



EMPLOYMENT TRIBUNALS

Claimant: Mr. L. Melody

Respondent: Lomas Distribution Limited

Heard at: Manchester (by CVP)

On: 22 and 23 June 2023

Before: Judge Callan

REPRESENTATION:

Claimant: In person

Respondent: Mr. B. Frew, counsel

JUDGMENT

The judgment of the Tribunal is that the complaints of wrongful dismissal (unpaid notice) and unfair dismissal are not well-founded. The respondent did not dismiss the claimant and he left the respondent's employment voluntarily. This means that both his claim for unpaid notice and unfair dismissal fail.

REASONS

Introduction

1. The claimant was employed as an HGV driver from around 2011/2012 until 28 September 2022 when he alleges he was dismissed.

2. On 26 September 2022, the claimant raised concerns about a fault light appearing on his vehicle. Despite the fault being attended to by the respondent's garage mechanics, the fault recurred on 28 September. The claimant alleges he told the respondent that he needed to take the vehicle back to the garage and could not complete the work allocated to him that day. A heated telephone discussion took place during which Richard Lomas, a director, said to the claimant "I don't need this today, come back and empty your cab". The claimant returned to the yard and

emptied his belongings. The claimant alleges that he was told by Lynn Lomas, another director, that Richard Lomas would call him as “he doesn’t mean it”. The claimant didn’t receive a call from Mr. Lomas and emailed the respondent on numerous occasions. He received his P45. The claimant alleges he believed that it was unsafe to drive the vehicle and he was following safety requirements in respect of the use of the HGV.

3. The respondent denies it dismissed the claimant. They say that he refused to complete his deliveries on 28 September, returned to the depot, cleared his belongings and demanded his P45 from a director. He did not return to work after 28 September and was taken to have resigned with immediate effect.

The Issues

4. The issues the Tribunal will decide were identified in the Case Management Orders dated 14 February 2023. They are:

- (1) Was the claimant dismissed? The respondent denies dismissing the claimant. The claimant relies upon an express dismissal by Mr. Richard Lomas. The claimant denies he resigned either voluntarily, or in the heat of the moment, in response to the respondent’s conduct on or around 28 September 2022.
- (2) If the claimant was dismissed, what was the reason or principal reason for dismissal?
- (3) Was it a potentially fair reason?
- (4) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
- (5) The claimant alleges he was dismissed because he brought to the respondent’s attention faults with his HGV vehicle, that is, that he was automatically unfairly dismissed for a reason falling within section 100(1)(a) to (e) of the Employment Rights Act 1996.
- (6) If the claimant is found to have been dismissed, the respondent relies upon the claimant’s conduct as the reason or principal reason for the dismissal. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct. If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - (a) there were reasonable grounds for that belief;
 - (b) at the time the belief was formed the respondent had carried out a reasonable investigation;

- (c) the respondent otherwise acted in a procedurally fair manner; and
 - (d) dismissal was within the range of reasonable responses.
- (7) In respect of the wrongful dismissal/notice pay claim, the claimant will need to establish he was dismissed. If so:
- (a) What was the claimant's notice period?
 - (b) Was the claimant paid for that notice period?
- (8) If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?
- (9) If the claimant succeeds in any of his claims, how much should he be awarded as compensation for his losses?

Evidence

5. The claimant gave evidence on his own behalf. On behalf of the respondent, I heard evidence from Mrs. L.B. Lomas, director and Mr. R. A. Lomas, also a director. I was also provided with a bundle of 97 pages, and I read those documents referred to by the witnesses in addition to the pleadings. The claimant also referred to the Driver and Vehicle Standards Agency "Guide to maintaining roadworthiness – Commercial goods and public service vehicles".

Relevant Legal Framework

6. Where dismissal is denied by the employer, it is for the employee to show that they were dismissed, either expressly or in circumstances where they were entitled to resign and claim unfair dismissal. Section 95 of the Employment Rights Act 1996 (ERA 1996) provides:

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) -
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) – [does not apply], or
 - (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.
- (2) – [does not apply]

7. Health and safety dismissals are dealt with in section 100 of ERA 1996 which provides as follows:

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that —
 - (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
 - (b) being a representative of workers on matters of health and safety at work or member of a safety committee —
 - (i) in accordance with arrangements established under or by virtue of any enactment, or
 - (ii) by reason of being acknowledged as such by the employer,the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
 - (c) being an employee at a place where —
 - (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
 - (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
 - (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
- (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

- (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

8. Notice to terminate a contract of employment can be given verbally or in writing. Notice, however given, must be expressed to the other party in clear terms to communicate that the right to terminate the contract is being exercised and when it is intended the contract will end (**Societe Generale London Branch v Geys**, SC, [2013] IRLR 122 and **Gidsda Cyf v Barratt**, SC, [2010] ICR 1475).

9. In respect of notice given by either party “in the heat of the moment”, the Employment Appeal Tribunal (EAT) decided in **Martin v Yeoman Aggregates Ltd.** [1983] ICR 314 that where either an employer or an employee has spoken words in the heat of the moment, they should be given the opportunity of retreating from the words used in haste. However, if the resignation has been given otherwise than in the heat of the moment, then it will stand as a valid resignation and the employment tribunal will lack jurisdiction to hear the employee’s unfair dismissal claim (**Ali v Birmingham City Council**, [2008] UKEAT/0313/08).

