



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr H Khanafer

v

Single Homeless Project

Heard at: Watford Employment Tribunal
On: 24 and 25 October 2023
Before: Employment Judge Forde

Appearances

For the Claimant: In person
For the Respondent: Miss Bouffé, counsel

JUDGMENT

1. The claimant's claim of unfair dismissal, conceded by the **claimant**, is well founded.
2. The claimant's claim of breach of contract in respect of non-payment of notice and bonus monies is unfounded and is dismissed.
3. The claimant's claim of unlawful deductions of wages is unfounded and is dismissed.
4. The claimant is awarded £0 for unfair dismissal. This is due to a 100% reduction in the award due virtue of the operation of s.132(6) of the Employment Rights Act 1996.

REASONS

1. By way of a claim form dated 12 September 2022, the claimant pursues claims of unfair dismissal, unlawful deductions from wages and unpaid notice and bonus pay. All claims arise from the termination of his employment.
2. The claimant was employed as a Service Manager at the respondent's Almington site. The respondent is a London wide charity which works to prevent homelessness, provides support and accommodation to the

homeless, promotes wellbeing, enhancing opportunity and being a voice for change.

3. The claimant began his employment on 14 August 2019. Prior to assuming the role from which he was dismissed, the claimant had a similar role at a different site operated by the respondent. However, the respondent lost the right to provide services to that site following a tendering process which resulted in the claimant's role moving to a different entity as a result of the operation of TUPE. The claimant remained with the respondent and accepted the role at Almington which was subject to a six-month probationary review, in line with the respondent's probation policy and procedure which provided that employees on permanent and fixed term contracts who were subsequently appointed to new posts would be subject to a further probationary review. In this case the review period was six months.
4. An interim probation review was completed on 4 February 2022 which ultimately led to the claimant being assessed as failing seven out of nine competencies germane to the probation review. That assessment, contested in its entirety by the claimant, led to the respondent concluding that the claimant's role would be terminated. This was communicated to the claimant on 22 March 2022.
5. However, the respondent's case is that the termination of the claimant's employment in the role that he had did not automatically mean an end to his employment. The claimant was provided details of how to consider alternative deployment opportunities within the respondent and was provided with the right to appeal against the decision to terminate his employment. The claimant appealed his dismissal.
6. While deployment was being considered the claimant was paid "special paid leave". Additionally, he was authorised to undertake work for other employers by the respondent although there is disagreement between the parties as to what this additional work, referred to as "secondary work" actually was.
7. Following an appeal, the claimant was informed on 24 April 2022 by Liz Rutherford, the respondent's CEO, that his appeal was unsuccessful.

CCTV

8. Pausing here, I need to make reference to an issue which arose around the claimant's use of remote CCTV access. Following complaints from the claimant's co-workers that the claimant had been viewing and monitoring Almington CCTV from his home address, an investigation was instigated into the claimant's conduct in this regard and use of CCTV which the respondent alleged and maintains in these proceedings was improper in that it breached the respondent's CCTV statement and Data Protection Policy, although I note that the Data Protection Policy was not relied upon by the respondent in its evidence before the tribunal.
9. CCTV is relevant because Ms Shaw, the respondent's HR, sent an email to the claimant on 10 May 2022 that confirmed that no disciplinary action

would be pursued against the claimant arising from the claimant's alleged misuse (denied by the claimant) of CCTV. This was because it had been considered as part of the probationary process (again, something that the claimant does not agree with and takes issue with). Secondly, special paid leave was paid to the claimant to find an alternative role within the respondent via redeployment.

10. On 7 June 2022 the respondent received a reference request form Centre Point. It later transpired that the claimant had accepted a full-time role with Centre Point (more of which later).
11. In due course, the respondent says that due to the claimant failing to respond to redeployment opportunities he was dismissed following a meeting held with Ms Shaw on 21 June 2022. The email invitation to the meeting is entitled "Invite to a dismissal meeting". Further, the email identifies that the meeting was to discuss his dismissal.
12. The claimant and Ms Shaw were the only attendees at the meeting that took place on 21 June 2022 and it is common ground that no minutes were taken of the meeting and nor was it recorded. However, and belatedly, Ms Shaw located a note which she says was contemporaneous with the conversation. The claimant disputed that he was informed on this date that he had been dismissed. From the note I quote the following:

"I explained to Hadi that I was dismissing him from SHP under authority delegated to me by Howard Rosenthal and would send a letter to confirm in writing".

13. As I have said, the claimant denied that he was informed of this during the meeting and instead relies on a letter he received from Ms Shaw dated 1 August 2022 as being the first notification of the termination of his employment. This is important because if I find that the claimant is right, and given that the respondent has conceded the claim of unfair dismissal by virtue of two prescribed procedural defects, the claimant would be entitled to damages for unfair dismissal, unpaid notice, a deduction made from the claimant's salary of £1,548.10 covering 11 days of what are said by the respondent to be unauthorised absences between 7 to 21 June 2022 and a bonus of £400 payable to employees in post at the end of June 2022.

