



EMPLOYMENT TRIBUNALS

Claimant: Mr D Silberman

Respondent: Peninsula Business Services Ltd

HELD AT: Manchester (by CVP)

ON: 24 May 2022
10 June 2022 (in Chambers)

BEFORE: Employment Judge Gianferrari

REPRESENTATION:

Claimant: In Person

Respondent: Mr Kohanzad, Counsel

JUDGMENT

1. The claimant's claim for wrongful dismissal fails, the claimant was not dismissed in breach of contract by the respondent.
2. The claimants claim for automatic unfair dismissal contrary to section 10 and section 12(3) of the Employment Relations Act 1999 fails. The claimant was fairly dismissed by the respondent.

REASONS

Introduction

1. By the claim form presented on 30 March 2020, the claimant brought a claim for wrongful dismissal from his job as a HR Documentation Consultant at the respondent's employment law and HR consultancy business. On 16 November 2020 following an application to amend his ET1, the claimant was permitted to pursue a second claim of automatically unfair dismissal.
2. On 13 January 2021 the respondent appealed against the Employment Tribunal decision of 16 November 2020.

3. On 22 April 2021 the Employment Tribunal refused the claimants application to further amend his ET1 to include claims for disability discrimination pursuant to the Equality Act 2010. Reciprocal applications made by the parties to strike out each other's claims were also refused.

4. On 23 November 2021 the respondents appeal was refused by the Employment Appeals Tribunal.

5. The matter was listed to proceed by way of full hearing and subsequently listed for on 24 May 2022 for determination of the claimant's claims for wrongful dismissal and automatically unfair dismissal.

6. In the response form of 27 April 2020 and submissions at the above hearings, the respondent resisted these claims arguing that there had been a fair dismissal.

Issues to be determined

7. At the commencement of the hearing, I agreed to a reading time of one hour and also to enable the parties to discuss matters.

8. On the parties return it was evident no accord had been reached and instead a concern raised by Mr Kohanzad for the respondent, that during their conversations the claimant was now pleading a case contrary or completely distinct from that raised before, namely automatic constructive unfair dismissal.

9. Mr Kohanzad submitted that the claimant's case as contained in his ET1 was understood as a direct dismissal case and not one of constructive dismissal, as was reflected in the responses contained in the ET3. This was supported by the factual summary included in the Case Management Orders made at the Preliminary Hearing on 16 November 2020 referring to summary dismissal.

10. Mr Kohanzad submitted that this understanding formed the basis of representations made, including in respect of the respondent's earlier appeal to the EAT and would oppose any attempt to amend the claim to include automatic constructive unfair dismissal.

11. Mr Silberman responded that he was not making an application for automatic constructive unfair dismissal. He had set out his position as pleaded in the documents before the court and was bringing no additional claim.

12. On confirmation of this I determined that there was no additional claim under consideration and the matter could proceed.

13. During this preliminary discussion the Issues were agreed as those helpfully set out by EJ Ross at the preliminary hearing on 16 November 2020 as follows:-

Wrongful Dismissal

1. Did the claimant commit a repudiatory breach of contract entitling the respondent to summarily dismiss him (i.e. without notice) on 4 February

2020? When answering this question, the Tribunal must identify the repudiatory conduct relied upon by the respondent.

2. If the Tribunal finds the respondent was not entitled to summarily dismiss the claimant (i.e. dismiss him without notice), what is the compensation to which the claimant is entitled? The claimant says he is entitled to payment in lieu from the termination of employment to the ending of the original notice period up to 19 March 2020. The respondent says because it terminated the contract it is only required to pay four weeks' pay in lieu of notice in accordance with the claimant's contract of employment. Note: both parties agree that the claimant's gross pay at the time of termination of employment was £20,000 per annum, following a pay rise.

Automatic unfair dismissal on the grounds of exercising the right to be represented at a grievance and grievance appeal hearing

3. Can the claimant, who has less than two years' service, show facts to suggest on the balance of probabilities that the potential real reason for dismissal was that he sought or exercised the right to be accompanied set out in s10 Employment Relations Act 1999.
4. Can the respondent show a reason for dismissal which is not the automatically unfair reason?

