



EMPLOYMENT TRIBUNALS

Claimant

Lisa Brittain

v

Respondent

G Moore Haulage Limited

Heard at: Cambridge

On: 8 and 9 June 2023

Before: Employment Judge de Silva KC

Appearances

Claimant: Anna Loutfi, Counsel

Respondent: Sarah Clarke, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is dismissed.
2. The Claimant's claim for unlawful deductions from wages pursuant to section 13 of the Employment Rights Act in respect of wages from 16 to 24 February 2022 is dismissed.
3. The Claimant's claim for failure to provide a statement of particulars pursuant to section 1 of the Employment Rights Act is dismissed.

4. The Claimant's claim for breach of contract in relation to bonus in December 2021 is dismissed.
5. The Claimant's claim for holiday pay is dismissed on withdrawal.

REASONS

A. THE PROCEEDINGS

1. By Claim Form presented on 20 May 2022, the Claimant made claims for unfair dismissal pursuant to section 98 of the Employment Rights Act 1996, unlawful deductions from wages (from 16 February to 24 February 2022) pursuant to section 13 of the Employment Rights Act, failure to provide particulars of employment pursuant to section 1 of the Employment Rights Act and breach of contract (bonus of £10,000 alleged to be payable in December 2021). A claim for holiday pay was withdrawn at the outset of the final hearing. The Response among other things denied that the Claimant had been dismissed.
2. The Tribunal heard evidence from the following witnesses, all of whom provided written witness statements:
 - a. The Claimant (who was cross-examined for 1½ hours);
 - b. Glen Moore (who was cross-examined for half an hour) on behalf of the Claimant;
 - c. Gary Moore (who was cross-examined for one hour) on behalf of the Respondent;
 - d. Rebecca Walsh (who was cross-examined for 20 minutes) on behalf of the Respondent.
3. All of the witnesses save for Ms Walsh were asked questions by the Tribunal. Both parties provided written opening submissions on the law and the facts for which the Tribunal is grateful. Both parties made oral closing submissions. Judgment was given orally at the hearing.

B. FINDINGS OF FACT

4. The Tribunal makes the following findings of fact on the matters which are relevant to the issues between the parties. Where there was no dispute between the parties as to a particular fact, the findings are recorded below without further explanation.

Where there was a dispute between the parties on the evidence, the Tribunal explains why it made its findings of fact.

The Parties

5. The Respondent company was established by Mr Glen Moore (the Claimant's father) and Mr Gary Moore, the Claimant's uncle, around forty years ago. The Respondent is a truck company, specialising in bulk earthmoving, plant and grab hire and on-site aggregate recycling.
6. The Claimant's latest period of continuous employment commenced in January 2006. She was employed for a period before this but there was a gap in her employment after which she was re-engaged in January 2006. She was employed as an Accounts and Administrative Assistant, dealing mainly with invoicing and credit control.
7. As well as being a family-owned company, other members of the Moore family were employed by the Respondent, including Gary Moore's daughter (Rebecca Walsh) who also worked in the administrative department, as well as at various times Gary Moore's sons (Jason and Adam) and Glen Moore's sons (Wayne and Justin).

Bonus

8. In 2016, the Respondent started paying bonuses to the children of Gary and Glen Moore, that is, the Claimant, Ms Walsh and the sons referred to above for some of the time that there were there. The only other staff of the Respondent who were paid a bonus were Peter Rockall and Tony Ardis who worked in sales.
9. The Claimant and Ms Walsh were both paid:
 - a. £10,000 in 2016, 2017 and 2018;
 - b. £5,000 in 2019;
 - c. £10,000 in 2020;
 - d. No bonus in 2021.
10. Nothing was documented about the bonus in 2016. The Claimant said in oral evidence that she was told she would be paid 10K "every year". However this was not mentioned previously, even in her witness statement. Moreover, she was unable to say who it was that said this to her or when this was. For these reasons, the Tribunal finds on balance that this was not discussed and it accepts the evidence of Gary Moore that this was a payout to members of the family which would be decided at the end of the year and there was no commitment to paying a particular sum, or even any sum at all.
11. This is consistent with the fact that only £5,000 in bonus was paid to the Claimant and Ms Walsh in 2019. Faced with this evidence which undermined her case, the

Claimant asserted - again for the first time in oral evidence - that she was expecting a further £5,000 later in the year. However, she did not explain the basis of this assertion (for example who had told her this) and it was inconsistent with the fact that she had not pursued the bonus. The Tribunal therefore finds on the balance of probabilities that the additional £5,000 was not promised or expected.

