



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Jason Wenn

v

NB Construction (UK) Limited

Heard at: Norwich

On: 16, 17 January 2023

Before: Employment Judge Postle

Appearances

For the Claimants: Mr Lawrence, HR Consultant

For the Respondent: Mr Fuller, Counsel

RESERVED JUDGMENT

1. The redundancy dismissal was unfair.
2. The subsequent dismissal for conduct was also unfair

REASONS

1. The Claimant brings claims to the Tribunal of unfair dismissal, unlawful deduction of wages, holiday pay and a claim for notice pay. The Respondent's reason for dismissal was gross misconduct and / or in the alternative redundancy; they resist all claims.
2. There is also a dispute as to when the Claimant's employment commenced with the Respondents.
3. In this Tribunal we heard evidence from Miss Banks, the Office Administrator at the Respondent, who was not involved in any aspect of the Claimant's dismissal or redundancy. The Respondents proffered two further witness statements from the Respondent's Managing Director Mr Barker and his daughter, Miss Barker. However, they chose, for reasons best known to themselves, to go on holiday rather than attend the two day Hearing despite being aware of the Hearing. In those circumstances, Employment Judge Postle has attached very little, if any, weight to those statements given their absence from the proceedings and thus the Claimant's / Representative's opportunity to challenge their evidence in cross examination.

4. For the Claimant, he gave evidence through a prepared witness statement which had only been prepared on the first morning of this Hearing and served, again, on the first morning of this Hearing. The Respondent's Counsel, having been given the opportunity to take its Client's instructions on the contents of the witness statement, confirmed he was ready to proceed on the first afternoon of the Hearing.
5. The Tribunal also had the benefit of a Bundle of documents consisting of 151 pages.
6. The Claimant asserts continuous employment with the Respondent runs from 5 August 2015, whereas the Respondents assert the Claimant only became employed with the Respondents from May 2019.
7. Fortunately, the dispute is easily reconciled as upon the Claimant's own evidence and admission during the course of this Hearing, that prior to May 2019 he was associated with the Respondents on a self-employed labour basis only. It would appear the Claimant became the Respondent's Site Manager as an employee in May 2019. In those circumstances, the Claimant still has sufficient service to bring a claim of unfair dismissal and a claim for redundancy pay under the Employment Rights Act 1996.
8. It is further clear, the Claimant was never issued with a Statement of Main Terms and Conditions of Employment, as confirmed by the Respondent's own Grounds of Resistance at paragraph 29 in which it is pleaded,

"It is admitted that the Claimant was not presented with a Statement of Terms and Conditions of Employment, however it is denied that the Claimant should be entitled to an award of four weeks as it would not be just and equitable in all the circumstances for such an award to be made..."

This is despite a purported Statement of Main Terms and Conditions now appearing in the Bundle for these proceedings, the statement is undated, it has the Claimant's electronic signature appearing at the end and the Tribunal are satisfied the Claimant has not seen this document prior to the Bundle being produced.

9. It would appear towards the end of the Claimant's employment, he was in charge of the Respondent's Tipper and Grab Division of the Respondent. Furthermore, it is not entirely clear from the evidence how many employees the Respondent employs in total, whether employed or self-employed. What is clear is it is a relatively small employer.
10. The Respondent's Managing Director, Mr Barker, decided some time towards the end of 2021 to restructure the company, particularly the Tipper and Grab Division. It is very clear there was no warning of the impending redundancy that the restructure would involve prior to 7 November 2021. In fact it was only on 7 November 2021 the Claimant was spoken to by Mr Barker, at which he was informed he, along with seven / eight lorry drivers

in the Tipper and Grab Division, were to be made redundant. It was a fait accompli. There clearly was no warning of these impending redundancies and certainly no consultation. The Claimant was asked to inform the lorry drivers of the redundancies which the Claimant duly did.

11. Following the discussions between Mr Barker and the Claimant on 7 November 2021, he was then issued with a letter also dated 7 November 2021 headed 'At Risk of Redundancy Confirmation' (page 50 of the Hearing Bundle), the letter read,

"Dear Jay

When we met on 7 November I explained then that NB Construction UK Limited is thinking about making some roles redundant. This is due to the need to reduce costs and the need to restructure. Unfortunately, your post is one of those at risk of redundancy.