Evidence

14. The hearing took place on 22 May 2022 when I heard evidence from Mr Silberman, claimant and Ms Knighton and Ms Foy on behalf of the respondent.

15. An agreed bundle of documents was presented at the commencement of the hearing and referred to in evidence.

16. The claimant raised the issue of the late service of an additional statement of Amy Foy and a supplementary statement of Karen Knighton, both dated 20 May 2022, the day before the hearing. The claimant provided six pages of written reasons as to why this evidence should be excluded. On obtaining representations from the parties, the respondent accepted that the statements should have been provided earlier and had focussed on the EAT appeal, but fundamentally the information in the statements having been requested in the Case Management Hearing was relevant to the issues to be determined. The respondent submitted that there was no reference to any prejudice caused by this documentation in the claimant's written reasons, and further that he had enough time to consider the value of the statements which were a page and a half each, as he had time to provide six pages of arguments as to why they should be excluded, albeit citing the Civil Procedure Rules which are not binding on this jurisdiction.

17. The claimant represented that on previous occasions the respondent had failed to provide information as requested which had prejudiced him and that he sought the statements exclusion. The claimant did accept that regarding the supplementary statement of Ms Knighton he had been in a position to prepare questions, albeit that he should have been informed that if the respondent was due to bring a new witness in (Ms Foy) he may have decided to call two witnesses himself. The respondent

countered that the claimant had referred to “may” call additional witnesses but not that he would call additional witnesses and he had time himself to have considered this decision further in respect of the admissibility of this evidence.

18. In considering the merits of both applications and having had sight of written representations I formed the view that the statements were brief in length and relevant to the issues to be determined. Whilst, the respondent had served the statements out of time, the information contained was already within the pleadings and so not entirely unknown to the claimant. I did not feel that the claimant would be unduly prejudiced, further supported by his indication that he has already prepared for one witness (Ms Knighton) and that the evidence should be admitted, albeit on clarification that the claimant had sufficient time over the lunch period to prepare questions for Ms Foy.

19. Mr Silberman gave oral evidence with reference to his claim from and correspondence between the parties.

20. Ms Knighton and Ms Foy gave oral evidence with reference to the response form and correspondence between the parties.

Law

Wrongful Dismissal

21. Wrongful dismissal is a common law action based on breach of contract. It does not take into account the reasonableness of the parties conduct but simply whether the contract has been breached. If the respondent has breached the contract and dismissed then the claimant will succeed in his claim for wrongful dismissal.

22. Alternatively, if the claimant has committed a repudiatory breach of the contract, then the respondent is entitled to summarily dismiss.

Automatic unfair dismissal on the grounds of exercising the right to be represented at a grievance and grievance appeal hearing

23. The relevant law is contained within **s10 and s12(3)** of the **Employment Relations Act 1999 (ERA)**.

Section 10 Right to be accompanied.

- (1) This section applies where a worker —
 - (a) is required or invited by his employer to attend a disciplinary or grievance hearing, and
 - (b) reasonably requests to be accompanied at the hearing.
- (2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who —
 - (a) is chosen by the worker; and

- (b) is within subsection (3).
- (2B) The employer must permit the worker's companion to —
- (a) address the hearing in order to do any or all of the following —
 - (i) put the worker's case;
 - (ii) sum up that case;
 - (iii) respond on the worker's behalf to any view expressed at the hearing;
 - (b) confer with the worker during the hearing.
- (2C) Subsection (2B) does not require the employer to permit the worker's companion to —
- (a) answer questions on behalf of the worker;
 - (b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or
 - (c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.
- (3) A person is within this subsection if he is —
- (a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,
 - (b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or
 - (c) another of the employer's workers.
- (4) If —
- (a) a worker has a right under this section to be accompanied at a hearing,
 - (b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
 - (c) the worker proposes an alternative time which satisfies subsection (5),

the employer must postpone the hearing to the time proposed by the worker.

Section 12 Detriment and dismissal.

- (2) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he –
- (a) exercised or sought to exercise the right under section 10(2A), (2B)] or (4), or
 - (b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

24. This provides statutory protection to a claimant making a reasonable request to be accompanied at grievance hearings. The claimant would be unfairly dismissed if this right was the respondent's reason for dismissal.

