



EMPLOYMENT TRIBUNALS

Claimant: Mr J Dalli

Respondent: Inspec International Ltd

Heard at: Manchester

On: 18 May 2018

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: In person

Respondent: Mr A P Diamond, Technical Director

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim in respect of failure to pay notice pay on dismissal succeeds. The respondent shall pay the claimant £3,138.60.
2. The claimant's claim in respect of arrears of holiday pay succeeds. The respondent shall pay the claimant the sum of £232.52.
3. In respect of notice pay and accrued holiday pay in total the respondent shall pay £3,371.12 to the claimant.
4. The claimant's claim in respect of unfair dismissal fails and is dismissed.

REASONS

1. The claimant brings claims of unpaid wages and unfair dismissal. The claims in respect of arrears of pay were clarified at the outset relating to holiday pay, notice pay and the claimant says he was under paid due to what he describes as "short-time" pay. The claimant indicated that holiday pay was resolved subject to "short-time" pay, and then an issue arose as to the extent of the notice and therefore there was a further accrued payment in respect of holiday pay.

2. So far as the alleged "short-time pay" was concerned, that was not particularised or made as claim explicitly in the ET1 and the Tribunal ruled that that has not been one of the issues within this claim which can be awarded.

3. So far as the notice pay was concerned, the respondent early on in the hearing conceded that the reason for dismissal was not gross misconduct as per the claimant's contract (page 57 of the bundle of documents) but that the respondent relied on misconduct. In the circumstances the clarification in relation to notice meant that three months' notice pay would be due arising from 4 years service, and the claimant had been paid £639.54 in respect of notice, so the calculation was made of three months at £1,259.38 making £3,778.14, less the £639.54 paid amounting to £3,138.60. Given that the notice should have been for a longer period the accrued holiday pay over the four days accrued at a daily rate of £58.13 amounts to £232.52, totalling £3,371.12, and those are the amounts that the Tribunal has awarded.

4. So far as the unfair dismissal is concerned, the issues were explained at the outset: can the respondent establish a potentially fair reason for dismissal within section 98(1) of the Employment Rights Act 1996? The respondent relies upon conduct in that the claimant failed to respond to requests for a meeting and was, in the respondent's view, uncommunicative after 21 August following a period of absence beginning on 11 May 2017.

5. The Tribunal commented that the labels that may fall to be considered may be a dismissal by way of conduct, capability or some other substantial reason, all of which are potentially fair reasons.

6. Next, the Tribunal had to consider if the dismissal was fair within all the circumstances applying section 98(4) of the Employment Rights Act 1996.

7. The case has been difficult given that both parties are unrepresented and I am grateful that the respondent, in accordance with the previous case management directions, prepared a bundle of documents and a helpful timeline to which some additions were made during the hearing.

8. The claimant had difficulty providing a witness statement or a bundle of documents, but his documents were copied by the Tribunal clerk on the morning of the hearing and included a number of handwritten statements which the Tribunal adduced as his evidence, and also the claimant showed the Tribunal Judge screenshots on his phone which showed that there was some communication in May and June with the respondent, which the respondent accepted.

9. The claimant also in his own evidence provided copies of original letters of medical appointments which he said had been sent, that is the copies had been sent to the respondent, and those were shown to the respondent.

10. When the Tribunal heard oral evidence, it heard from Andrew Patrick Diamond, the Technical Director of the respondent; from Peter Threlfall, the Laboratory Manager of the respondent; and from the claimant. All of the witnesses gave evidence on oath.

Findings of Fact

11. In order to determine the issues before me I have to make findings of fact.

12. The claimant was employed as a caretaker and store operator by the respondent from 1 July 2013 until 14 October 2017, giving him four years' service. The respondent is a relatively small enterprise operating over two sites in the North West engaged in the testing and certification of personal and protective equipment. Most staff are laboratory staff rather than employed in posts commensurate with the claimant's post, which meant in fact that there was somewhat of an operational headache in relation to the claimant not being present. I accept that the respondent does not have a separate Human Resources function.

13. I have already mentioned the timeline in the bundle of documents before me, and I adopt that timeline as a chronology. It appears from pages 21-26 of the bundle, and there are some additions because Mr Threlfall accepted the telephone call to the claimant on 15 May 2017 and the claimant showed me the text message, and there was another call certainly on 6 June, so there were a couple of early additions to the timeline.

14. I also accept, although I have not heard directly from them, that the timeline was compiled also by the accountant and his assistant staff, who called the claimant in the September as a strategy to try to bring the claimant to communicating with the respondent, and I accept that the respondent was adopting a different tack because that telephone number would not necessarily be known by the claimant to be associated with the respondent. I find that the claimant did not return those calls and he did not come in to the respondent from 21 August 2017.

15. I do accept that the claimant sent certification for his absence to the respondent, and I have seen the fitness for work certificates within the bundle of documents provided by the respondent from pages 45-50. The early certificates cover back pain, the later certificates do cover back pain and depression, which I think sadly has affected the claimant and made it difficult for him even today.

16. I also accept that the respondent was trying to bring the claimant to communicate with them given the contents of the emails that are contained in the bundle asking for the claimant to get in touch, asking and hoping that he was feeling better, asking him to call or call in.

17. The respondent was left with a position where, as I have said, there was no contact with respondent by the claimant from 21 August. That led them to send on 15 September 2017, a letter giving a first written warning to the claimant, which the claimant accepts he received. He says he sent a letter saying "why" but I am concerned that the respondent says they did not receive that letter, and the claimant did not follow it up when the respondent wrote a letter date 28 September at page 40 of the bundle of documents indicating that there was going to be a final written warning and that the next stage of disciplinary would be to instigate a dismissal procedure.