10. The case of **Sovereign House Security Services Ltd. v Savage** [1989] IRLR 115 established that generally, where unambiguous words of resignation are used by an employee and are so understood by the employer, the proper conclusion of fact is that the employee has resigned and Tribunals should not be astute to find otherwise. In some cases, however, there may be something in the context of the exchange between the employer and the employee, or in the circumstances of the employee himself, to entitle the Tribunal to conclude that notwithstanding the appearances, there was no real resignation despite what it might appear at first sight (for example, decisions taken in the heat of the moment).

11. The Court of Appeal in the case of **Willoughby v CF Capital plc** [2011] IRLR 985 dealt with what it termed “special circumstances” exception from the general rule that a notice of resignation or dismissal (oral or in writing) has effect according to the ordinary interpretation of its terms. Once notice is given, it cannot be withdrawn except by consent. The “special circumstances” exception is that the recipient of the notice must be satisfied that the giver really did intend to give notice of resignation or dismissal where there is a doubt as to whether he really did intend to give notice. The Court held that “the need for such a so-called exception to the rule will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted”.

12. If it is established that special circumstances apply, the EAT in **Kwik-Fit (GB) Ltd v Lineham** [1992] ICR 183 held that “A reasonable period of time should be allowed to lapse and if circumstances arise during that period which put the employer on notice that further enquiry is desirable to see whether the resignation was really intended and can be properly assumed then such enquiry is ignored at the

employer's risk." The EAT were of the view that such a period would be relatively short, perhaps a day or two.

Facts

13. The claimant was employed by the respondent as an HGV driver from 1 July 2011 at its depot in Buxton, Derbyshire. The date of commencement of the claimant's employment was disputed by the respondent.

14. The respondent employed over 300 full-time employees and provided services such as warehousing, storage and industrial services in addition to operating a fleet of over 200 HGV tractor units and trailers. It also operated commercial vehicle workshops at Ashbourne where over 20 technicians serviced and maintained its fleet. In addition, at its premises at Buxton, the respondent employed three fitters to work on its Volvo tractor units.

15. The claimant was allocated a particular vehicle, a Volvo tractor unit along with a tipping trailer. The respondent's drivers undertake work in accordance with their transport planner's instructions which usually comprised collecting goods from a location for delivery elsewhere. The claimant's transport planner was Andrew Dranfield, a long-term employee of the respondent and a qualified Transport Manager in accordance with the DVSA rules. He had completed a refresher course just prior to September 2022.

16. The claimant had separated from his wife and children and was under financial pressure. The claimant was engaged in some casual dry stone walling work on a self-employed basis. He asked the respondent if he could improve his earnings by going "self-employed" under the IR35 regime in or around mid-August 2022. Mr. Lomas refused to engage him on such terms.

17. The claimant was very sensitive about mention of his family circumstances. During the conduct of the litigation, on Friday 2 June 2023 it was alleged that he had sworn at the respondent's solicitor during a telephone conversation at 6.30 pm and again on 23 June 2023 when the solicitor had mentioned that if he wished to rely upon his partner's evidence, he would have to provide her statement. When this was put to the claimant in cross-examination, he said that he was "worked up" about mention of his family. He admitted that he had the ability to swear when under pressure which included when personal details were mentioned which he considered were irrelevant.

18. On 26 September 2022, the claimant reported a fault on his vehicle. He completed a defect form which he handed into the garage office. In addition, he noted it in his green daily works check sheet. The fault was indicated on the dash display as a stop sign and a message indicating the cab tilt was unlocked. He dropped his vehicle off at the workshop for repair on the same day.

19. The following day, no fault appeared on the dash display when the claimant commenced work and he believed the fault had been rectified. Later that day, the fault recurred and he again dropped the vehicle at the garage for repair.

20. On 28 September 2022, the claimant started work in his vehicle and at first no fault was displayed. However, not long afterwards, the fault recurred. The claimant messaged Mr. Dranfield at 05.32 am and included a photo of the dash display. He rang the garage's night staff to inform them of the fault and he was told the vehicle was safe to drive. The claimant remained uneasy with the situation and decided to return to the garage when he had completed his morning deliveries. On his way back to the garage, he received instructions via text message from Mr. Dranfield at 08.27 am in respect of another delivery. The claimant rang Mr. Dranfield to report that the fault had recurred and Mr. Dranfield told him it was safe to continue to drive the truck. The claimant disagreed and said the vehicle was unsafe to drive on public roads. Mr. Dranfield said that it was best for the claimant to speak to Richard Lomas if he was refusing to do the work he had been issued.