12. The Claimant's case was in reality based on a letter dated 24 October 2019 which confirmed that she received a salary of £35,000 plus a "*guaranteed yearly bonus of £10,000*" normally paid towards the end of the year. It was a letter to "*Dear Sirs*" for the purpose of a mortgage application. It was signed by her father (Glen Moore) and Ms L Tunley who is an external consultant coming in around 1 day a week who often signed letters of this kind to mortgage providers. This was not any kind of contractual document. It was not stated to vary the contract in any way. The most that can be said is that it purported to state an existing arrangement.
13. Glen Moore, on behalf of the Claimant in cross-examination at the hearing, said that he had a discussion with Gary Moore about the terms of this letter and agreed with him that the sum was guaranteed. This was not mentioned in Glen Moore's witness statement or at any time before cross-examination, even though it goes to a key issue in the case, i.e. alleged bonus entitlement. When this was put to him, he said that one remembers things late. This is unconvincing. Had what he said been true, he would be likely to have remembered it at least when writing his statement. The Tribunal therefore finds on the balance of probabilities that the alleged conversation with Gary Moore never took place.
14. When it was put to the Claimant in cross-examination that the letter was something that her father had written to assist her and the bonus was not guaranteed, she said that she had shown a "*rough*" copy of the letter to Gary Moore, then saying that she meant an "*unsigned*" copy. Again this was mentioned for the first time in cross-examination, even though it is relevant to the interpretation of the letter on which her bonus claim is primarily based. There would be no particular reason simply to show it to Glen Moore if, as she alleges, there was a contractual entitlement. Had she shown it to him and he approved it, he would have been likely to have signed it which he did not. Therefore, the Tribunal accepts Gary Moore's evidence that he was not shown the letter, even in draft.
15. Although the letter refers to guaranteed bonus, the bonus was not guaranteed. The Claimant had not been told this and moreover, shortly after this letter, only £5,000 in bonus was paid in 2019. The letter was written for the purposes of obtaining a mortgage and was inaccurate to the extent that it said that bonus was guaranteed.
16. Glen Moore accepted that no bonus was payable in 2021 due to Covid which is consistent with it not being guaranteed.

Events in 2021

17. In February 2021, the Claimant suspected Gary Moore of 'ripping off' her father. This was communicated to Gary Moore who changed passwords so that the Claimant could not access the Respondent's main email and the administrator

account. As a result, there was a tense exchange between them when she swore at him.

18. The Claimant said about the period 2021/2022 that the working relationship and tensions at the office were rapidly becoming unbearable and she used to dread having to go into work each morning. She said in oral evidence that this applied when Gary Moore was working on the same floor as her but there was plainly tension generally. She perceived that Gary Moore driving her out of the company. As for Gary Moore, he perceived the Claimant's attitude, behaviour and attendance to be poor. He spoke to the Claimant on just a single occasion after February 2021. Even though they worked mainly but not always on different floors, the tension between them was widely known about in the office.
19. From 2021, the relationship between Ms Walsh and the Claimant deteriorated. Although they had been close, they did not speak during Ms Walsh's maternity leave in 2021/2022. Gary and Glen Moore's relationship also deteriorated and they entered discussions about Gary Moore buying out his brother.
20. The Respondent alleges that the Claimant said that she was going to leave when her father left but the Tribunal accepts the Claimant's evidence that she did not say this. As the Claimant points out, if she had said this to Ms Walsh, this could only have been before 2021 when Ms Walsh was at work and their relations were good and there was no particular reason for her to have wanted to leave at that time. The Respondent asserts that she had been vocal about this in the weeks before the alleged resignation in February 2022 but this is not supported by the witness evidence.
21. The Tribunal nonetheless recognises that the Claimant and father are close and the Claimant was loyal to him. It accepts the evidence of Gary Moore that the Claimant mainly dealt directly with her father, Glen Moore, rather than him in relation to work issues involving management.

