EMPLOYMENT TRIBUNALS

Claimant	**v**	**Respondent**
Mr Jeanclaude Ahnien		London General Transport Services Limited (T/A Go Ahead London)

Heard at: London South (by video)

On: 03 October 2022

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: In person

For the Respondent: Mr R Bailey (of Counsel)

Judgment

1. All Claimant's claims fail and are dismissed.

2. The Claimant has acted unreasonably in the way that the proceedings have been conducted by him and must pay to the Respondent the sum of **£6,000** with respect to the Respondent's costs.

3. The deposit of **£200** paid by the Claimant pursuant to the Deposit Order dated 17 May 2022 shall be paid to the Respondent.

Reasons

Relevant procedural background and evidence

1. By a claim form dated 23 January 2021 the Claimant brought complaints of unauthorised deduction from wages and unfair (constructive) dismissal.

2. The Claimant's claim form did not contain sufficient particulars for the Respondent to properly understand and respond to the complaints. The Claimant's complaints were clarified by the Claimant by answering on 10 March 2022 the Respondent's request for further information pursuant to the Tribunal's order following a preliminary hearing on 22 February 2022.

3. There was a further preliminary hearing on 17 May 2022 at which the list of issues was finalised, further case management orders were given, and the case was listed for the final hearing on 3 and 4 October 2022.

4. At the same hearing the Respondent's application to strike out the Claimant's claims or in the alternative, to make a deposit order was considered. Employment Judge Siddall did not strike out the Claimant's claims but made a deposit order of £100 with respect to each of the two complaints the Claimant was pursuing in the case.

5. In making the Deposit Order EJ Siddal stated that with respect the Claimant's claim for unauthorised deduction from wages in his view "*it would be very difficult or the claimant to show that he was being paid at the wrong grade*". With respect to the Claimant's unfair dismissal claim the Judge said:

> "*The claimant was very focused on this refusal to reinstate him unconditionally as grounds for his claim for unfair dismissal. I explained however that the tribunal was likely to focus on what had happened up to the date of his resignation on 8 October 2020. The claimant complains that he had been treated unfairly prior to that date.*"

6. In deciding not to strike out the Claimant's complaints, the Judge said:

> "*I have considered whether the claims should be struck out as having no reasonable prospect of success. However the Claimant does make some allegations that will require evidence to be considered. First he complains of unfair treatment prior to the date of the disciplinary hearing fixed for 8 October 2020. Second in relation to his pay claim he relies upon conversations with his trade union rep and with the chief executive suggesting that his pay would be reviewed following his reinstatement.*"

7. The Claimant paid the deposit and the case proceeded to the final hearing.

8. The Claimant represented himself and Mr R Bailey appeared for the Respondent. The Claimant gave evidence and was cross-examined. There were 4 witnesses for the Respondent: Ms N James (Assistant Operations Manager), Ms J Keane (General Manager of the Respondent's Bexleyheath and Orpington Bus Garage), Ms D Lambshead (HR Manager) and Mr J Trayner (Managing Director).

9. The Respondent also submitted a witness statement of Mr D Corbin (the then Area General Manager). By reason of Mr Corbin now being located in Singapore, and the absence of permission from the competent Singaporean authorities to allow Mr Corbin to give evidence to the Tribunal from Singapore, Mr Corbin was unable to give his evidence to the Tribunal. Mr Bailey asked Mr Corbin's witness statement to be accepted in evidence, recognising the fact that because Mr Corbin was not present to be cross-examined on his statement, the Tribunal may attach such weight to his evidence as it considers appropriate.

10. I was referred to various documents in the bundle of documents of 152 pages (202 electronic pages) the parties introduced in evidence. I was also presented with a Chronology and the Respondent's Statement of Costs. Mr Bailey prepared a written opening statement.

11. At the start of the hearing, I confirmed with the Claimant that he understood the purpose of the hearing, the issues I would be deciding and potential costs consequences of him losing his claims. The Claimant confirmed that he understood the position. He said that it was "a gamble", but he wanted to proceed and have his complaints heard.

12. At the end of the hearing, after I have delivered my judgment and gave reasons orally, the Claimant requested written reasons.

Findings of Fact

13. The Claimant started his employment with the Respondent on 25 January 1993 as a bus driver. On 29 October 2018 he was dismissed by reason of ill health capability following a long-term sick absence.