Findings of Fact

25. Having considered the evidence, I made the following findings of fact. Where a conflict of evidence arose, I resolved the same on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

26. The findings of fact relevant to those issues which have been determined are as follows:-

- 26.1 The claimant was employed by the respondent from 15 July 2019, that he resigned from his position on 24 January 2020 which was accepted on 28 January 2020, and he was summarily dismissed on 4 February 2020.
- 26.2 On 20 December 2019 the claimant raised a grievance alleging lack of support from a senior staff member Molly Costello and that she spoke to him in a rude and belittling way.
- 26.3 On 3 January 2020 at the grievance hearing before Ms Karen Knighton, Team Leader, the claimant indicated that he wished a colleague, Kaitlin Crowley to attend as a witness to events. Ms Knighton confirmed that Ms Crowley would be spoken to in the course of the investigation. Mr Silberman was offered the right to be accompanied at the hearing and he indicated that he was happy to proceed alone. During the course of the meeting it was made clear that Ms Knighton would be speaking to individuals as part of her investigation.
- 26.4 I find that after the grievance hearing Mr Silberman approached witnesses and discussed his case with them because Ms Knighton's evidence of email correspondence on 6 January 2020 raised it and

necessitated a warning to Mr Silberman regarding such conduct. Mr Silberman in his evidence accepts that he did speak to individuals to inform them that they would be witnesses.

- 26.5 I find that Mr Silberman's conversation with the witness Ms Crowley was more than a simple request to attend as supported by Ms Knighton's investigation evidence, where it is alleged that he coached Ms Crowley to put forward information that she knew to be incorrect. Mr Silberman disputed that he did, instead encouraging the witness to put forward an accurate account. I don't seek to evaluate the conversation or context for the purposes of this hearing other than to determine that I find this was a discussion about Mr Silberman's grievance, over and above a mere request for support at a hearing.
- 26.6 I find that Mr Silberman was fully aware of the respondent's concern that he had discussed his grievance with others and was on notice not to do so from the evidence of Ms Knighton and her grievance outcome letter of 14 January 2020.
- 26.7 The respondent found the grievance unsubstantiated and Mr Silberman indicated on 15 January 2020 that he wished to appeal this decision and denied that he coached a witness but instead spoke to her about events and encouraged her to clarify them to the investigation. The claimant also stated that he had not received the notes of the grievance hearing.
- 26.8 I find that Mr Silberman continued to discuss his grievance with others following his initial grievance hearing because Ms Foy in her evidence stated that Mr Silberman volunteered to her that he had raised a grievance and that she would have known about the detail of it had she been to Delia's leaving meal.
- 26.9 I find that discussing his grievance with colleagues, the nature of which taken at its simplest level being a stated lack of support from a senior member of staff, could be construed as speaking ill of an individual and management.
- 26.10 I find that these discussions directly impacted on those individuals being spoken to and could be overheard by others as from Mr Silberman's evidence.
- 26.11 I find that Mr Silberman resigned from his employment on 24 January 2020 (confirmed as accepted by the respondent on 28 January 2020) and following a period of eight weeks' notice Mr Silberman's employment would end on 19 March 2020.
- 26.12 On 29 January 2020 the respondent sent a letter confirming Mr Silberman's salary had increased by £1,500 effective from 1 January 2020.

