



EMPLOYMENT TRIBUNALS

Claimant:
Mr LS Stoica

v

Respondent:
Omniserve Ltd

Heard at: Reading

On: 6 September 2018

Before: Employment Judge Lang

Appearances

For the Claimant: No attendance or representation

For the Respondent: Mr A O'Neill (Solicitor)

RESERVED JUDGMENT

1. The complaints of unfair dismissal, unauthorised deductions from wages, breach of contract and unpaid holiday pay are not well founded and are dismissed.

REASONS

1. By a claim form presented on 21 August 2017, the Claimant brings complaints of unfair dismissal, breach of contract, unlawful deductions from wages and unpaid holiday pay arising from the termination of his employment on either 18 July 2017 (which is the Respondent's case) or 4 August 2017 (which is the Claimant's case).
2. The Respondent made a counterclaim for overpayment of wages of £590.84. A Rule 21 Judgment was entered in favour of the respondent on 9 February 2018. The claim was previously listed for a hearing on 18 January 2018 but was postponed as the Claimant was out of the country in Romania visiting his sick father. The Claimant's email to the Employment Tribunal of 5 September 2018 stated he was unable to attend the hearing today. He was told that if he failed to attend, the Employment Tribunal might dismiss his claim or proceed in his absence. The Claimant failed to attend today; enquiries were made of the Claimant but both his telephone number and the telephone number of his representative appeared to be out of use. The Respondent's solicitor produced emails between him and the Claimant sent the day before the hearing in which the Claimant confirmed that he could not attend due to the fact that he

could not afford to and he asked the Respondent if the Respondent was able to provide him with a cab fare.

3. The Tribunal decided having regard to rule 47 to proceed with the hearing in the absence of the Claimant and consider under rule 42 any written representations from the Claimant that had been delivered to the Tribunal together with the Claimant's witness statement which had been exchanged and was provided by the Respondent's solicitor.

ISSUES

4. Unfair dismissal

- 4.1 Was the Claimant dismissed?
- 4.2 Was there a fundamental breach of contract?
- 4.3 Did the respondent breach the so called trust and confidence term, i.e. did it, without reasonable or proper cause, conduct itself in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?
- 4.4 Did the Claimant affirm the contract of employment before resigning?
- 4.5 Did the Claimant resign in response to the Respondent's conduct?
- 4.6 Was it a reason for the Claimant's resignation? It does not need to the reason for the resignation.
- 4.7 The conduct that the Claimant relied upon as breaching the trust and confidence term appears to be:-
 - (a) Conduct of a suspension meeting on 3 July 2017 and in particular being accused of lying and the fact that he was not invited to it formally and was not given an opportunity to have a companion attend with him.
 - (b) A failure to deal with grievances raised on 18 July 2017 at a disciplinary hearing. The Claimant says that he submitted a statement at that hearing which contained various grievances.
 - (c) Unjustified disciplinary action against him resulting from a petition submitted by 40-50 staff including the Claimant against the Terminal 4 Operations Manager.
- 4.8 If the Claimant was dismissed, what was the principal reason for the dismissal?
- 4.9 Was it a potentially fair one?

- 4.10 Was dismissal fair in accordance with section 98(4) of the Employment Rights Act 1996? Did the Respondent act within the band of reasonable responses?
- 4.11 If the dismissal was unfair, should there be any adjustment to compensation awarded to reflect the possibility the Claimant would have been dismissed in time anyway?
- 4.12 Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal and if so to what extent?
- 4.13 Did the Claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent and if so by what proportion if at all? Would it be just and equitable to reduce the amount of any compensatory award?

5. Notice Pay

- 5.1 If the Claimant was dismissed, what is his entitlement to notice pay?

6. Unpaid Holiday Pay

- 6.1 The Claimant appears to suggest that he was underpaid holiday pay by half an hour per day taken. Otherwise the claim for holiday pay has not been particularised and was not set out in the Claimant's schedule of loss.

7. Claim for arrears of pay

- 7.1 Once again, this is not particularised by the Claimant. In the schedule of loss he states that he wanted to be compensated for the loss of hours via the ADP system which was intentionally amended whilst he was on annual leave and suspended whilst on full pay.

THE HEARING

- 8. The Claimant did not attend but the Tribunal considered his claim form and his witness statement. The Respondent produced a witness statement of Grezegorz Salata who did not attend the hearing and Elizabeth Welch (Human Resources Officer) who did attend the hearing and gave evidence.

FACTS

- 9. The Claimant's employment commenced on 21 May 2012. He was employed by the Respondent at Terminal 4 Heathrow as a Customer Experience Supervisor. The Respondent provides passenger security, coaching, cleaning, and retail services to airports and airlines.