14. Following the Claimant's trade union officer special review/compassionate appeal to the Respondent's managing director (a historic process), the Claimant was reemployed by the Respondent from 18 December 2018 with the preservation of his continuous service, however on different terms. That included putting the Claimant in a different grade (GDC4), because the Claimant's old grade (CD04) had been closed by the Respondent. The Claimant was also put in the Respondent's Workplace Savings Scheme (a defined contribution pension scheme) because the Enhanced Money Purchase / Final Salary Scheme, the Claimant had been a member of prior to his ill-health capability dismissal, had been closed by the Respondent for new entrants.

15. The new terms were communicated to the Claimant on 11 December 2018. The Claimant accepted the new terms and commenced his employment on those terms.

16. In 2020 there were several complaints made by members of the public about the Claimant's driving and conduct, which resulted in the Claimant receiving several disciplinary warnings. On 5 February 2020, the Claimant was issued with a final written warning for dangerous driving.

17. The final written warning was reaffirmed on 9 July 2020 and again on 27 July 2020, following further disciplinary hearings related to similar complaints by members of the public about the Claimant's driving and conduct.

18. On 23 September 2020, a member of the public complained about the Claimant driving dangerously because he had driven through a red light.

19. On 1 October 2020, Ms James conducted a fact-finding meeting with the Claimant with respect to the incident. At the meeting the Claimant first denied driving through a red light. However, when he was shown by Ms James CCTV recordings of the incident he admitted going through a red light and apologised.

20. Following the fact-finding meeting the Claimant was instructed to attend a disciplinary hearing on 7 October 2020 on the disciplinary charge of dangerous driving. The hearing was postponed to 8 October 2020 because the Claimant wanted to change his Trade Union representative.

21. On 8 October 2020, the Claimant attended the meeting with his Trade Union representative, Mr Carleton Maflin. Mr Maflin asked the disciplining officer, Ms J Keane, to delay the start of the meeting by 5 minutes to allow Mr Maflin to discuss the matter with the Claimant, which she agreed.

22. Mr Maflin returned to the meeting without the Claimant. He told Ms Keane that it was not worth continuing with the meeting and asked for a note pad, which she gave him. Mr Maflin returned a few minutes later and handed in a handwritten resignation notice by the Claimant with immediate effect.

23. Later that day the Claimant telephoned Ms Keane and asked if he would be able to come back to work. Ms Keane explained to the Claimant that he had resigned and therefore was no longer an employee of the Respondent.

24. On the same day, the Claimant also sent an email to Mr Trayner saying that he was compelled to resign. Mr Trayner asked Mr Corbin to look into the matter.

25. On 9 October 2020, Mr Corbin spoke with the Claimant on the telephone. The Claimant said that he had resigned because of bad advice he had been given by the union and wanted to come back to work. Mr Corbin said that the Claimant could retract his resignation, but he would still need to attend the disciplinary hearing. The Claimant declined and said that he wanted his resignation to be accepted. The Claimant then returned his equipment and the uniform.

26. On 12 October 2020, Ms Keane wrote to the Claimant acknowledging the receipt of his resignation and equipment and advising the Claimant that he would receive his final pay on 15 October 2020, which he did.

27. On 12 October 2020, the Claimant wrote to Mr Corbin asking whether there were vacancies in New Cross garage or Morden Wharf garage. Mr Corbin replied on the same day, reminding the Claimant that he had been given the option to retract his resignation, which he had declined, and stating that since the Claimant had resigned the Respondent would not be offering him employment at another location.

28. On 30 October 2020, the Claimant wrote to Ms Lambshead asking to retract his resignation. Ms Lambshead replied on the same day recounting the circumstances of the Claimant's resignation and stating that she would not be able to provide the Claimant with another opportunity to retract his resignation.

The Law

Unauthorised deduction from wages

29. Section 13(3) of the Employment Rights Act 1996 ("**the ERA**") provides:

> "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*"

30. Determining what wages are 'properly payable' requires consideration of all the relevant terms of the contract, including any implied terms, applying the ordinary principles of common law and contract (see Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA).

31. For wages to be "properly payable" the worker must have some legal, but not necessarily contractual, entitlement to the wages claimed (seen New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA).

Unfair (constructive) dismissal

32. Section 94 ERA gives an employee the right not to be unfairly dismissed by his employer.

33. Section 95 ERA describes circumstances when an employee is dismissed by his employer, including when "*(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*", commonly known as "constructive dismissal".