The hearing

Disclosure of the claimant's employment contact with Centre Point

14. In the lead up to the hearing the respondent had asked the claimant to provide a copy of his employment contract with Centre Point to be disclosed, as it was considered highly relevant to the issue of remedy both in respect of his basic and compensatory award. The claimant provided a highly redacted version of his employment contract. I considered the redacted agreement and the claimant's concerns that he expressed in respect of disclosing the full agreement to the respondent. I found that the redacted agreement rendered the document virtually devoid of any meaningful content. Accordingly, I had to consider an application for specific disclosure of the claimant's contract of employment.

15. Balancing the submissions that I heard from the claimant with regards to disclosure, I decided that I would disclose to the respondent key elements of the contract that I considered to be relevant to the claim. When I indicated to the claimant the clauses of the contract that I intended to disclose the respondent he did not raise an objection. Of most importance here is clause 2.4 of the claimant's employment contract with Centre Point which sets out as follows:

“During the continuance of your employment with the company you will, unless prevented by incapacity, devote the whole of your time and attention and ability to the business of the organisation and will not without the prior written consent of the Company engage in any other business activity or employment (whether paid or unpaid). Such consent will not be unreasonably withheld provided that there is no conflict, either actual or potential, with the work of the Company and/or your own job performance.”

16. The wording of the above clause is quite clear; it sets out in unequivocal terms the claimant must devote the whole of his time to his employer for his employer Centre Point for whom he was working as a Service Manager on a full-time basis. The contract identified that the claimant commenced his employment with Centre Point on 7 June 2022 which overlaps with the time that the claimant said that he was employed by the respondent.
17. I heard evidence from the claimant and Ms Shaw. I found Ms Shaw to be a straightforward, open and reliable witness. She was prepared to accept failings in practice or procedure that could have weighed significantly against the respondent. By contrast, I found the claimant to be combative and at times dismissive and further, unreasonable when confronted with a factual matrix or chronology that did not support his claim. Critically, I did not consider the claimant to be a reliable witness in so far as his account of the meeting that took place between him and Ms Shaw on 21 June 2022. That meeting I find to be the critical issue within the claim because if I accept the claimant's account of that meeting then inevitably I would be bound to find in his favour. However, and for the reasons that I give in this judgment, I preferred the evidence of Ms Shaw and accept that her note of the meeting although recovered late in these proceedings, represents a contemporaneous note of what was discussed between she and the claimant. Accordingly, I make the following findings of fact.

Findings of fact

Date of notice

18. While the claimant disputes the evidence of Ms Shaw's contemporaneous note he has failed to put forward a basis as to why he does. Where there are differing accounts, the existence of such a note can prove to be clear evidence of what actually happened on an occasion. In this case, the note coupled with Ms Shaw's actions before and after the meeting, including sending an email to the claimant entitled "Invite to a termination meeting", leads me to a finding on the balance of probabilities that the claimant was notified of his dismissal for the first time on 21 June 2022 and not 1 August 2022. I find it inconceivable that the Ms Shaw would have held a meeting with the claimant and not discussed his dismissal after having sent him an email which clearly indicated that the purpose behind the meeting was to do

that very same thing. While Ms Shaw's evidence around this clear, cogent and credible I found the claimant's explanation as to what was discussed during the meeting to be incoherent and incredible particularly when he was addressing what was (in his view) discussed in the meeting.

Secondary employment

19. While the respondent has conceded unfair dismissal it has asked that I consider a 100% reduction in the claimant's award of basic and compensatory compensation on the basis of his alleged dishonesty formed on two basis, namely "Polkey" and under section 122(2) of the Employment Rights Act 1996 ie, a just and equitable basis.
20. Of the reasons given by the respondent I have specifically been asked to find that the claimant failed to inform the respondent that he had been appointed to a role with another employer and that he had, in doing so, acted in breach of his contract in that he misled the respondent.
21. I had again, I had the benefit of hearing evidence from the claimant on this point. The thrust of his evidence was that he had spoken to Ms Shaw and that that discussion had led to an explicit authorisation for him to work for another employer. Ms Shaw's evidence was that it was well known within the sector within which the respondent operated that workers would work for other operators within the sector on a part-time ad hoc basis. She described this working as secondary employment and it was that this that she had in mind when she provided authorisation to the claimant to obtain secondary employment. The claimant disputed this and appeared to assert that there had been ambiguity around the definition of secondary working such that it was open to him to interpret Ms Shaw's permission to work for another employer as permission to accept and work in a second full-time role for another employer.
22. Further, the claimant relied on the fact that he was on special paid leave and that with notice he could attend the respondent when required. However, it is my finding that clause 2.4 of his contract with Centre Point makes clear that he was required to devote his entire time to that employer's work. I find it inconceivable that the obvious conflict or incompatibility between the contracts that he had with the respondent and with Centre Point both of which required him to work full-time and exclusively for each entity. Plainly, we would not have been able to do this but in evidence the claimant insisted that he would have been able to do so pointing out that he would have been able to have made himself available to the respondent during the period after the 7 June 2022 if he was provided with sufficient notice. I found this to be a difficult point to accept as reflecting the true state of affairs.
23. I find that during the course of a number of interactions with Ms Shaw the claimant was asked specifically as to whether or not he had obtained another job. During the course of the meeting on 21 June he was asked about this and simply side-stepped the question. It is now part of the respondent's case that the claimant knowingly misled the respondent on this issue.