Events in February 2022

22. Discussions about the sale of Glen Moore's share of the business to Gary Moore concluded in February 2022. It is clear that this sale would have affected the Claimant's day-to-day work. Much as she liked her job and got on with many people there, the person in charge was someone she barely spoke to, if at all. The Claimant and her father accepted in evidence that they talked about the difficult situation and I find that they discussed the possibility of her leaving. They were both very evasive about this when asked about it in cross-examination, repeatedly not answering the question or answering a different question not put. Moreover it is only logical that they would have discussed this in the circumstances. I accept their evidence that they did not specifically discuss Glen Moore financially supporting the Claimant but, as Glen Moore said, he was there for her if she needed him financially.
23. On 16 February 2022, Glen Moore attended the site to negotiate the sale of his shares. The Claimant was working in the office at this time and left at her usual time of 4pm. Following their meeting, Glen Moore telephoned Gary Moore at

approximately 4.45pm, accepting his offer to buy him out. It is Gary Moore's position that during this telephone call, Glen Moore advised him that the Claimant would not be coming in any more, that she should be paid up until that day and that she would not be working in the business if Glen Moore was not there.

24. I return to my findings on this central issue in the case, having addressed the evidence of what took place after that.
25. The Claimant alleges that, when she left work that day, she told her colleagues that she was ill and was not coming in the next day. However, she does not identify the colleagues. Had she told colleagues, she would have mentioned this in her statement. It would be natural to say whom she spoke to and would have supported to her account of events. Therefore, I find that she did not mention this to colleagues.
26. The Claimant alleges that she went to a doctor the following day (17 February 2022) but disclosed no medical evidence of this. It would have been available and the Claimant appreciated this was a relevant issue which is why she disclosed a text from the surgery about a prescription on 18 February 2022. As it is, it is unclear even whom the prescription was for on 18 February 2022. Therefore, the Tribunal finds on balance that she did not visit a doctor on 17 February 2022 and was not unwell on 16/17 February 2022.
27. On 18 February 2022, her desk was cleared. The Claimant admitted in cross-examination that it was cleared by a colleague Scarlet White (who is going out with her brother). Again this is not mentioned in her statement and she said for the first time in cross-examination that Ms White had told her that Gary Moore had asked her to clear her desk. Had this been true, she would have been likely to mention it earlier. She was also vague about the date even though this would have been a significant event, potentially (on her own case) indicating that she had been dismissed. Therefore, the Tribunal finds that Ms White cleared the desk at the request of the Claimant. The Tribunal draws no inference from the fact that Ms White was not called by either party given her potentially divided loyalty.
28. The Claimant did not attend work the following Tuesday, Wednesday or Thursday (22 to 24 February 2022). She did not tell anyone that she was not coming in.
29. Payroll sent the Claimant her P45 the following week along with her salary up until 16 February 2022. The Claimant received this on 24 February 2022.

Later Events in 2022

30. The Claimant did not contact the Respondent following the receipt of her P45, even to send a text querying the position. Glen Moore rang Gary Moore but left no messages. Ms Walsh's unchallenged evidence was that Glen Moore had a conversation with her but he only mentioned the Claimant being paid up to acquisition, rather than asserting that she had not been dismissed. It would have been straightforward to send a text or even instruct a lawyer on this important issue of apparent dismissal, if they thought she was still employed.

31. It was not until 20 April 2022, almost two months after P45, that the Claimant took the issue up with the Respondent by a solicitors' letter. She told the Tribunal that she was ill over this period but there is no medical evidence of this and moreover it would have taken very little to at least raise the issue with the Respondent. However, nothing was done.
32. What motive the Claimant may have had to leave is of little weight in determining what happened. It is agreed that the situation was difficult but this was a well-paid job with good flexibility. The tension between Gary Moore and the Claimant might have been a reason for her wanting to leave and/or for Mr Moore wanting her to leave.

C. RELEVANT LAW

Unfair Dismissal

33. The Claimant must show that she was dismissed. The Respondent asserts that she resigned through her father (or else to her father).
34. In ***Sovereign House Security Services Ltd v Savage*** [1989] IRLR 115 CA, the employee said he "*was jacking the job in*" but did so in response to his employer's implication that he was guilty of theft. The court stated: *... generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. [...] However, in some cases there may be something in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or herself, to entitle the tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight*".
35. It is not disputed that words communicated through a third party can amount to a resignation and here the Claimant fairly accepted that if her father had said that she was resigning, he would not have done so without her authority.
36. The Respondent accepts that, if I were to find that there was no resignation, there was a dismissal and this was unfair.