34. In order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer,
    b. the employer's breach caused the employee to resign
    c. the employee did not delay too long before resigning, thus affirming the contract, and losing the right to claim constructive dismissal.

(see Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA).

Conclusions

Unauthorised deduction from wages

35. The Claimant's pleaded case is that he was reemployed in GDC4, however "*with negotiations of reinstating grade CD04 and Holiday Pay*", and that he "*waited 1 year to change my grade and it never changed*".

36. It appears the Claimant's expectation of being moved back into his old grade arose from a conversation with his union official he had at the time of accepting redeployment, who advised the Claimant to accept reemployment on the new terms and promised to negotiate on his behalf. The Claimant also said that he broached the subject with Mr Trayner, who said that he would look into that.

37. That is as highest as the Claimant's case for unauthorised deduction from wages raises. However, this falls far short from establishing that the Claimant had any legal entitlement to any money by reference to the old grade CD04 and his old terms. He accepted the new terms, he wanted to negotiate to go back to the new terms, but on his own case the terms "never changed". As Mr Bailey put it in his opening note: "*Pious hope cannot be equated with a contractual right*".

38. The Claimant accepted in cross-examination that the Respondent had paid him everything he was due under his contract of employment. This necessarily means that there have been no unauthorised deductions from his wages. Accordingly, his claim for the same must fail.

Unfair (constructive) dismissal

39. The Claimant's claim for unfair constructive dismissal is equally hopeless. His pleaded case is that he "*forced [himself] to resign*" because of bad advice he received from his trade union representative. He says he was treated unfairly by the Respondent. However, he was unable to identify anything before his resignation, which could be sensibly said to be a breach of contract by the Respondent, either of any express term or the implied term of trust and confidence.

40. He complains that he was not allowed to retract his resignation the second time because it was more than 14 days after his resignation. It is not clear why the Claimant thinks that 14 days had any significance, but in any event that is what happened after and not before his resignation and therefore could not have been the reason for his resignation.

41. In his witness statement he appears to be saying that he was entitled to 14 days' notice of the disciplinary hearing. He did not provide any evidence to support that contention. In any event, the disciplinary meeting was scheduled for 7 October 2020 and then delayed until 8 October 2020 at the Claimant's request. Neither he, nor his union representative raised any objections about the timing of the meeting.

42. The Claimant also complains about the fact that he was suddenly called to the fact-finding meeting from the garage, and that when he received the call, he thought something happened to his family. I find there was no breach of any kind (let alone a fundamental breach) by the Respondent to ask the Claimant to attend a fact-finding interview as soon as Ms James became aware of the customer's complaint, given the serious nature of the complaint and the fact that the Claimant already had three reaffirmed final written warnings.

43. Whatever the Claimant thought at the time about whether he was given an adequate notice of the fact-finding and the disciplinary meetings, I find that the sole reason why he resigned his employment with the Respondent was because he and his union representative realised that the likely outcome of the disciplinary meeting would be dismissal for misconduct, the nature of which was dangerous driving and poor customer conduct. Being dismissed for that reason would understandably make it harder for the Claimant to find another job as a bus driver. To avoid that he decided that it would be better for him to resign in advance.

44. Furthermore, the Claimant repeated requests to be reinstated shows that he clearly did not consider that the Respondent had breached the duty of trust and confidence or otherwise was in a fundamental breach of his contract of employment.

45. The Claimant was offered to retrack his resignation, but he was not prepared to do that if he had to face the disciplinary meeting. Instead, he wanted to be moved to another garage and everything forgotten. While I can see why the Claimant thought this would be the best outcome for him,

it was well within the Respondent rights, and indeed its duties to the public, to decline that option.

46. In short, the Claimant's claim for unfair (constructive) dismissal has no merits and is dismissed.

Costs application

47. After I have delivered my judgment dismissing the Claimant's claims, the Respondent applied for a costs order against the Claimant under Rule 76(a) of the Employment Tribunals Rules of Procedure 2013 (the "**ET Rules**") on the grounds that both of the Claimant's claims had been made subject to the Deposit Order on 17 May 2022, and therefore the Claimant's continuing to pursue his claims under Rule 39(5) was deemed to be unreasonable conduct of the proceedings for the purposes of Rule 76(a), unless contrary is shown.