21. The claimant had a telephone conversation with Mr. Lomas and informed him of the issues he was having with the vehicle. Mr. Lomas stated that it was safe to keep driving the truck and not to worry about it. The claimant stated that the issue with the vehicle contravened the Road Traffic Act 1988 and it was unsafe to drive. The claimant alleges Mr. Lomas said "I don't need this today, I tell you what to do. Come back and empty your cab, you're finished." and ended the telephone call. Mr. Lomas alleges that the claimant was instantly aggressive, swearing and shouting at him during the call. He alleges he said to the claimant "Look Lee, if you want to bring the truck back here, then that's fine. Park it up and we can get you on another one". Mr. Lomas denied saying "You're finished". The claimant set out the words he alleged were said by Mr. Lomas in his ET1 at page 10. The words "You're finished" do not appear there.

22. To hold the cab is in its normal driving position, there are two locking mechanisms which are not linked to the cab tilt sensor. The tilt sensor warning can be displayed on the dash despite the cab being in the normal driving position and this would indicate that the cab tilt sensor or its wiring are faulty. The cab itself cannot be in the driving position and tilted at the same time. To move the cab to the tilt position it is necessary to release the safety locking mechanisms by using a special key and turning a concealed valve. Once the valve is released, a specially designed cab tilt bar would be required to manually pump the cab into the tilted position. If the cab is moved to the tilted position, the cab tilt sensor would report that the cab is no longer in the driving position and the warning would be displayed on the dash. It is a relatively common occurrence for the cab tilt sensor to display an incorrect signal.

23. The claimant tipped his load at the quarry, returned to the depot and emptied his cab. He then went into the transport office and asked to speak to Lynne Lomas regarding obtaining his P45 and discussed what had happened with her. He alleges he told her that he had been told to leave the company. The claimant said that Mrs. Lomas said "Don't worry, he doesn't mean it. He's having a bad day. I'll get him to ring you". Mrs. Lomas stated that the claimant was visibly angry and told her that he was leaving and wanted his P45. She asked him what had happened, and he said he had brought his vehicle back to the yard and was clearing his stuff out. Mrs. Lomas said the claimant had told Mr. Lomas what he thought of the job

and that the garage workers were on more money than him with less responsibility and were useless. He had had enough. Mrs. Lomas said that she tried to get the claimant to reconsider leaving and urged him to come back in the next day and just get on with his work. She alleges, however, that it was clear that he had made his mind up.

24. The respondent ran its payroll weekly each Friday, a week in hand. His pay for the week commencing 25 September 2022 was paid on 7 October 2022 and his P45 was generated on that date. As the claimant did not work Thursday 29 September or Friday 30 September, he was paid for the part-week worked on 7 October, along with his accrued holiday pay for 4 days untaken holiday entitlement.

Discussion and Conclusions

25. The claim turns on whether the claimant was dismissed or resigned in circumstances which fall within “the special exception” identified in the caselaw. Otherwise, if the claimant simply resigned, the tribunal lacks jurisdiction to determine the claim of unfair dismissal (see paragraph 9 above).

26. In evidence, the claimant categorically denied that he had resigned his employment. He was clear that his case was that he had been expressly dismissed by Mr. Lomas during the telephone conversation on 28 September 2022.

27. The claimant agreed in evidence that at times, such as when his own truck was off the road being serviced, he could use a spare vehicle. If this occurred, he would transfer his belongings from his usual vehicle into the cab of the spare truck.

28. He agreed that he had been a bit agitated when he spoke to Richard Lomas. He said that was because the fault signal was sounding and he had been told to ring a Director about bringing back the vehicle for repair. The claimant denied being aggressive from the outset during the call but admitted that he had been aggressive during the call and said both parties had been shouting. He denied swearing at Mr. Lomas.

29. The claimant was categorical in his assertion that Mr. Lomas had told him “You’re finished”.

30. Mrs. Lomas was clear that the claimant had been demanding his P45 and was agitated. She tried to calm him down but the claimant was adamant that he was leaving.

31. The claimant did not approach the respondent about the possibility of continuing his employment. His evidence was that he was expecting a telephone call from the respondent. He made contact with the respondent’s office via email to chase up his P45. He did not attempt to return to work.

32. In my judgment, the burden being on the claimant, the words relied upon in his claim (“I don’t need this today, come back and empty your cab”) did not amount to clear words of dismissal by Mr. Lomas. In context, the words “come back and

empty your cab” where it was the practice that if a driver shifted to another vehicle while his vehicle was being repaired, did not amount to a termination of the claimant’s employment.

33. The claimant took the trouble to set out the words he said were used by Mr. Lomas in some detail in the ET1, but inexplicably left out the words “You’re finished”. I find therefore, on the balance, that the claimant was not expressly dismissed by Mr. Lomas. That being so, the contract was terminated by the claimant but in circumstances that did not fall within the “special exception” category in that the claimant had a firm intention to resign (see the evidence of Mrs. Lomas). In the alternative, he did not seek to retract his resignation if the “special exception” applied within a reasonable period (see paragraph 12 above).

Conclusion

34. Given my findings that the claimant was not dismissed, nor is to be taken as having been dismissed, his claims of unfair dismissal and wrongful dismissal (unpaid notice) both fail.

Judge Callan

Date: 22 September 2023

JUDGMENT SENT TO THE PARTIES ON

28 September 2023

FOR THE TRIBUNAL OFFICE

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