forced to come from home in East Anglia to Basingstoke on Mondays, by 03 October 2019 Clayton Manley clearly stated that he was home based, and was expected to be working at his home on Mondays and Fridays. There is nothing to link any of this to age, and the Tribunal rejects the suggestion that just because Paul Bayley was in his 60's it was obvious that he would not be good with technology and so in some way to insist on him doing so along with everyone else was age discrimination. It was at first to do with an old laptop not being able to cope with the program, but they replaced his laptop.

24. The Claimant said the whole thing was orchestrated by Eric Holt, a director who in March 2019 had said that he wanted the Claimant dismissed. However that was not said to be age related, and there was no evidence that it was. If Clayton Manley was being unfair to the Claimant because that was what a director wanted, that is not age related.

25. Accordingly, the Tribunal decided that age played no part in anything that occurred. The resignation was not by reason of any breach of contract by the Respondent and not because of any failing in handling the grievance. It follows that this was not an automatically unfair dismissal, and nor was it an unfair constructive dismissal.
26. The Claimant was not happy at the way the Respondent was being run. Had he not resigned he would have been dismissed, either for performance or for for conduct reasons within a short period of time, and that would either have been fair or been subject to substantial reduction by reason of contribution or *Polkey*¹².
27. The burden of proving the claim for commission is on the Claimant. There was an assertion that he was entitled to commission, but there was no supporting evidence. The Tribunal would expect to see payslips from previous quarters showing regular commission payments, or that a request had been made of the Respondent for orders placed from his customers during the relevant period, and some proof that he was entitled to 1½% of the order value (as he claimed) and some email traffic between him and his customers about such orders. The burden of proving that commission of between £2,000 and £5,000 (itself a wide and vague claim) has not been discharged by oral evidence that he placed orders which were delivered and invoiced before he left so that he was entitled to commission. The Respondent's long term accountant had written to him to say that there was no entitlement to commission, and the Claimant had not previously found fault with his calculation of commission.
28. For these reasons all the claims are dismissed.

Employment Judge Housego

Date: 13 October 2021

Judgment & reasons sent to parties: 27 October 2021

FOR THE TRIBUNAL OFFICE

¹² *Polkey v AE Dayton Services Ltd* [1987] UKHL 8