The Law

48. Rule 39(5) and (6) of the ET Rules provide:

"(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

49. Rule 76 of the ET Rules provides:

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
[…]

50. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party*"

51. The following key propositions relevant to the tribunal's exercising its power to make costs orders may be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA)

    b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

    c. While the threshold tests for making a costs order are the same whether a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

    d. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

    e. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach at [41]:

       "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in*

bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately to lose sight of the totality of the relevant circumstances".

52. With respect to the issue of quantum the following key principles arise from authorities:

    a. Costs awards are compensatory, not punitive – (Lodwick v Southwark London Borough Council [2004] ICR 884 CA).

    b. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order — (Raveneau v London Borough of Brent EAT 1175/96)

    c. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.

    d. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (Doyle v North West London Hospitals NHS Trust [2012] ICR D21, EAT, at [14-15]).

    e. The assessment of means is not limited to the paying party's means as at the date of the hearing. The tribunal is entitled to take account of the paying party's ability to pay in the future, provided that there is a "realistic prospect" that he will be able to satisfy the order in the future - (Vaughan v LB Lewisham [2013] IRLR 713, EAT, at [26-28]).

    f. In Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12, the EAT said that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

53. The Presidential Guidance on General Case Management state:

> "*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*"
>
> *18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:*
>
> *18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);*
> *[….]*
>
> *21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings*."

Conclusion

54. Rule 76(a) of the ET Rules is engaged by virtue of the operation of Rule 39(5). The next step is for me to decide whether in the circumstances it would be just and proper for me to exercise my discretion and make a cost order against the Claimant. In doing so, I must look at the whole picture considering the nature, gravity and effect of the Claimant's conduct.

55. The Claimant claims are plainly misconceived and meritless. I take into account the fact that the Claimant is a litigant in person, and before the preliminary hearing on 17 May 2022 it might not have been apparent to him how bad his claim was. However, he was told by Employment Judge Siddall that his case had little reasonable prospect of success. It appears the only reason EJ Siddall decided against striking out the Claimant's claims was because the Claimant made "*some allegations that will require evidence to be considered*" (see paragraph 5 of the Deposit Order).

56. Therefore, the claimant knew that to get anywhere with his claim he would need to present good evidence to support his contentions that there was unfair treatment prior to the disciplinary hearing and that he was entitled to CD04 pay grade. He did not present any such evidence, other than making bare, inconsistent and at times incoherent allegations. He must have known (or at any rate, it should have been obvious to him) that he had no such evidence, and yet he pressed on with his claim. As he said at

the start of the hearing it was “a gamble”. I should add a very poorly thought through gamble.

57. In the circumstances pressing ahead with the claim was clearly unreasonable. The Claimant’s unreasonable conduct has caused the Respondent to incur further significant legal costs in defending this hopeless claim. Therefore, I find that considering the nature, gravity and effect of the Claimant’s unreasonable conduct it will be just and proper for me to make a costs order against him.

58. The Respondent sought £12,500 - its total legal costs incurred in these proceedings. I enquired about the Claimant’s financial means. He told me that he worked as a bus driver via an agency earning between £400-500 a week (after deductions). His wife works as a cook at the school. They have three adult sons, who do not work and do not contribute to the household bills. Their outgoings are about £2,300 a month. He does not have savings.

59. I find that the Claimant has limited means. However, I must balance that with the need to compensate the Respondent for costs incurred as a result of the Claimant’s unreasonable conduct. Giving allowance to the fact that the Claimant is a litigant in person, I find that the Respondent should be compensated only for its legal costs incurred after the preliminary hearing on 17 March 2022. I note that most of the preparatory work for the final hearing came to be done after that date.

60. Taking all these factors into account, I have decided that the Claimant must pay to the Respondent £6,000 towards the Respondent’s legal costs, being £3,000 of Counsel fee for the final hearing and £3,000 towards the Respondent’s solicitors’ fees.

61. If the deposit of £200 is paid to the Respondent, it should count towards the settlement of the costs order pursuant to Rule 39(6) of the ET Rules.

62. I make no specific order as to the timing of the payment. I trust the Respondent will be sensible in proposing to the Claimant a payment plan, which will avoid putting the Claimant’s finances under a severe strain in the current uncertain and difficult times.

Employment Judge Klimov
08 October 2022

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