



EMPLOYMENT TRIBUNALS

Claimant

Mr William Cook

Respondent

Corsey UK Ltd

v

Heard at: Bury St Edmunds

On: 25 March 2022

Before: Employment Judge Freshwater

Appearances

For the Claimant: Mr Curwen, Counsel

For the Respondent: Miss Wood, Litigation Consultant

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and fails.
2. The Claimant's claim for holiday pay is well founded and succeeds.
3. The Respondent is ordered to pay the Claimant the gross sum of £820.80 within 28 days, in respect of his claim for holiday pay.
4. The provisional remedy hearing booked on 20 May 2022 is vacated.

REASONS

Introduction

1. The Claimant was employed as a Head Chef and manager of a restaurant called the Pancake and Waffle Shack. He had worked there since 17 January 2017 as a Chef, taking over management of the restaurant in April 2018. The case is about the circumstances in which his employment came to an end.

Procedure

2. The hearing was fully remote and took place over one day by way of CVP.

3. The Claimant attended and was represented by Mr Curwen. The Respondent was represented by Ms Wood.
4. Mr Edwards, the owner of the Respondent, initially attended but did not return following a short break in proceedings.
5. There was an agreed electronic bundle of 113 pages.
6. I heard oral evidence from the Claimant. The Claimant also relied on the written witness statements of Summer Eden, Billie Nolan and Kacper Lawicki. In addition, he relied upon a document signed by Harrison Southgate but that was not in a formal witness statement format.
7. I heard evidence from Mrs Yendle on behalf of the Respondent. In addition, the Respondent sought to rely on the written witness statements of Casey-Lee Gunsman and Julian Edwards (the current owner of the Respondent.)
8. The parties agreed at the beginning of the hearing that it was not necessary to call Mr Edwards to give oral evidence because his witness statement was not contentious.
9. At the outset, the issues in the case were agreed with the parties. They are set out below.
10. Judgment on liability was reserved and a provisional remedy hearing date fixed (in case necessary) on 20 May 2022.

The claim and issues

11. At the start of the hearing, the issues in the case were discussed and agreed as follows:
 - 11.1 Was the Claimant dismissed?
 - 11.2 If he was dismissed, has the Respondent established it was for a potentially fair reason?
 - 11.3 Was the dismissal in fact fair?
 - 11.4 if the dismissal was not fair, what remedy was appropriate?
 - 11.5 Has the Respondent failed to pay the Claimant accrued holiday pay, and if so, how much is he owed?
12. Originally, there had been another part to the claim namely whether there had been any unlawful deductions from the Claimant's wages. However, the Claimant withdrew that part of his claim at the start of the hearing.

13. The Claimant claimed that the conduct of the Respondent was such that he had been dismissed and that he had not resigned. He did not put forward a case of constructive dismissal, instead arguing that the conduct and words of the Respondent were such that it was clear he had been expressly dismissed.
14. The Respondent's case was that the Claimant had resigned and had not been dismissed unfairly or at all.

Findings of fact

15. The Claimant was employed from 17 January 2017 to work at the Pancake and Waffle Shack ("the restaurant".)
16. At the time the Claimant's employment commenced, and during the material times in this claim, the owners of the restaurant included Mrs Corrine Yendle and Miss Casey-Lee Yendle. Miss Yendle has since married and is now known as Mrs Gunsman. For clarity, I refer to her as Mrs Gunsman throughout my judgment.
17. The restaurant closed on 25 March 2020 as a result of government restrictions at the start of the Covid-19 pandemic. It remained closed until it was sold to Mr Edwards.
18. The Claimant was not placed on furlough whilst the restaurant was closed as he did not have the necessary national insurance number.
19. There were text messages between the Claimant and Mrs Yendle in May and June setting out that all staff, including the Claimant, would have to apply for their jobs. These can be read in the bundle.
20. The Claimant saw that jobs at the restaurant were being advertised on Facebook. He contacted Mrs Yendle to ask when he could be interviewed.
21. Mrs Yendle was concerned about the state the kitchen had been left in after the closure of the restaurant, and also when it had been open (as a result of photographs posted on Facebook by a former member of staff). She was further concerned about the way the Claimant managed other staff working in the restaurant. These concerns were expressed to the Claimant in text messages and ultimately in a letter dated 23 June that was sent to the Claimant by ordinary post. That letter said there would be an investigation meeting on 4 July 2020 to discuss the concerns. It was said that the meeting was not a disciplinary hearing.
22. I accept the Claimant's evidence that he had not received the letter dated 23 June 2020. As it was not sent by recorded delivery, there is no evidence that

it was in fact delivered to the Claimant. In any event, it is very unlikely that it would have been received by the Claimant before the meeting on 24 June 2020 as was suggested by the Respondent.

23. On 24 June 2020, a meeting took place between the Claimant, Mrs Yendle and Mrs Gunsman. That meeting was recorded by the Claimant without the knowledge of Mrs Yendle or Mrs Gunsman. There was no dispute between the Claimant and Mrs Yendle as to the contents of the transcript, and I find that the transcript is an accurate record of what was said at the meeting. The transcript can be read at pages 58 to 68 in the bundle, and I do not repeat the contents here.
24. The Claimant contacted Mrs Yendle on 1 July 2020 to say “I’d like to get things wrapped up so that we can call it a day.” He asked for his holiday pay. This can be seen in the bundle at pages 69 and 70. There was email correspondence between the Claimant and Mrs Yendle on 2 July 2020 in which they discussed the Claimant’s P45 (this correspondence is not in the bundle but is referred to in paragraph 15 of the Claimant’s witness statement). I accept Mrs Yendle’s oral evidence (which was not challenged) that the Claimant asked for his P45 in the beginning of July, before 4 July.

