



EMPLOYMENT TRIBUNALS

Claimant: Mr P Damani
Respondent: Tacticmed Limited
Heard on: 27th October 2021 by CVP
Before: Employment Judge Pritchard

Representation
Claimant: In person
Respondent: Ms E Farrow, director

REASONS

1. These written reasons for the Judgment sent to the parties on 10 November 2021 are provided at the Claimant's request.
2. The Claimant claimed notice pay and unpaid wages. The Respondent resisted the claims.
3. The Tribunal heard evidence from the Claimant and from Ms Farrow on the Respondent's behalf. A number of documents were placed before the Tribunal.

Issues

Notice pay

4. Can the Respondent show that it was entitled to dismiss the Claimant without notice, or payment in lieu of notice, by reason of gross misconduct, namely conduct which so undermined the trust and confidence inherent in his contract of employment that the Respondent should no longer be required to retain him in employment?

Unpaid wages

5. Can the Claimant show that the Respondent made deductions from wages which were properly payable to him?

Findings of fact

6. The Respondent sells medical products such as thermometers. The Claimant commenced employment with the Respondent on 22 July 2020 as a Sales

Person. He usually worked in the Respondent's open plan office with a number of other people, including one other Sales Person.

7. The Tribunal heard disputed evidence as to whether the Claimant made unacceptable comments to his line manager, Farah, by asking her out for a drink; comments to Aniya referring to her as a cleaner; and to Kasia about her clothes. These alleged comments have been characterised by the Respondent as sexist comments. The Claimant says that although he would invite other colleagues out for a drink after work, he did not make the alleged comments.
8. The Tribunal also heard disputed evidence as to whether the Claimant had been given previous warnings about his conduct. The Respondent's case is that the Claimant had been given several verbal warnings about various matters, the detail of which was not explained. However, the Tribunal was shown no documentary evidence, such as might be expected to appear on an employee's personnel file, to record that any verbal warning had been given. The Respondent also referred the Tribunal to a document within its bundle which was said to be a written warning dated 3 September 2022 in which it was said that the Claimant was continuously arriving late for work, did not use his clock card, disturbed other employees, and breached the Respondent's expected standards. The Claimant told the Tribunal that he had received no such warning. He maintained that he did not disturb other employees, although he spoke to them, and they would speak to him, as part of natural discourse during the working day.
9. The Tribunal also heard disputed evidence as to whether the Claimant was consistently late for work. The Respondent said that during the final period of the Claimant's employment, there was a clocking system in place. However, no clocking records were placed before the Tribunal which might evidence such lateness.
10. The Claimant was dismissed 9 September 2020. The dismissal letter sent to him by Miss Farrow refers to the warning said to have been given on the 3 September 2020 and stated that insufficient improvement had been made. Examples of poor conduct were given as: failure to use the clocking system in the correct way; only working 23 hours instead of the contracted 40 hours; and unacceptable attitude, in particular to Farrah and Ania. The Claimant conceded that he did not always use the clocking system because it was simply advisory. The Tribunal notes that the Respondent's email instruction to use the clocking system was couched in terms of advice.
11. The Claimant appealed against his dismissal but the Respondent took no action in this regard.
12. The Respondent paid the claimant for 23 hours of his last week of work instead of his contracted 40 hours. The Respondent's case is at the Claimant was only paid for 23 hours because that is what their records showed; the Claimant's case that he worked and completed his 40 contracted hours.

Applicable law

Notice pay

13. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
14. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.
15. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.
16. In such cases, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: Shaw v B & W Group Ltd UKEAT/0583/11.

Unpaid wages

17. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.

Conclusion

18. The Tribunal determines questions fact on the balance of probabilities. In other words, the Tribunal has to decide which version of events is more likely to be true.
19. The Tribunal must also apply the applicable law. In this case, the burden of proof lies on the Respondent to show that it was justified in terminating the Claimant's employment without giving notice. The burden of proof is on the Claimant to show that he was underpaid

Notice pay

20. The Respondent's evidence about the alleged sexual comments was vague and, although it was said they caused embarrassment to the recipients, as described to the Tribunal cannot reasonably be said to be comments of a sexual nature at all.
21. The Claimant's alleged lateness for work was not set out in documented form such as might reasonably be expected.
22. The previous verbal warnings alleged to have been given to the Claimant were all similarly undocumented and Ms Farrow was rather vague as to exactly how many verbal warnings were supposed to have been given or for what. Even if the warning of 3 September had been issued to the Claimant, this would not by itself support a finding of gross misconduct.

23. With regard to the alleged lateness, that in itself would not have amounted to gross misconduct on the basis of the evidence before the Tribunal.
24. On the balance of probabilities, the Tribunal concluded that the Respondent had failed to adduce sufficient evidence to show that the Claimant breached his contract such that his conduct amounted to gross misconduct and thus justify summary dismissal. The Tribunal concluded that the Respondent had therefore breached the Claimant's contract of employment by failing to pay him contractual notice pay. The Respondent was ordered to pay to the Claimant the sum of £1531.37 being three weeks net wages claimed.
25. As to the Claimant's claim for unpaid wages, the Tribunal found it is more likely than not that the Claimant did work a full 40 hours in his final week. Miss Farrow's evidence was somewhat vague as the hours the Claimant worked in that week, seemingly relying on what the Respondent understood at the time by reference to its clocking records. In contrast, the Claimant's evidence was clear and indeed consistent with his email sent to the Respondent shortly after the end of his employment in which he asserted his entitlement to payment for the full 40 hours as well as his three weeks' notice pay. The Tribunal preferred the Claimant's evidence. The Tribunal concluded, on the balance of probabilities, that the Respondent failed to pay the claimant for 17 hours worked. The Respondent was accordingly ordered to pay to the Claimant unpaid wages in sum of £246.04 net.

Note

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Employment Judge Pritchard
Date: 12 November 2021