



EMPLOYMENT TRIBUNALS

Claimant: Mr Paul McBride
Respondent: Barton Stud Limited
Heard at: Bury St Edmunds (in person)
On: 7 July 2023
Before: Employment Judge Graham

Representation:

Claimant: In person
Respondent: Mr Anderson, counsel

JUDGMENT having been given orally on 7 July 2023, and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Claim

1. By way of ET1 dated 10 April 2022 the Claimant complains that he is owed notice pay, holiday pay, and other payments. In the narrative the Claimant says that he is complaining of wrongful dismissal. The Claimant alleged that he had not been paid a bonus which he was entitled to.
2. By way of ET3 dated 10 June 2022 the Respondent denied the claims and argued that the Claimant had made comments to colleagues which amounted to harassment and sexual harassment, which justified his dismissal for gross misconduct.

Issues

3. A list of issues had not been prepared however at the start of the hearing the Claimant confirmed that the complaint about a bonus payment was no longer pursued. I therefore **dismissed** that claim upon withdrawal. The Claimant confirmed that he was pursuing a claim for holiday pay, and it later became clear that he was seeking payment for holidays up to May 2022 at

the rate of 2.5 days annual leave per month.

4. The legal issues to be decided as I understood them are as follows:

Annual leave

4.1 What was the Claimant's leave year? The parties agree that the Claimant's leave year was 1 January to 31 December.

4.2 How much of the leave year had elapsed at the effective date of termination?

4.3 How much leave was the Claimant entitled to per leave year?

4.4 How much leave had the Claimant accrued during the leave year on a pro rata basis?

4.5 How much paid leave had the Claimant taken in the leave year?

4.6 How many days remain unpaid?

4.7 How much, if any, is outstanding to be paid to the Claimant?

Wrongful dismissal

4.8 Was the Claimant in repudiatory breach of contract entitling the employer to terminate his employment without notice?

The Hearing

5. I was provided with a hearing bundle of 125 pages. The Claimant relied on his own witness statement. For the Respondent I received witness statements Tom Blain (Respondent's Managing Director), Josefina Posada, Joanna Pryke, and Megan Case. I also listened to an audio recording of an interview with Darcey Foley.
6. Neither Ms Pryke nor Ms Case attended the hearing in person. Ms Pryke's witness statement concerned an alleged incident in November 2021 where there had been a flood in the stables and she alleges that the Claimant said "come on girls, get your bikinis out." Ms Case's statement does not address any of the specific issues in this case but has been produced because she said that Claimant has asked her to confirm in these proceedings that she felt comfortable around him, to which she strongly objects.
7. Ms Case says that the Claimant admitted to her that he had previously been accused of sexual harassment and would make vulgar jokes about girls including her and that he had been persistent in messaging her. As neither witness attended I placed little weight on their evidence but I did not disregard them in their entirety as they appeared to corroborate the evidence of Mr Blain and Ms Posada who have attended.
8. I was also provided with opening submissions on behalf of the Respondent which I have found helpful.

Law

Annual leave

9. The combined effect of regulations 13 and 13A of the **Working Time Regulations 1998** is that a worker is entitled to 5.6 weeks' paid annual leave per year.
10. Pursuant to regulation 14 of the **Working Time Regulations**, a worker whose employment is terminated during their leave year is entitled to receive a payment in lieu of any paid annual leave that they have accrued, on a pro rata basis, during their leave year, but have not taken.
11. Such a payment in lieu is calculated on the basis that the worker receives one day's pay for each day of accrued but untaken annual leave. Clause 10 of the Claimant's contract of employment confers a contractual right analogous to the statutory right conferred by regulation 14.
12. There is no right to payment for annual leave which has yet to accrue.
13. While holiday entitlement is commonly expressed by reference to days, or sometimes even by reference to hours, it is important to note that the **Working Time Regulations** express the entitlement by reference to weeks. In determining what is a week's pay for the purposes of a claim to accrued but untaken annual leave, the relevant provision is subsection 221(2) of the **Employment Rights Act 1996**, which provides as follows:

Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

Wrongful dismissal

14. The only issue I have to decide in relation to the wrongful dismissal complaint is whether the Claimant was guilty of a repudiatory breach of his contract of employment, or what is normally labelled 'gross misconduct'?
15. This means conduct of the employee so serious it constitutes a fundamental or repudiatory breach of the contract of employment. A fundamental or repudiatory breach is one going to the root of the contract displaying an intention on the part of the "contract-breaker" no longer to be bound by the contract's terms.
16. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the tribunal. Guidance can be found in the case of **Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285** where the question was set out as being "*whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service*". It was also stated in that case that "the disobedience must at least

have the quality that it is 'wilful': in other words a deliberate flouting of the essential contractual conditions".

17. More recently it was expressed as whether the conduct "so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment"- ***Neary v Dean of Westminster [1999] IRLR 288.***
18. Whether there has been deliberate wrongdoing that is sufficiently serious to repudiate the contract is a fact sensitive question. Attitudes change as to what is or is not particularly unacceptable conduct. Therefore, the courts have not laid down any specific guidelines dealing with what is sufficient misconduct to justify dismissal.
19. When determining whether something is gross misconduct justifying summary dismissal, all the circumstances of a particular case will be relevant, including whether that type of conduct is listed in the employer's disciplinary policy or company handbook as amounting to gross misconduct. However, just because conduct is listed as being gross misconduct in a contract or a contractual disciplinary procedure, it does not automatically follow that summary dismissal will be justified if the employee conducts himself in that way. It is for the Tribunal to decide whether the conduct is sufficiently serious to be repudiatory - ***British Bakeries Ltd v O'Brien UKEAT/1479/00.***
20. The question for me to decide is whether the Respondent has proved the Claimant did in fact do something that fundamentally breached his contract of employment? I am not concerned, unlike unfair dismissal, with what the Respondent believed, reasonably or otherwise, nor whether the Respondent acted within the 'band of reasonable responses.' The test for wrongful dismissal is different. In a wrongful dismissal claim, the Tribunal is concerned with whether a repudiatory breach of contract occurred.

Findings of fact

21. From the information and evidence before me I made the following findings of fact. I made my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgment all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues to be decided.
22. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. I have not referred to every document I read or was taken to in the findings below, but that does not mean they were not considered.
23. The Claimant commenced employment with the Respondent as a Stud Hand on 1 November 2021. The Respondent's business specialises in

boarding thoroughbred broodmares and young stock, foaling mares, and the preparation of thoroughbred horses and foals for bloodstock sales.

24. The Claimant's contract of employment at clause 2 states that this contract is for six months only and will be reviewed on the 31st of May 2022. However, close four then states:

"the first six months of your employment will be a probationary period during or at the end of which either you or the Company may terminate your employment by giving one week's written notice

This is without prejudice to the Company's right to terminate your employment without notice if you have been found to have committed an act of gross misconduct or a serious breach of your terms and conditions."

25. The contract then goes on clause 7 to set out the length of notice required on either side, including the length of notice required after completion of probation and also after completing two years' service. The Claimant has argued that this is a fixed term contract for six months whereas the Respondent disputes that, and says that the reference to 6 months is a reference to the probation period.

26. Whereas the Claimant has formed the view that this was a fixed term contract, however I prefer the evidence of the Respondent that this is not a fixed term contract and that the reference to 6 months' is simply a reference to the probationary period. This is because of the contents of clause 4 setting out the probationary period and clause 7 setting out the notice requirements beyond probation which would have been superfluous otherwise. I therefore do not find that this was a fixed term contract.

27. Clause 10 of the contract sets out the provisions as regards annual Leave and Statutory Holidays. This provides that:

"the holiday year runs from 1 January to 31 December and that you should take all of your entitlement during that year. You are not entitled to carry forward any holiday entitlement into the following year.

