



EMPLOYMENT TRIBUNALS

Claimant: Mr K Nasser
Respondent: Ozmen Limited t/a Ozmen Extra
Heard at: Sheffield **On:** 17 July 2019
(Reserved Judgment 6 August 2017)

Before: Employment Judge Shulman

Representation

Claimant: Mrs C Fowler, Solicitor
Respondent: Mr S Mallett, Counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal is hereby dismissed.
2. The claim for no notice pay is hereby dismissed.
3. There is no order for costs.

REASONS

1. Introduction

The Claimant was employed by the Respondent as a shelf stacker at the Respondent's London Road store in Sheffield from 29 April 2016 to 4 October 2018. Huseyin Ozmen (Mr Ozmen) is a director of the Respondent and at all material times Sharon Wheelhouse (Miss Wheelhouse) was the office manager.

2. Claims

The Claimant claims unfair dismissal and no notice pay. Claims of no holiday and no written reasons for dismissal were withdrawn during procedures.

3. Issues

The issues in this case relate to whether the Claimant was dismissed or whether he resigned, if dismissed, what was the reason for dismissal, whether the dismissal was fair and whether he was entitled to notice pay.

4. Matters occurring during the hearing

- 4.1. At the end of the Claimant's evidence the Respondent made a submission of no case to answer. That submission was unsuccessful.
- 4.2. Towards the end of the hearing the Tribunal invited the Claimant to consider the unfair dismissal claim being based on constructive dismissal, in addition to the question of whether the Claimant was dismissed and the Claimant declined the invitation.
- 4.3. For the hearing on 5 June 2019 (which became a preliminary hearing) the Respondent's representative had failed to order a Turkish interpreter for the hearing. The hearing had to be adjourned and costs thrown away were reserved to this hearing. That matter is dealt with at the end of this decision.

5. The law

- 5.1. The Tribunal has to have regard to section 95(1)(a) Employment Rights Act 1996, which states that an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

6. Facts

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

- 6.1. The Claimant says the reason for his dismissal was due to Mr Ozmen's issue with the Claimant's cousin Hassan Nasser (Hassan).
- 6.2. The Claimant had a clean disciplinary record and was regarded by the Respondent as being honest, reliable and of good character.
- 6.3. On 4 October 2018 the Claimant was called in to see Miss Wheelhouse in her office. The Claimant was not aware of the reason. Miss Wheelhouse asked the Claimant to sign a document relating to Hassan. The Claimant was unaware of its nature, but he discovered it related to a payment the Claimant had received from the Respondent on behalf of Hassan some time earlier, when apparently the Claimant was asked to sign nothing. The Claimant told Miss Wheelhouse that he did not feel happy signing the document as it did not relate to him and Ms Wheelhouse called Mr Ozmen in because of that. The Respondent wanted a confirmatory receipt for the payment made earlier.
- 6.4. Miss Wheelhouse told the Tribunal that Hassan was in Sheffield and could have been traced through the Claimant to sign the document himself, although Hassan had himself been in dispute with the Respondent. The Claimant felt that the document did not relate to him.
- 6.5. Mr Ozmen came into Miss Wheelhouse's office and in trying to get the Claimant to sign there is no doubt that once he arrived Mr Ozmen's behaviour towards the Claimant was assertive. Mr Ozmen said that the Claimant was raising his voice. The door was closed and there were two managers in the room, Mr Ozmen and Miss Wheelhouse and

the Claimant, who was on his own. Miss Wheelhouse says that at this point both Mr Ozmen and the Claimant were shouting quite loudly and were both angry. The whole exercise in trying to get the Claimant to sign the document took several minutes. Miss Wheelhouse, a woman, tried to split Mr Ozmen and the Claimant up. The Claimant wanted to call Hassan on the telephone but Mr Ozmen resisted this, although at some stage the Claimant did succeed in telephoning Hassan and when he offered the phone to Miss Wheelhouse, with Hassan on the other line, she declined to speak to Hassan.