Unlawful Deductions from Wages

37. The Respondent accepts that, if there was no resignation, then the Claimant is entitled to payment of wages from 16 to 24 February 2022.

Breach of Contract

38. The Claimant alleges that there was an implied term as to guaranteed bonus of £10,000 up to 2019 and thereafter an express term this effect. A term may be implied when it is notorious, certain and true.

Statement of Particulars

39. The Claimant seeks an award under section 38 of the Employment Act 2002 and section 1 of the Employment Rights Act for failure to give a statement of employment particulars. The Respondent admits that there was no statement of particulars but the parties agree that I can only make an award if another claim succeeds, that is to say that it can only be an ancillary claim.

D. CONCLUSIONS

40. The Tribunal notes the following about the alleged statement by Glen Moore to Gary Moore on 16 February 2022 that the Claimant was resigning:

- a. Neither Glen Moore nor the Claimant deal at all in their statements with the Respondent's assertion that Gary Moore said that the Claimant was leaving. This is at the very heart of the case but they simply ignore the point. Indeed, they deal with different arguments that were not relied on by the Respondent; for example, the Claimant addresses a point about not being sent a letter which was not part of the Respondent's case;
- b. Gary Moore was clear and consistent in the evidence he gave about the conversation and what Glen Moore told him about the Claimant leaving the Respondent;
- c. For the reasons set out above, the Tribunal found that the Claimant asked Ms White to clear her desk;
- d. It is also found that the Claimant has not shown that she was ill as at 16/17 February 2022 and did not tell anyone that she was ill. Her actions were consistent with an understanding that her employment had been terminated;
- e. The Claimant did not tell anyone that she was not coming into work the following week which is consistent with an understanding that her employment had terminated. The notification practices at the Respondent are informal but it would have been a matter of practical sense to tell someone she was not coming in so that they knew that someone else had to do the invoicing;
- f. Neither she nor Glen Moore actually took the issue up with the Respondent for more than two months after the P45, even to send a text. Again, this is consistent with an understanding that she had resigned.

41. For these reasons, the Tribunal finds that Glen Moore did tell Gary Moore that the Claimant was not coming in any more and to pay her to that day and that she would not be working for the Respondent. Ms Loufi put the fair point to Gary Moore in cross-examination that he could and indeed should have followed the matter up with the Claimant directly. However, the Tribunal accepts his evidence that Glen Moore's word was good enough for him. This is consistent with the informal way

things were done in a family business and the Claimant's close relationship with her father. He had no reason to doubt what Glen Moore had said.

42. The Tribunal does not accept the Claimant's case that Gary Moore was taking the opportunity to be rid of the Claimant. It accepts that he needed someone to do the invoicing and this would have been a rash step to take in these circumstances.
43. The words used were unambiguous. They were not said in the heat of the moment. As the Claimant accepts, Glen Moore would not have said this without the authority of the Claimant and the Tribunal finds that she did tell him this and give him authority to tell Gary Moore that she was resigning. It cannot be suggested that the words used indicated that she would be leaving temporarily. They were said in the context of Glen Moore leaving which was a plausible reason for the Claimant leaving.
44. As there was no dismissal, the claim for unfair dismissal fails.
45. As the Claimant resigned on 16 February 2022, the claim for unlawful deductions from wages fails.
46. As for the bonus, there was no express term as to bonus. As for the assertion that there was an implied term guaranteeing bonus of £10,000 arrangement, this is not how the case was advanced. The Claimant's case was based on the letter to the mortgage provider which is not contractual for the reasons set out above. In any event, no term as to guaranteed bonus can be implied. It was not notorious, certain and true. The bonus had been introduced long after the beginning of the Claimant's employment, it was varied in particular in 2019. As Glen Moore accepted, the Respondent was not required to pay it in 2021. His passing observation that it should be paid now that business is better is without foundation. We are well past the bonus year in question and the Claimant rightly does not contend for this.
47. As the other claims fail, the Tribunal can make no award in respect of the Respondent's not providing a written statement of particulars.

Employment Judge de Silva KC

Date: 15 August 2023

Sent to the parties on:

29/8/2023

For the Tribunal: N Gotecha