You are entitled to 21 working days paid holiday (which accrues evenly over the twelve months) and to the following eight statutory holidays..."

28. Eight statutory holidays are listed.

29. The period 1 January to 3 March 2022 (which is the date of termination) equates to 61 days and the Claimant was in employment for 17% of the leave year. Whereas the parties have agreed in this hearing that the annual leave accrues at 2.5 days per month this includes bank holidays which differs from the method of calculation within the Respondent's Grounds of Resistance.

30. In its Grounds of Resistance the Respondent calculated the entitlement differently and this was based upon the Claimant having worked 17% of the year, therefore he was entitled to 17% of the 21 day entitlement. This amounts to 3.57 days, although the Respondent has rounded this up to 4 days.

31. The Claimant took holiday on the 3 January 2022 as this was a bank holiday.
32. Upon termination of the Claimant's employment, he was paid in lieu of 2.5 days holiday. He was then subsequently paid a further 1.5 days accrued holiday on 21 July 2022 after he issued his claim. The Claimant was therefore paid four days of untaken annual leave, and he had also taken a bank holiday. Whichever method of calculation is used the end result is the same given that the Claimant took and was paid for a bank holiday on 3 January 2022.
33. During the evidence the Claimant said that he had just remembered that he had been told that he could carry over a day's leave from the year before by the stud manager Zoe. This hadn't been raised before and he confirmed that he hadn't remembered it at the time he lodged his ET1. This appears to be at odds with the contractual provisions at clause 10 which provides that annual leave may not be carried over. As this had not been raised before I did not make any findings about it.
34. I was referred to the Respondent's disciplinary procedure, and at page 2 of that procedure it sets out examples of gross misconduct and includes threaten assault or intimidation and improper contact while at work or on business.
35. On 28 February 2022 the Claimant sent a message one of the Respondent's staff, Darcey Foley, on Facebook messenger stating that "you just pop up on someone I might know". Ms Foley is a young female member of staff.
36. On 2 March 2022 Mr Blain was sent a message by his secretary that Ms Foley had come to see him to talk about concerns about the Claimant, specifically unrequested communications from him. Mr Blain was also notified by Mark Nevin (the Stud Groom) that Miss Foley had made similar comments to him about the Claimant's conduct. Mr Blain says that Mr Nevin told him that he was aware that the Claimant had previously made an unsavoury comment to girls in the yard that they should get their bikinis out for following a water leak. Mr Blain spoke to Miss Foley later that afternoon, where she expressed her concerns to him.
37. On 3 March 2022 Mr Blain's secretary messaged him again to advise that Ms Foley had come to report that the Claimant had said more to her that day and that Ms Foley was in tears.
38. Mr Blain formally interviewed Ms Foley the same day. The interview was audio recorded and Mr Blain's secretary acted as a witness. In the interview Ms Foley mentioned the Claimant's message from Facebook messenger and she said that the Claimant had acted like his message was a joke and deleted it, but he had also commented about her profile picture and the kind of clothing she was wearing and that he spoke about in a very sexual manner saying he would "give it a go if he could." Miss Foley said this left her feeling very uncomfortable, and she then said that the Claimant had also told her that she was good-looking enough to be a threat towards Ms Posada. Miss Foley said that she had broken down in tears because of the Claimant's behaviour and that she didn't feel comfortable being in his presence of working with him and he was the same age as her father.