- 6.6. The Claimant says that Mr Ozmen was now upset and told the Claimant to get out, which Mr Ozmen accepts he might have said. Mr Ozmen opened the door at this time and Miss Wheelhouse also heard the remark, although she did not hear any physical threats and no threats to sack, just a heated discussion. Mr Ozmen used a hand gesture pointed towards the door. He walked out of the office and the Claimant followed.
- 6.7. Outside the door and in the warehouse Mr Ozmen and the Claimant were close together but on the evidence the Tribunal has the allegations by the Claimant that Mr Ozmen put his hand on the Claimant's shoulder, pointed his finger into the Claimant's face and said "I will break your nose" appear unfounded. It is also alleged by the Claimant that Mr Ozmen tried to hit the Claimant and clenched his fist. These allegations are also unfounded. The Claimant says that Mr Ozmen was annoyed and agitated. The Claimant says he was upset because he had been put under pressure to sign the document.
- 6.8. The scene returned to Miss Wheelhouse's office where she tried to persuade the Claimant to sign. Miss Wheelhouse says that the Claimant then said that he would sign whatever was needed, as the Claimant wished to leave his job.
- 6.9. The Claimant had by this time removed his uniform and another manager, Ahmet Boyraz (Mr Boyraz), tried to encourage the Claimant to put his uniform back on and talk things over with him, which the Claimant declined.
- 6.10. Miss Wheelhouse suggested that the Claimant go home and come back to work the next day, but the Claimant felt he had been dismissed by Mr Ozmen, despite the fact that the Claimant admits that Mr Ozmen did not say that he had been dismissed, nor that the Claimant was not to return and the Claimant accepts that Miss Wheelhouse's invitation to come back next day did occur.
- 6.11. Strangely nothing more was said between the parties until on or about 17 October 2018. Then Miss Wheelhouse wrote to the Claimant asking if he was returning to work. Then on 22 October 2018 the Claimant made it clear, by email, that 4 October 2018 was his last day at work, because he had been threatened by Mr Ozmen, so he did not feel safe and the Claimant alleged that Mr Ozmen had sacked him when he told him to get out.
- 6.12. The Claimant never received his notice pay.

6.13. During the hearing we viewed CCTV covering most of the incident on 4 October 2018, but the parties requested me to see it again, which I did before making my decision. This was done in the presence of a clerk to the Tribunal. The disc containing the CCTV was, as I understood it, sent by the Respondent's representative. I do not know whether this was cleared and agreed with the Claimant's representative or not. I proceeded on the basis that it had been agreed between them. If I am wrong about that I will listen to representations from the Claimant's representative. As I believe is agreed between the parties, there was no sound to accompany the pictures and I have not attempted to marry the pictures to the timings shown on them. Indeed I have for the most part found facts based on the evidence of the witnesses and the agreed bundle. The conclusion which I draw from watching the CCTV again is that the Claimant was in a disadvantageous position as against the Respondent, but this does not help me as to whether or not the Claimant was dismissed, because I could not hear any words said, which are crucial to the case.

7. Determination of the issues (after listening to the factual and legal submissions made by and on behalf of the respective parties):

- 7.1. For the Claimant to be dismissed the contract under which the Claimant was employed must have been terminated by the Respondent, whether with or without notice.
- 7.2. The onus is on the Claimant to prove that he was dismissed.
- 7.3. The Claimant alleges all sorts of conduct against the Respondent and it is permissible to look at all the surrounding circumstances and how a reasonable employee would have understood the words used in the circumstances. If the words are ambiguous they are construed against the party seeking to rely on them, in this case the Claimant.
- 7.4. What are the words? They are "get out". After those words were spoken by Mr Ozmen both Mr Ozmen and the Claimant left Miss Wheelhouse's office, following which there was a carry on between the two of them outside the office. In other words Mr Ozmen made no further effort to "unseat" the Claimant. Instead they carried on arguing. Then the Claimant returned to Miss Wheelhouse's office where she encouraged the Claimant to sleep on things and Mr Boyraz tried to smooth things over. By 17 October 2018 Miss Wheelhouse was still asking the Claimant if he was coming back and it was he who firmly shut the door on 22 October 2018.
- 7.5. In this case the surrounding circumstances and the words, which nobody denies, do not satisfy section 95(1)(a) Employment Rights Act 1996 and the Claimant has failed to discharge the onus upon him of proving dismissal. In all the circumstances the claim of unfair dismissal is dismissed and it follows that the Claimant can only have resigned and, therefore, is not entitled to notice so his notice pay claim is also dismissed.

8. Costs thrown away on 5 June 2019

- 8.1. There is no doubt the Respondent did not apply for a Turkish interpreter for the hearing on 5 June 2019. That was the responsibility of the Respondent's representatives.
- 8.2. There is nothing on the Tribunal file to show that there were any conversations between the Tribunal and the Respondent's representatives relating to the arrangement of a Turkish interpreter before the hearing on 5 June 2019.
- 8.3. The Respondent's representatives simply failed in their duty to request the Tribunal to secure the services of a Turkish interpreter for 5 June 2019 and for that reason the hearing could not continue and as such the Respondent's representatives transgressed Rule 80(1) of the Tribunal Rules 2013.
- 8.4. However the Claimant's representative told us at the hearing that the Claimant was on a "no win no fee" basis and as such the Claimant having had his claims dismissed has suffered no loss.
- 8.5. Therefore, the Tribunal cannot make an order for costs against the Respondent's representatives, even if the Tribunal wished to do so.

Employment Judge Shulman

Date 12 August 2019