NB Construction UK Limited will now begin a consultation process. The purpose of the consultation is to:

- Explore ways of avoiding or reducing the number of redundancies;*
- Look at whether people can be redeployed into other suitable roles;*
- Give you the chance to raise concerns or ask questions; and*
- Help us to identify your needs and offer support.*

No decisions will be made until the consultation is finished. If you have any suggestions or proposals as to how the need for redundancies can be avoided or reduced, we want to hear them. Please contact myself with your suggestions and all will be given due consideration.

I know this is an upsetting and difficult time for everyone. I can assure you that we will do all we can to keep you informed and involved in the process. Please feel free to contact me if you have any queries.

*Yours sincerely
Nick Barker "*

12. Clearly the letter is a sham as following this letter there were no consultation meetings between the Claimant and the company, or Mr Barker, whatsoever. There appears to have been no discussions about reducing the number of redundancies or any alternative positions within the company. Then on 10 December 2021, no further meetings having taken place between the Claimant and Mr Barker, the Claimant was then issued with a letter dated 10 December 2021, headed 'Confirmation of Redundancy',

"Dear Jay

I am writing to confirm the outcome of the final consultation meeting held on 10 December 2021. This meeting was the final stage of our redundancy consultation which started on 7 December 2021.

Unfortunately, it is not possible to find any solutions other than to make you compulsory redundancy. We have decided to make your role redundant. As a result of this letter it is to be treated as formal notice of dismissal due to redundancy.

You are entitled to one week's notice. You will be paid in lieu of any notice owed to you and you finish work on 28 January 2022.

As you have worked for the company for more than two years you are entitled to a statutory redundancy pay. Your redundancy pay has been calculated using the Government Ready Reckoner and is £1,088.00

Attached to this letter is a breakdown of what you will be paid for outstanding annual leave which you will receive with your final pay and P45 on 28 January 2022.

We will not require you to attend the office in January 2022 and you may treat this time as gardening leave. This is at the company's discretion and may change if business needs require, but we will give you adequate notice if we require you to come to work.

I would like to remind you that on your last day of work you must return all company property including office keys, vehicle keys, equipment, documents, papers and correspondence.

You have the right to appeal against this decision. If you want to appeal you should write to myself Mr Nick Barker Managing Director within 14 days stating your grounds of appeal against your redundancy dismissal.

...

*Yours sincerely
Nick Barker "*

13. The Claimant did not appeal as he appeared to have little faith in any meaningful outcome given the fact that the appeal was to the person who took the decision to dismiss and make the redundancies.
14. To repeat, it is clear by 10 December 2021, there had been no further consultation, no exploration of alternative positions, or any discussions about reducing the number of redundancies. There was apparently a vacant position for Health and Safety Officer in the Respondent which the Claimant was qualified to undertake. This alternative position was not offered to the Claimant, even on a trial basis.
15. The Claimant, in the course of his employment, had been issued with a company telephone. At some stage this telephone was damaged, a crack appearing on the face of the telephone which caused reception difficulties when talking to work colleagues. As a result of this, a further company telephone had been issued to the Claimant. On 4 January 2022 the Claimant was contacted by the Office Administrator Miss Banks regarding

the return of company property and the mobile telephone, despite the letter of dismissal saying the return of all company property was to take place on the last day of his employment. The gardening leave coming to an end on 28 January 2022.

16. The Claimant returned the telephone that was damaged on 6 January 2022 to Miss Banks, whereupon she logged it on a scrap piece of paper without noting any serial number or damage. The Claimant had apparently obtained the second telephone and office keys for work which were in his partner's car and wanted to wipe the personal data from that telephone before returning it and his plan was to bring that telephone and keys in later.
17. For reasons best known to Mr Barker, he felt that the wrong telephone, or a damaged telephone, had been returned and took it upon himself to visit the Claimant on 6 January 2022 (the Claimant lived on the company premises) to collect the telephone. Whether he attended with his daughter is largely immaterial. Whereupon the Claimant returned the second telephone. There appears to have been no settled intention to steal the second telephone which comes out as rather a bizarre allegation by the Respondents, given the fact that the telephone was handed back well in advance of the last day the Claimant was employed by the Respondents. Quite why the urgency in any event to collect the second telephone, is also a mystery. One can only conclude an attempt by Mr Barker to engineer a situation so as not to honour the Claimant's garden leave and notice pay.
18. Following this, Mr Barker issued a letter dated 7 January 2022 headed 'Notice of Disciplinary Meeting'. The letter read (page 53 of the Hearing Bundle),

"Dear Jay

I am writing to tell you that you are required to attend the disciplinary meeting on Monday 10 January 2022 at 9am which is to be held at my office at Holly Manor.