39. The Claimant has alleged that Ms Foley was laughing during the audio recording. Having heard the audio recording during the hearing, I do not find that Miss Foley was laughing in the way alleged. At the very end of the audio recording, Miss Foley appeared to make a very brief nervous laugh after describing how uncomfortable she felt about someone the same age as her father making inappropriate comments towards her. It was by no means a laugh in jest, rather it was one more of nervousness or embarrassment.
40. Mr Blain then interviewed Miss Posada as her name had been mentioned as someone who had also expressed concern about the Claimant's contact. Ms Posada is another young female member of staff who was employed by the Respondent. Again, this interview was audio recorded in the presence of Mr Blain's secretary as a witness. Miss Posada said that she found the Claimant to be difficult and that she avoided him. She said there was an incident where she asked the Claimant for help and he responded to her angrily telling her "fuck this, it's too hard." Miss Posada mentioned another occasion where she was leading horses with the Claimant and another colleague, when the Claimant told her that men should have led the horses. Miss Posada said that she found this derogatory. Additionally, Ms Posada told Mr Blain about the bikini incident in response to a water leak at one of the stables which has made her feel uncomfortable. The note of the meeting suggests that Miss Posada had witnessed the incident herself, however, it later became clear that she had been told about it by another colleague, Ms Pryke.
41. Mr Blain called the Claimant into a disciplinary hearing on 3 March 2022 to discuss the concerns. The allegations were put to the Claimant. Mr Blain says that the Claimant admitted the allegations, but the Claimant said he felt that the comments were "not that bad" and that they were a "joke". At the conclusion of the disciplinary hearing, Mr Blain informed the Claimant that the manner in which he had spoken to his female colleagues was not appropriate and that he was dismissed with immediate effect on grounds of gross misconduct. A letter was sent to the Claimant on 4 March 2022 confirming his dismissal.
42. The Claimant denies that he admitted the allegations save for making a comment to Miss Posada that a man should have taken the foal as it was known to be strong (in earlier evidence the reference was to a horse not a foal but it is understood to be the same incident). The Claimant also admits telling Ms Foley that she scrubbed up well. The Claimant strongly denies making or admitting to the other comments, specifically about girls in bikinis or saying that "he would give it a go." The Claimant denies saying that Ms Foley was good looking enough to be a threat to Miss Posada.
43. Later in the evening on 3 March 2022, the Claimant sent a message to Mr Blain and said that he should speak to an "American girl" who came in for a day on Monday to hear about a conversation she overheard at lunchtime. The Claimant has told me that there was a conversation that day when Miss Foley said that a dog had run off with her underwear. The Claimant had replied, that "*maybe the dog should take underwear to Putin, and then he will go away too.*" The Claimant suggested that Ms Foley had been involved in sexual banter in the staff room.

44. I understand that the name of the person referred to as “the American girl” by the Claimant is Dawn Reed. The Respondent has referred me to an email exchange between the Respondent’s lawyers and Ms Reed on 24 October 2022 where she said that she did not want anything to do with the Claimant and that she only had a couple of conversations with him during which he told her that he hated horses and that he liked killing cats, and that but for the Claimant she probably would have continued working for the Respondent. Miss Reed stated that she does not recall any conversations of a sexual nature or any sexual banter between any member of staff. Ms Reed did not provide a witness statement and was not called to give evidence therefore I attach only very little weight to this exchange.
45. Following the Claimant’s dismissal, he sent a message to Ms Foley on Facebook Messenger stating *“Your lying bitch I never said any of that shit to you but don’t I’ve was smart enough to tape our actual conversations we did have and when your call has a witness swear on the bible you are going to be so caught out lying cunt.”*
46. On 5 March 2022, the Claimant emailed the Respondent and denied making the earlier comments to Ms Foley and Ms Posada during his employment. The Claimant said that he’d never read such fiction in the whole 51 years of his on the planet, and he described it as bullshit.
47. On 7 March 2022, the Claimant raised an appeal against his dismissal. He challenged the process as being unfair and alleged that he was not allowed to work with female staff because of previous false allegations from another member of staff (KM).
48. The Respondent did not hear an appeal against the Claimant’s dismissal.
49. On 22 March 2022 the Claimant emailed Mr Blain and said that he was not going to let his dismissal go without fighting for the truth, and he said I’m going to prove that both girls lie through their teeth and that he (Mr Blain) and Zoe are responsible for “the shit that goes on”.
50. On 10 April 2022 the Claimant sent a further email, repeating his denials.
51. On 17 June 2022 the Claimant wrote to Miss Foley and accused her of defamation and said he wanted no further contact with her. A similar letter was sent to Miss Posada on the same date.
52. On 20 June 2022. Claimant wrote to Miss Foley again to tell her that the time frame has passed for her to make any statements against him for the allegations she had made. The Claimant said this was slander and he didn’t wish to have any further contact with her. A similar letter was sent to Ms Posada on the same date from the Claimant.
53. The task for me is to decide whether the Claimant made any or all of the comments alleged during the course of his employment. I am not directly concerned with comments made by the Claimant after his dismissal, although they may be of assistance when considering the issue of credibility. This is a delicate balancing exercise. On the one hand I have the evidence of Mr Blain who has attended in person and says that the Claimant admitted the conduct and said that it was a joke. Mr Blain refers me to the transcripts of the interviews with Ms Foley and Miss Posada.