24. When asked why he did not inform the respondent as to his employment with Centre Point, the claimant responded that he was simply not asked. In cross examination by Miss Bouffé he was asked as to the reason why he did not tell anybody at the respondent about this and he said that he had been authorised to work for Centre Point on a full-time basis.
25. I simply do not accept that evidence. Accordingly, I find, on the balance of probability, that the claimant was knowingly obtuse about the nature of his employment with Centre Point and did so because he derived a financial benefit from receiving special paid leave from the respondent while being employed by Centre Point. In making this finding, I reject the claimant's submission that he was expressly authorised to take up an exclusive, full-time role, with another employer, by Ms Shaw. I find it irrelevant the fact that he had not asked for special paid leave and reject the submission that it was in the respondent's interest to pay him special paid leave. The claimant's case in this regard started to unravel following my order of the disclosure of the claimant's contract of employment (see above) and specifically clause 2.4 which makes clear that the claimant was considered a full-time worker of Centre Point. Accordingly, I find that the claimant's submission that he was able to perform his role for the respondent and Centre Point at the same time (or within the same time period) to be without foundation or credibility.
26. Given my findings, it follows that the claimant's claim of unlawful deductions must fail. I find that the claimant's employment was terminated on 21 June 2022 and not 1 August 2022. This means that the claimant received his notice pay from 21 June 2022 (albeit subject to deduction).
27. Secondly, the claimant's claims of an unlawful deduction also fails. He was working for Centre Point during the period that he makes this claim and not the respondent. The point was made clearly by Ms Bouffé who pointed out that in respect of 20 June 2022 when the claimant accepts that he took annual leave from Centre Point he was also being paid by the respondent, which serves to underline the point that not only was he absent from the respondent but the reason for his absence was his obligation to Centre Point and not to the respondent. It follows that I find that the respondent was lawfully entitled to deduct pay from the claimant for the period 7 June 2022 to 21 June 2022.
28. Thirdly, given the claimant was dismissed on 21 June 2022, he would not be eligible for a bonus payment of £400. This claim therefore fails.
29. Fourthly, and lastly, I must give consideration to the respondent's application that the claimant's award of damages for unfair dismissal be reduced by 100%. As I have found, the claimant deliberately chose not to disclose this vital piece of information to the respondent and did so in circumstances where he knew that it would be of financial benefit to him to avoid disclosure of this fact. I considered that failing to be serious and I considered that it would be appropriate to consider reducing his award by virtue of his conduct.
30. Section 123(6) of the Employment Rights Act 1996 states that:

“Where the tribunal finds that the dismissal was to any extent caused or contributed by an action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

31. What the appellate courts have subsequently determined is that the tribunal must have a consideration as to when is a reduction for contributory conduct appropriate. In Nelson v BBC (No.2) [1980] ICR 110, CA, the Court formed the view that it would never be just and equitable to reduce a successful complainant’s compensation unless the conduct on his or her part was culpable or blameworthy. Put another way, if a person is blameless, it can neither be just or equitable to reduce his or her compensation on the ground that he or she caused or contribute dot the dismissal. In Nelson, the Court of Appeal said that the conduct could also include conduct which was perverse, foolish, bloody-minded or merely unreasonable in all of the circumstances.
32. I consider that the claimant’s conduct in refusing to disclose the fact of his new employment to have been unreasonable. It is obvious that had he disclosed this information to Ms Shaw she would have terminated his employment immediately. I consider that the claimant is entirely blameworthy for this fact and cannot justify his conduct by relying on his perception of the authority he says he had received from Ms Shaw to work for Centre Point as secondary employment. There is also the possibility that had the claimant may have engaged with the respondent’s redeployment process he may not have obtained the job with Centre Point. Clearly, his motivation to engage with that process diminished from 7 June 2022. Consequently, I find on the balance of probabilities, that the respondent’s decision to ultimately dismiss the claimant was due in consequence of the claimant’s conduct during the course of the redeployment process and his failure to engage with it.
33. Given my findings and particularly my findings with regard to the claimant’s conduct, I find that it would be just and equitable to reduce the claimant’s award in respect of unfair dismissal. I find that the claimant had attempted to mislead the respondent for his personal gain. This is a serious finding to make and, on that basis, I order that there be a 100% reduction of the claimant’s award meaning that he will not receive anything as compensation in respect of the finding of unfair dismissal in his favour.
34. Accordingly, I order that all claims are dismissed.

Employment Judge Forde

Date: 9 January 2024

Sent to the parties on: 15 January 2024

T Cadman
For the Tribunal Office