18. The dismissal took place on 14 October 2017 and the dismissal letter appears at page 41. It indicated that there was the opportunity to appeal but the claimant again did not communicate and did not take that opportunity. Page 42 of the bundle of documents from the respondent shows on 1 November 2017 that given they had had no contact from the claimant the procedure so far as they were concerned was over.

19. Although that period, the timeframe from 21 August to 14 October, a period of seven weeks, appears relatively short, that is not the period to be considered in isolation, because the claimant had been on leave since 11 May, a period of five months. I have already indicated that the respondent operationally was considering how to fulfil that role, and in the end an agency cleaner was employed to fulfil part of the role.

20. I find, that the claimant's work was good when he was in work, that there were no substantial issues with his performance and that there had been no formal disciplinary issue until this procedure leading to dismissal for failing to communicate during sickness leading to the respondent seeking to clarify the claimant's status and being unable to clarify the same.

21. I accept that the claimant had raised issues relating to work that he was asked to do regarding his tools, especially he was given work in a PPE testing facility, and at times he was not happy with the tasks that he was asked to do, but I also take into account that the respondent gave the claimant loans when required and had increased the claimant's pay although it was not on the basis that the claimant had wished. I also accept, as I have said, that the claimant provided full certification with dates and explanation, but given the lack of communication from the claimant and the fact that he had not communicated that his phone screen was broken so the respondent was unaware of how to actually communicate with him, there was certainly a difficulty particularly in the period between 21 August and 14 October. The claimant could have asked his mother to go into to the premises as she has helped him on occasion or made contact by letter to inform the respondent but he did not.

The Law

22. Considering the relevant law, I have taken into account section 98(1) of the Employment Rights Act 1996. In determining for the purposes of this part of the section whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason or, if more than one, the principal reason for the dismissal, and that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

23. I have also considered section 98(4) of the Act, which is as follows:

“Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer,

(a) Depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) It shall be deemed in accordance with equity and the substantial merits of the case.”

Submissions

24. The respondent in submissions contended that they had tried to correspond and manage the situation and asked the Tribunal to take in consideration the full timeframe and the significant period of uncertainty for the respondent.

25. The claimant submitted that the Tribunal has enough evidence to find the dismissal unfair. He says he notified the respondent; he was sending all his fitness for work certificates and he queried how the respondent had not received correspondence or recorded phone calls.

Conclusions

26. Having heard all the evidence and in applying the law these are my conclusions.

27. The reason for the dismissal was a reason pertaining to conduct, that conduct being the claimant's failure to communicate in reply to the respondent's reasonable requests when he was absent. I accept that he sent the fitness for work statements although I also consider that the string of emails requesting meetings and requests by telephone left the respondent in the dark because the claimant did not make his intentions clear regarding his health, his prognosis and his intentions after 21 August. The claimant did not tell the respondent about difficulties with his phone and he did not send communications by email or letter after the 21st. If the label to be put on this is not conduct, then the label may be some other substantial reason within section 98.

28. When I fall to consider what is fair the respondent stressed, and I accept, that they were at a loss as to how to take the situation forward when there was no communication from the claimant.

29. The claimant had relatively short to medium service over the four years he was with the respondent. I accept and have found that he was a good employee but there was no-one in this company that could easily fulfil that role, and I anticipate that senior staff in the laboratory were not particularly happy to do caretaking duties.

30. The respondent knew of the claimant's history of depression and knew of previous sickness but did not take that into account; they were concerned with the period of the failure to communicate from August to October.

31. The respondent's business needs required, in my judgment, a relatively quick conclusion. The respondent is not ICI or a large public organisation. The claimant's absence in failing to communicate was managed by a disciplinary procedure. Some employers may have managed that by a direct personal approach, but this is always a difficult circumstance to manage. The claimant was told in writing the consequences if he did not communicate, and sadly he did not communicate.

32. I accept when the respondent says they had some knowledge of ACAS advice on managing absence. I have looked at that and in the 2010 ACAS Advisory Booklet it says in respect of managing attendances and employee turnover "it is very important to deal with persistent absences promptly, firmly and consistently in order to show both the employee concerned and other employees that absence is treated as a serious matter and may result in dismissal".

33. I accept that the claimant's absence was entirely genuine. The claimant was not pulling the wool over people's eyes; he was poorly, but the fact that his phone had been damaged and there was no means of communication, shows him to be blameworthy. I accept the fact that the absences were certified, but the situation meant that the respondent could not allow the absence to continue and overall, taking into account particularly the size of the respondent's organisation and the five month period that had elapsed, I cannot say that it would be unfair to dismiss; in my view that the respondent acted within the band of reasonable responses and fairly.

34. I can see that the claimant has been upset by this oral judgment and has appeared at times fragile in his presentation before the Tribunal. I have considered that but I also have to bear in mind, and I asked specifically during the hearing about this, that we are now at May 2018 so it may have been a really tough last six months for the claimant.

35. Having given those reasons in respect of the unfair dismissal I do not find that claim proven and I dismiss the unfair dismissal claim, but the claimant has succeeded in respect of the notice and accrued holiday pay in a judgment of £3,371.12.

Employment Judge Grundy

Date 24 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 June 2018

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2403130/2018

Name of case(s): Mr J Dalli v Inspec International Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 25 June 2018

"the calculation day" is: **26 June 2018**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office