At this meeting the question of disciplinary action against you in accordance with the company disciplinary procedure will be considered with regard to your attempt to defraud the company of its assets and in particular your company issued mobile telephone.

The possible consequences arising of this meeting might be dismissal for gross misconduct.

You are entitled if you wish, to be accompanied by another work colleague.

*Yours sincerely
Nick Barker "*

19. The Claimant did not attend the meeting as he felt it would be futile. No minutes of any meeting have been produced at this Hearing taking place on 10 January 2022.
20. The Claimant then received a letter of dismissal which oddly offered no right of appeal in any event. That letter is at page 54 of the Hearing Bundle. The Claimant having been dismissed on 10 January 2022, using the words contained in the letter,

“I have no other option but to consider this an attempt to defraud the company from its assets, an action which I deem to be gross misconduct on your part and breach of contract.”

This is in relation to the alleged non-return of the company telephone.

The Law

21. Section 98 of the Employment Rights Act 1996, sets out a potentially fair reason for dismissal being conduct and also where an employee is redundant.
22. Section 98(4) of that Act sets out,
 - “Where the employer has fulfilled the requirements of subsection (1) the determination of the question of whether dismissal is fair or unfair (having regard to the reasons shown by the employer)-
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
23. In relation to conduct dismissals, what the Tribunal is looking for is the following:-
 - a. Did the Respondent carry out reasonable investigation into the Claimant’s alleged gross misconduct;
 - b. Did the Respondent have reasonable grounds for its belief that the Claimant had allegedly committed gross misconduct;
 - c. Was the dismissal within the band of reasonable responses that was available to the Respondent; and
 - d. Was the dismissal in all the circumstances fair.
24. In relation to redundancy dismissal, the Tribunal will need to satisfy itself of the following:
 - 24.1 That the employer has given as much warning as possible of redundancies so as to enable any employees who may be affected

to take early steps to inform themselves of the relevant facts, consider alternative solutions and if necessary, find alternative employment;

- 24.2 The employer consults and that consultation must be meaningful, not a case of going through the motions;
- 24.3 There should be some criteria for selection and that selection process should be objectively assessed; and
- 24.4 The employer should seek to see whether instead of dismissing the employee, could offer him alternative employment within their organisation.

Conclusions

- 25. There was a genuine redundancy situation.
- 26. As to the redundancy process, clearly the Respondents failed to adequately warn and consult with the affected employees. Warning of impending / possible redundancy should be set out in clear and unambiguous terms, in fact there was no warning at all.
- 27. As to consultation with affected employees, again this should consist of sitting down with all affected employees and discussing the reasons for the proposed redundancies and consider with the employees whether there are any ways this could be avoided. Whether there are any realistic alternatives to redundancies and whether all the employees in the company should be placed in a pool for selection and then a clear transparent selection process be applied. None of which any of these aspects actually happened. The consultation was a complete sham and in fact, there was no real or meaningful consultation.
- 28. Furthermore, there was no consideration as to whether the Claimant should be offered alternative employment, even on a trial basis, with the Health and Safety Officer position, which apparently the Claimant was qualified to undertake.
- 29. In relation to the dismissal that occurred subsequent to the Claimant being made redundant, that also was a complete sham. There appears to have been no proper investigation into the alleged theft, no reasonable belief the Claimant was on the facts at the time attempting to steal the company telephone and thus no grounds upon which to dismiss the Claimant. It clearly was not a reasonable response to the facts known to Mr Baker at the time he took the decision to dismiss.
- 30. In these circumstances both the redundancy and purported dismissal thereafter are unfair.

31. A Remedy Hearing will have to be arranged to consider compensation and Polkey arguments.

Employment Judge Postle

Date: 10/3/2023

Sent to the parties on: 16/3/2023

NG
For the Tribunal Office.