54. I also have the evidence of Miss Posada who also attended in person. Whereas the comment about bikinis was not made to her and was hearsay, it is supported by the witness statement of Ms Pryke who did not attend. Ms Posada gave evidence about the Claimant's comment that a man should have brought out the horse (or foal) which she found derogatory, and that one occasion when she asked for help the Claimant told her aggressively to go away.
55. I also have the email exchange with Ms Reed which does not add a great deal to the issues in the case.
56. On the other hand, I have the evidence of the Claimant who admits a small number of the comments, specifically the scrubbing up well comment and the horse comment. The Claimant also admits to telling Ms Posada to go away, although his explanation was more detailed, and he says that he said "I have had enough of this shit" or words to that effect. The Claimant vehemently denies the remainder of the allegations.
57. This is a case of one word against another. I do not have the benefit of live witness evidence from Miss Pryke to whom it is alleged the Claimant made the bikini comment. Nor do I have the benefit of live witness evidence from Miss Foley either to whom it is alleged that the Claimant said he would have a go and made other comments.
58. The Respondent has referred me to the Claimant's Facebook messenger message to Miss Foley in which he called her a lying bitch and a lying cunt. The Claimant admits sending the message and he also accepts that it was inappropriate to have sent it. During his evidence, the Claimant accepted that the use of the word bitch is a sex based word in that it is an offensive word used mainly towards women. As regards the word cunt, the Claimant appeared to accept that this was also sex based offensive word which could be used towards women, although he says that it has been used about him on occasion. The Respondent draws to my attention that whilst the Claimant has accused Mr Blain of lying, he did not call him a lying bitch or a lying cunt. The Claimant says when he sent the message, he was still getting over the bereavement of his father, and he had other issues going on, including being evicted.
59. The Claimant also refers me to numerous documents in the hearing bundle which are essentially character references from friends and possibly former colleagues, including what appears to be WhatsApp messages or Facebook messages which are derogatory about Miss Posada. I do not find that these assist the Claimant's case, simply because none of these individuals were present at the material time. I note that the Claimant says that he has been re-engaged by a former employer twice since his dismissal by the Respondent. However, again, I do not find that this assists me in determining whether or not he made the comments alleged.
60. In all of the circumstances and on the balance of probabilities I find that the Claimant did make the comments that have been alleged specifically that he told Miss Foley that he would have a go, and secondly, that he told Miss Pryke and others that they should get their bikinis out. I also find that the Claimant admitted to Mr Blain that he had made these comments. I prefer the evidence of Mr Blain and Ms Posada in this regard.