The law

25. Section 95 of the Employment Rights Act 1996 states that an employee is dismissed if the contract under which he is employed is terminated by the employer (whether with or without notice.)
26. The burden of proof is on the Claimant to show there has been a dismissal. The standard of proof is the balance of probabilities. In other words, was it more likely than not that that the Claimant’s contract of employment was terminated by dismissal rather than by resignation?
27. The general rule is that unambiguous words of dismissal or resignation may be taken at face value without the need for analysis of the surrounding circumstances (Southern v Franks Charlesly and Co 1981 IRLR 278, CA).
28. In respect of ambiguous words, any ambiguity is likely to be construed against the person seeking to rely upon them (Graham Group plc v Garratt EAT 161/97).
29. The test as to whether ambiguous words amount to a dismissal or a resignation is an objective one. All the surrounding circumstances should be considered. If the words are still ambiguous, the tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances.

30. When considering all the circumstances, tribunals will look at events before and after the incident in question and take account of the nature of the workplace in which the misunderstanding arose.
31. The conduct of the parties is one of the surrounding circumstances to be taken into account when alleged words of dismissal are ambiguous.
32. A warning of an impending dismissal or redundancy at an unspecified future date will not amount to a dismissal and an employee who leaves his or her employment in such circumstances will be taken to have resigned (Morton Sundour Fabrics Ltd v Shaw [1996] 2 KIR 1 Div Ct.)

Conclusions

33. There were no unambiguous words used by the Respondent to dismiss the Claimant. In addition, there was no written document dismissing the Claimant.
34. As such, there was no express, unambiguous, dismissal of the Claimant.
35. I have therefore moved on to consider whether there were ambiguous words used that amounted to the dismissal of the Claimant.
36. First, I have looked at the surrounding circumstances objectively. These include the fact that all staff (including the Claimant) were asked to reapply for their jobs, that the Claimant was told that nobody's job was guaranteed, that there were serious concerns about the cleanliness of the business, that the Claimant asked for an interview slot having seen jobs at the restaurant being advertised on Facebook, as well as the other text message conversations and the meeting on 24 June 2020.
37. I do not think that that Mrs Yendle and Mrs Gunsman handled the overall situation particularly well. The Claimant should not have found out that jobs at the restaurant were being advertised on Facebook. The interview meeting on 24 June seems to have become conflated with the concerns that were set out in the letter dated 23 June. However, I conclude that Mrs Yendle and Mrs Gunsman were attempting to establish what had happened and to find out what the Claimant's version of events were before they decided how to proceed with the reopening of the restaurant.
38. The Claimant repeatedly asked if he was being dismissed during the recorded meeting on 24 June 2020. Despite the direct questioning, Mrs Yendle did not tell the Claimant that he had been or was being dismissed. She did tell the Claimant that Mrs Gunsman would be going back into the business to build it back up. Mrs Gunsman said that she would be running the kitchen. Mrs Gunsman also said that she didn't feel she could work with the Claimant. However, she said that was her point of view rather than a decision that had already been taken.

39. Looking at the meeting objectively, I have taken into account that the Claimant knew that he was recording the meeting on 24 June, whereas Mrs Yendle and Mrs Gunsman did not. As such, the Claimant knew his words were being recorded whereas Mrs Yendle and Mrs Gunsman did not. The Claimant could ensure that what he wanted to say was recorded. The meeting clearly became heated, and in the heat of the moment things are said which may or may not be acted on at a later date.
40. Objectively, I conclude that Mrs Yendle and Mrs Gunsman were considering whether or not to retain the Claimant's contract of employment, but that they had not reached the stage of deciding to dismiss him. This is why they discussed their concerns with the Claimant at the meeting on 24 June 2020.
41. I find that even taking into account the surrounding circumstances, including the conduct of the Respondent, there is still ambiguity.
42. Second, I have therefore asked myself how a reasonable employee would have understood them in light of all the circumstances both before and after the meeting of 24 June 2020.
43. I find that a reasonable employee, in light of all of the circumstances, would have understood the words used by the Respondent to be worrying and suggestive of the fact that their employment was at risk. I do not find that a reasonable employee would have understood they had been dismissed following the meeting on 24 June 2020 (taking into account everything that had occurred before the meeting). The evidence shows that despite asking on various occasions, the Claimant was told he was not being dismissed.
44. The fact that the Claimant may not have been offered a job at the end of the meeting, and that he was told there were serious concerns about his work, did not mean that he had already been dismissed. The Claimant sent a message to Mrs Yendle saying he would "...like to get things between us wrapped up so we can call it a day." He requested his holiday pay and his P45. The Respondent believed he had resigned and proceeded on that basis.
45. I conclude that the Claimant believed he would be dismissed in the future, but had not actually been dismissed and that he terminated the contract of employment himself.
46. The Claimant has not proved on the balance of probabilities that he was dismissed by the Respondent and his claim for unfair dismissal is dismissed.
47. Mrs Yendle accepted in her evidence that she could not recall paying the Claimant for his accrued annual leave for the year 2020-2021. As such, I

found that this part of the claim is well founded. I accept the Claimant's evidence that he was not paid for 9 days of accrued annual leave for the holiday year April 2020 – March 2021. This part of the claim is therefore well-founded.

48. I have calculated the amount of money due for 9 days accrued holiday pay from the information in the claim form and evidence in the bundle. The Claimant says he works 48 hours week. Assuming he works 5 days a week, that is 9.6 hours a day. 9.6 hours multiplied by 9 is 86.4 hours. The pay slips filed show that the hourly rate for payments for holiday pay in 2019 was £9.50. £9.50 multiplied by 86.4 is £820.80.

Employment Judge Freshwater

Date: 31 March 2022.....

Sent to the parties on:

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For the Tribunal Office