10. On 3 July 2017, the Claimant was suspended. The allegation was that he had taken a holiday to Albufeira in Portugal with two colleagues on 25 to 30 June 2017 and then reported to the Respondent that he was sick during this period. A video of the holiday had been posted on social media. The Claimant had completed a self-certification form on his return from his absence saying that he had been sick.
11. The Claimant was not accompanied to the suspension meeting and he was not told of the meeting in advance. He denied being abroad in Albufeira at the relevant time. He was invited to a disciplinary hearing which took place on 18 July 2017. He again denied being in Portugal. He said that the video related to a trip earlier in 2017. He gave the Respondent permission to check his flight details with Easyjet. He submitted a statement at the hearing which ran to four pages. He complained of various matters in the statement including the conduct of the suspension meeting – in particular, he complained about not being allowed a companion having had no notice of it and he said that the hearing had been conducted in an intimidating manner. He made various complaints about unpaid overtime and holiday pay and said that his shifts had been changed during his suspension.
12. He suggested that the disciplinary proceedings were a vendetta as a result of a petition that had been submitted by a number of staff including himself against his operations manager.
13. In his statement which was exchanged with the Respondent, the Claimant admitted that he had in fact been in Portugal at the relevant time. He said that the holiday had been arranged by his line manager who had implied that if he did not go along with it, he would make sure that the Claimant lost his job. He was reluctant to go and when questioned about the holiday was unable to tell the truth out of fear of losing his job.
14. The Respondent had checked the flight number of the airport which was shown on the social media video and this demonstrated that the first time in 2017 that the aircraft travelled to Portugal was in June 2017.
15. I find as a fact that the Claimant did go to Portugal on the dates in question and did submit a self-certification form in which he confirmed that he was absent from work due to food poisoning.
16. The Claimant offered to resign at the disciplinary hearing and suggested that a payment of £3,000 be made to him. He sent an email on 20 July 2017 in which he said: *"Please find attached my formal resignation"*. He however simply attached a copy of his statement that he had previously submitted at the disciplinary hearing. There was no clear resignation set out in that document. The Claimant was told that no settlement payment would be made to him.
17. On 27 July 2017, the Claimant confirmed his belief that he was still suspended on full pay.

18. Accordingly, the Claimant was invited to a further disciplinary hearing on 4 August 2017 and following receipt of an invitation to that hearing, he confirmed by email that he considered that he was no longer employed by the Respondent.
19. By way of a letter dated 7 August 2017, the Respondent accepted his resignation and said that his last day of employment was 4 August 2017.
20. Elizabeth Welch had investigated the Claimant's complaints set out in his statement submitted at the disciplinary hearing. I accept her evidence. With regard to overtime, she found there had been no payroll queries lodged in relation to the Claimant. There was no evidence of him chasing for overtime payments. Similarly, there were no payroll queries lodged by him in relation to holiday pay or indeed by any other employees in relation to the way in which holiday pay was calculated. There was no change to his shift schedule whilst he was suspended.
21. Finally, with regard to the alleged vendetta, while a petition was lodged on 18 February 2017 which alleged that the Operations Manager had breached several of the company's policies such as serious breach of health and safety, bullying and harassment including the use of intimidation and threatening or aggressive behaviour and altering staff numbers to deceive the system, no further particulars were received of this complaint despite requests to the union and it was not until the Claimant submitted a statement on 24 July 2017 (this was dated 13 May 2017 but in fact not created until 24 July 2017) that the Respondent had any details of the allegations against the Operations Manager. The disciplinary process in relation to the Claimant had no connection with the petition.

THE LAW

22. Under section 95 of the Employment Rights Act 1996, an employee is dismissed by his employer if(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.
23. It is well established that a breach of the so-called trust and confidence term can constitute a fundamental breach of contract entitling the employee to terminate it without notice by reason of the employer's conduct. The term provide that the employer will not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damaged the relationship of trust and confidence between it and the claimant.

CONCLUSIONS

24. Dealing with the conduct the Claimant relies upon as breaching the trust and confidence term:-

25. The conduct of the suspension meeting was not irregular. There is no requirement for an employee to be formally invited to a suspension meeting. It is not in the nature of a disciplinary or a grievance meeting and there was therefore no requirement for a companion to be permitted to such a meeting. I do not accept that it constitutes a breach of contract for the Claimant to be accused of lying and it is perfectly appropriate for the Respondent to put this to him as an allegation in that meeting having regard to the clear evidence that it received that the Claimant had misrepresented the reason for his absence in the return to work form.
26. I accept that the various complaints were raised in the statement that he provided to the disciplinary hearing on 18 July 2017 but do not consider these to be of merit. There was no basis for a suggestion that the Claimant had been required to chase overtime or that there had been any shortfall in holiday pay. There had been no change to his shift schedule whilst he was suspended. Further, the petition lodged in relation to the Operations Manager on 18 February 2017 had no link whatsoever to the suspension and subsequent disciplinary hearing.
27. I do not consider the Claimant resigned in response to the Respondent's conduct. It is clear that at the hearing on 18 July 2017 and that the Claimant made an offer of settlement of £3,000 but when this was rejected his response was to resign. The reason for his resignation was, as he well knew, that he was faced with likely dismissal. He confirmed his resignation upon receipt of an invitation to the disciplinary meeting on 4 August when he was well aware that dismissal was the likely outcome of that meeting.
28. I do not consider that there was any fundamental breach of contract and accordingly the Claimant was not dismissed.
29. It follows that the claim for notice pay fails.
30. In relation to the claim for holiday pay, this has not been particularised by the Claimant. I have accepted the evidence of Ms Welch that there were no anomalies in relation to the holiday pay calculations and do not consider that this claim is well founded.
31. Further, I have also accepted the evidence of Ms Welch in relation to the alleged changes of the shift patterns and do not consider that there is any basis for a suggestion that the Claimant has lost out on any pay in this regard.
32. Accordingly, I do not consider that any of the complaints are well founded.

Employment Judge Lang

Date: ...17.09.18.....

Sent to the parties on:15.10.18.....

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For the Tribunals Office