61. The reason for making this finding is due to the contents of the Claimant's Facebook messenger post to Miss Foley at the material time where he used to sex based offensive language, and secondly because of the weight of the corroborating evidence on the part of the Respondent. The Respondent's witnesses and documents give a consistent account of the Claimant's behaviour during his employment.
62. I also consider that this conclusion is supported by the comments which the Claimant does admit to having made, including comments about that the horses should have been brought out by two men, and his comment to Miss Foley that she scrubs up well. Whilst telling someone that they scrub up well may not necessarily amount to sexual harassment in every case, context is relevant. I find that in these particular circumstances that is how Miss Foley felt and that it was reasonable for her to have felt that way. Given that the Claimant admitted making this comment, I felt that on the balance of probabilities he also made the subsequent comment that he would like "to have a go." I took that comment to have sexual connotations.

Submissions

63. Both parties relied upon oral submissions which are only summarised here. The Claimant maintains that he did not make the comments save for those he has admitted with respect to scrubbing up well and that a man should have taken out the horse. The Claimant alleges that he was denied his human rights, specifically the right to a fair hearing by not having sufficient notice of the disciplinary, not having a witness present nor as I understand it an appeal.
64. The Respondent asserts that even leaving aside the conduct which the Claimant denies, that conduct which he has admitted is sufficient to find that he committed gross misconduct entitling it to terminate the contract as it did. Mr Anderson says, bluntly, that the Claimant was not entitled to niceties or the safeguards one would expect under s. 98 Employment Rights Act 1996 as the Claimant did not qualify for unfair dismissal protection, he was not therefore entitled to notice of the meeting, the presence of a witness, nor by implication an appeal. The Respondent asserts that the Claimant is not owed any further holiday pay and that he cannot claim for unaccrued holiday.

Conclusions

Annual leave

65. What was the Claimant's leave year? The parties agree that the Claimant's leave year was 1 January to 31 December.
66. How much of the leave year had elapsed at the effective date of termination? I find that 17% had elapsed.
- 66.1 How much leave was the Claimant entitled to per leave year? 21 days.
- 66.2 How much leave had the Claimant accrued during the leave year on a pro rata basis? 3.57 days.

- 66.3 How much paid leave had the Claimant taken in the leave year? 1 day.
- 66.4 How many days remain unpaid? None as he was paid for 1 bank holiday and he was then paid 2.5 days upon termination and paid a further 1.5 days post termination.
- 66.5 How much, if any, is outstanding to be paid to the Claimant? None.
67. I therefore **dismiss** the claim for holiday pay as it is clear that the Claimant was paid for his holiday entitlement for the period from 1 January to 3 March 2022. There was no legal entitlement to unaccrued holiday pay.
68. As regards the claim for wrongful dismissal I remind myself that this is a different test to that for unfair dismissal. I cannot look at the fairness of the process adopted nor what the Respondent reasonably believed at the time of dismissal. I do not find that the Claimant had any entitlement to additional notice of the hearing nor the presence of a witness or an appeal stage as he did not have qualifying service of two years as required under the ERA 1996. Nevertheless it would have been open to the Respondent to have done any or all of those things however they chose not to and I do not criticise them for it.
69. I am required to determine whether the Claimant committed an act of gross misconduct entitling the Respondent to terminate the contract without notice. I have already found that the Claimant did make the comments alleged to Miss Foley, Miss Pryke and to Miss Posada. I also consider that collectively they amount to gross misconduct under the Respondent's procedure. The Claimant's conduct also amounted to a fundamental breach of the implied duty of mutual trust and confidence at common law, and as such as a repudiatory breach of contract. Accordingly the Respondent was entitled to treat the contract as discharged and to dismiss the Claimant without notice.
70. I therefore **dismiss** the claim for wrongful dismissal as I have found that the Claimant did make the comments alleged, and I further find that they amounted to gross misconduct under the Respondent's disciplinary policy, but in any event it constituted a repudiatory breach of contract, entitling the Respondent to terminate the Claimant's employment without notice.
71. The claim is **dismissed** in full.

Employment Judge **Graham**

Date 23 August 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 September 2023

FOR THE TRIBUNAL OFFICE