- 26.13 At Mr Silberman's grievance appeal on 29 January 2020, before Anna Byrne, Employment Regional Manager Midlands Mr Silberman attended unaccompanied. I find that he was again informed of his right to be accompanied at the hearing and was content to proceed. This is supported by Ms Knighton's and Mr Silberman's evidence. Mr Silberman again explained his wish for Ms Crowley to attend the original grievance as a witness, but she didn't want to attend. Mr Silberman denied coaching Ms Crowley in discussions with her about his grievance. Mr Silberman reiterated his concerns that he had not been supported by a senior colleague and been spoken to in a rude manner. For the reasons set out at para 22.5, above, I find that Mr Silberman had discussed his grievance with Ms Crowley.
- 26.14 I find that on 4 February 2020 Mr Silberman raised the issue of a typographical error with members of staff and that he found it amusing as supported by the evidence of Mr Silberman, Ms Foy and Ms Knighton. I accept the evidence of Ms Foy and Ms Knighton that this was upsetting to the junior member of staff who had forwarded the email.
- 26.15 Later that day a meeting took place between Mr Silberman and Ms Knighton. In respect of whether Mr Silberman accepted discussing his grievance in the kitchen earlier that day, there is a conflict in his evidence and I accept that elicited in cross examination, that he did discuss his grievance with colleagues. I find that the issue concerning the typographical error was discussed at this meeting and Mr Silberman offered no explanation as to his behaviour in the kitchen that day. This is in accordance with the evidence of Ms Knighton and partially accepted, in respect of offering no explanation by, Mr Silberman.
- 26.16 I find that Mr Silberman was told on the 4 February 2020 that he would be paid in lieu as accepted by the parties.
- 26.17 On 7 February 2020 the respondent sent Mr Silberman a letter confirming his dismissal for his "...disregard for adhering to management instructions and your refusal to carry out your duties as informed." The letter stated that during the course of the meeting on 4 February 2020 Mr Silberman had been asked whether he had been discussing his grievance with colleagues and making remarks about Ms Costello and "You responded that you had, despite being fully aware that I had requested on several occasions, that you do not." It was also alleged that Mr Silberman had been making derogatory comments against management. I find that this referred to the matters discussed with Mr Silberman in the meeting of 4 February 2020 from the evidence of Ms Knighton.

Claimant's Submissions

27. Mr Silberman sought to refer to cases part way through his submissions, which had not been provided to the court or respondent. He was invited to address the evidence and proceeded on that basis.

28. Mr Silberman submitted that it was unfair of the respondent stop him referring to the grievance in its entirety when approaching colleagues to accompany him in the grievance procedure. He stated that it was an accepted fact that both parties wanted to call Ms Crowley and it was reasonable that he would make attempts to call someone.

29. Mr Silberman submitted that the respondents have admitted that their repeated instructions not to discuss his grievance, when he was making reasonable attempts to speak to witnesses, was a breach of his statutory right, particularly as the requests took place before the grievance appeal hearing.

30. The respondent indicated that he would receive payment in lieu of notice as confirmed on 4 February 2020.

31. In respect of automatic unfair dismissal Mr Silberman had a right to be accompanied and exercised the right by requesting Ms Crowley to attend. He did have conversations with others, the main purpose being to seek accompaniment and whilst it was right that he should not discuss the substance of the grievance, he had to make the request.

32. Mr Silberman submitted that the respondent had not followed ACAS guidance in respect of the disciplinary procedure in respect of allowing him to be accompanied nor providing him with hearing until he commenced his grievance appeal.

33. He made reference to the Burchell test and that the respondent had not undertaken a reasonable investigation as they didn't follow proper procedure. Mr Silberman was never given an opportunity to defend his actions.

34. Mr Silberman did contest the reason for his dismissal later but was not made aware that he was summarily dismissed until after the event.

35. The respondent did not state his laughing at the typographical error as a reason for dismissal, stating only that he had ignored a management request.

36. Mr Silberman argued that he had established, on the balance of probabilities that his was an automatically unfair dismissal in that he had asked Ms Crowley to attend his grievance procedure and discussing the grievance with his colleague was necessary.

Respondent's Submissions

37. Mr Kohanzad referred to the two claims intimated and whilst different are related. Wrongful dismissal related to the primary facts of what happened and automatically unfair was really question of what was in the mind of Mrs Knighton the reason why test – conscious/ unconscious mindset of Mrs Knighton.

38. Did the claimant commit an act of gross misconduct? If not then he succeeded in wrongful dismissal. This was decided on matters of fact, three areas:-

- Discussing grievance when told not to

- Typographical error
- Speaking ill of senior staff

39. Mr Kohanzad submitted that it was accepted mostly by the claimant, that prior to completion of the investigation, he was speaking of his grievance to colleagues. He was warned by email and accepted that he still spoke of his grievance to colleagues. Therefore, he had been given a reasonable management instruction which he breached. Breach of management instruction was in the sphere of gross misconduct.

40. Mr Silberman was asked in evidence, that if he wanted someone to attend could he have just said that. If they'd asked for more information, he could have spoken broadly about it. The claimant did not do that but instead spoke in detail about the grievance.

41. Mr Silberman says he simply asked witnesses to attend, but he did not and was telling lots of people about the grievance, making comments about his boss. It might have been justified comment but wrong to tell everyone about it.

42. Mr Kohanzad stated that Mr Silberman accepted the reason for the grievance not being discussed was that it could prejudice the investigation or lead to division. It is submitted that this was a reasonable management request, he breached it and that is gross misconduct.

43. In respect of whether Mr Silberman was speaking ill of Ms Costello, Mr Kohanzad suggested he of course was which was intrinsic in his grievance. He was telling people and allowing others to overhear it. This was more than providing background or speaking to someone aside. It was submitted that Mr Silberman's oral evidence was that he told people of the grievance and was careless for others to overhear. It was a reasonable management request which was ignored and he bad mouthed Ms Costello.

44. Mr Kohanzad stated that in respect of the typographical issue Mr Silberman was laughing at Ms Tahla who was dyslexic. No evidence from Ms Foy or the claimant to suggest that everyone was laughing together. Mr Silberman did not say we were all having a laugh at the mistake. It wasn't that type of conversation. Ms Foy unchallenged by claimant about this evidence.

45. Mr Silberman accepted this could be construed as humiliation and thus gross misconduct and the respondent was entitled to dismiss.

46. Mr Kohanzad submitted that in relation to automatic unfair dismissal Mr Silberman told, on his own account, five or six colleagues. The statutory protection is to allow an employee to ask another employee to accompany them. This is narrowly construed so that an individual can't be dismissed for asking a colleague to attend but the claimant went beyond that.

47. Mr Kohanzad represented that Mr Silberman was dismissed for discussing his grievance when told not to, badmouthing his boss and belittling junior staff. He had not come close to establishing that he was simply asking colleagues to attend with him.

Conclusions

48. In evaluating the evidence and applying the law to the findings of fact I concluded the following:-

Did the claimant commit a repudiatory breach of contract entitling the respondent to summarily dismiss him (i.e. without notice) on 4 February 2020? When answering this question, the Tribunal must identify the repudiatory conduct relied upon by the respondent.

49. Yes. The claimant having triggered the grievance process continued to discuss his grievance with potential witnesses and in the hearing of others. He was warned against such conduct on more than one occasion. These discussions centred on his principal reason for raising the grievance, a perceived lack of support from a senior member of staff, and the inherent criticism of her accordingly. This amounted to a failure to adhere to a management instruction and gross misconduct.

50. The claimant found amusement in the typographical error of a junior colleague and whilst he may not have intended to humiliate this individual, caused her upset. He chose not to apologise or explain his actions when this was subsequently put to him. This could amount to gross misconduct.

51. Both instances together amount to a repudiatory breach and entitling the respondent to summarily dismiss the claimant.

52. Having found that the claimant was not wrongfully dismissed I do not consider remedy.

Can the claimant, who has less than two years' service, show facts to suggest on the balance of probabilities that the potential real reason for dismissal was that he sought or exercised the right to be accompanied set out in s10 Employment Relations Act 1999?

53. No. The respondent had informed Mr Silberman of his right to be accompanied at the start of the initial grievance hearing. The claimant's evidence was that he wanted Ms Crowley to accompany him to this hearing as she had evidence to assist his position. He was told by Ms Knighton that she would speak to this witness. Mr Silberman continued with the hearing without objection or further request for a colleague to be in attendance with him. At the grievance appeal hearing he was again informed of his right to be accompanied and continued without raising issue or requesting anyone else to accompany him.

54. There was no evidence presented that indicated that Mr Silberman's dismissal related to the exercising of this right.

Can the respondent show a reason for dismissal which is not the automatically unfair reason?

55. Yes. The respondent demonstrated that the reason for dismissal was for gross misconduct.

56. May I apologise to the parties for the length of time that this judgement has taken to be delivered which has unfortunately been impacted by my personal circumstances.

Employment Judge Gianferrari
Date: 18 October 2022

REASONS SENT TO THE PARTIES ON
20 October 2022

FOR THE TRIBUNAL OFFICE

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