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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr A Nelson

and

Respondent
Victoria & Albert Chandelier
Cleaning Ltd

Held at Ashford on 24 and 25 January 2017

Representation

Claimant:

Mr M Islam-Choudhury, Counsel

Respondent:

Ms S Palmer, Counsel

Employment Judge Wallis (sitting alone)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The claim for holiday pay is dismissed upon withdrawal by the Claimant;
2. The other claims are unsuccessful, for the reasons set out below, and they are dismissed.

REASONS

1. By a claim form presented on 3 October 2016 the Claimant claimed unfair dismissal, notice pay and unpaid wages. He also said that he had not received a written contract of employment, neither had he received any payslips. He also suggested that there had been a failure to provide him with written reasons for dismissal.
2. At the start of the hearing the claim for holiday pay was withdrawn and dismissed.

3. The Respondent had drawn up a list of issues which was agreed subject to an amendment which is incorporated into the list set out below.
4. The issues were as follows:-
 - i. Did the Respondent fail to provide written particulars of employment to the Claimant (the Respondent conceded that no written statement was provided); if so, what award is just and equitable to make under s.38 of the Employment Act 2002 (the Claimant suggested the higher amount, the Respondent suggested a nil award or the lower amount);
 - ii. With regard to the claim of unfair dismissal, what was the date of dismissal;
 - iii. What was the reason for dismissal (the Respondent suggested it was the Claimant's conduct, the Claimant suggested that the reason was the breakdown of the relationship between the Claimant and the owner of the Respondent business, his former wife);
 - iv. If the reason was conduct, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason to dismiss in all the circumstances including the size and administrative resources of the Respondent's undertaking and having regard to equity and the substantial merits of the case;
 - v. Was the dismissal procedurally fair;
 - vi. If the reason for the dismissal was conduct, did the Respondent have a genuine belief that there had been misconduct, and was that based on reasonable grounds following a reasonable investigation;
 - vii. If the dismissal was unfair, should any compensation be reduced by reference to the likelihood of a fair dismissal having occurred following a fair procedure and/or whether or not the Claimant caused or contributed to his dismissal by his conduct;
 - viii. Is the Claimant entitled to notice pay (did he act in such a way as to justify summary dismissal);
 - ix. Did the Respondent fail to provide a written statement giving particulars of the reasons for the Claimant's dismissal;
 - x. If a statement was given, were the particulars inadequate or untrue;

- xi. Did the Respondent fail to pay the Claimant from April 2011 until the termination of his employment;
- xii. Did the Respondent fail to provide the Claimant with payslips;
- xiii. If any of the claims are successful, what is the appropriate remedy.

DOCUMENTS AND EVIDENCE

- 5. The Respondent had produced the agreed bundle of documents. They had also produced a list of issues, as mentioned above, a schedule setting out the details of the payslips sent to the Claimant, a list of the persons involved in the matter and a chronology. During the course of the hearing the Respondent was able to obtain further bank statements to add to those within the agreed bundle.
- 6. I heard evidence from the Claimant himself Mr Albert Nelson and then from the owner of the Respondent business Ms Ann-Marie Lawless.

FINDINGS OF FACT

- 7. This was a case where there were numerous disputes about the facts of the matter between the parties; there was hardly anything upon which they could agree. The Claimant was the former husband of Ms Lawless, the owner of the Respondent business. The Respondent disputed the nature of the Claimant's position within the business, the hours that he worked, the agreement between them about pay, the way in which payment of wages was made, the subject of the argument between them on or around 4 July 2016, and whether or not the Claimant had acted as the Respondent alleged in respect of the matters that led to his dismissal. In short, the parties were unable to agree on most things.
- 8. I noted that there was no dispute that the Claimant and Ms Lawless had divorced in 2002. During their marriage they had a chandelier cleaning business called Elite Chandeliers. That business was retained by the Claimant under the terms of the divorce settlement. They reconciled in 2008 and around that time Ms Lawless started another, separate, chandelier cleaning business. There was a dispute about how and to what extent Ms Lawless had been involved in the Elite business. I did not consider that this was relevant to the issues that I had to decide.
- 9. I was satisfied that in 2009 Ms Lawless set up the Respondent business firstly as a sole trader and then as a limited company from December 2013. The Claimant continued to operate the Elite business. In addition to his work for Elite, I found that the Respondent employed the Claimant on a part-time basis in order to provide price quotations to customers. It was the Respondent's case that the Claimant was employed for 16 hours each week at the National Minimum Wage. The Claimant said that he was employed for more hours per week and that it was

agreed that he would be paid £620 every four weeks and that Ms Lawless would pay his wages into a pension fund. Ms Lawless said that she had not heard about the pension arrangement until she received the Claimant's witness statement, but she agreed that they had agreed the rate of pay, which at the national minimum wage, by the time of dismissal, amounted to about £620 every four weeks. The Claimant said that he had never received any payslips from the Respondent and simply trusted Ms Lawless to pay his wages into a pension fund.

10. I noted that both witnesses were relatively credible in the witness box and it was difficult to decide who was telling the truth about this arrangement. I therefore referred back to the contemporaneous documents. The Respondent produced copy payslips and bank statements going back over a number of years. I noted that the Claimant pointed out that the payslips that were produced by the Respondent referred to the Respondent as a limited company even before the company had been set up. However, I also noted that the payslips produced for the Tribunal hearing were said to be copies of the originals obtained by the Respondent from its accountant; it may be that in running off copies the name was somehow changed. I cannot speculate about that, but given that the Respondent was able to provide copy payslips from its accountant which showed that the Claimant was paid wages regularly, I considered that that provided a piece of evidence that suggested that he had in fact been paid regularly. The next piece of evidence that was contemporaneous was the contents of the Respondent's bank statements. They appeared to show that regularly Ms Lawless took from the Respondent's account amounts of cash that appeared to coincide with the amounts that were said to be paid to the Claimant as wages and that were referred to on the payslips.
11. I noted the Claimant's contention that the payslips referred to the payment method as paid by BACS, and that the Respondent's evidence was that he was paid in cash. I noted that the two other employees of the Respondent were paid by BACS. I noted the Respondent's evidence that the Claimant wanted to be paid in cash. Doing the best that I could on relatively scant evidence, I decided and so found that there was sufficient evidence to show that the Claimant had been paid wages regularly by the Respondent. In weighing up the evidence to make that finding, I found it difficult to understand that, if there had been an agreement about a pension fund, the Claimant had never, according to him, asked Ms Lawless to show him any documentation about his pension fund or how it was doing until he had been dismissed and brought a Tribunal claim. I noted that he said that he had trusted her with the paperwork, nevertheless five years was a long period of time to show no interest at all in the alleged pension fund. I also took into account that the Claimant had not mentioned the pension fund in his claim form or his solicitor's letter; it appeared first in his witness statement. I rejected his evidence about that alleged arrangement. I should also mention that I noted that the Claimant had been fairly relaxed about presenting correct facts when he had printed on his business cards for his company that the business had been established in 1910; it had not.

12. I noted the content of the email that the Claimant had sent to the Respondent's accountant on 21 July 2016, some of which was missing, which referred to a telephone call in the previous week and asked when the Claimant went on the books and which account he was paid from. I found that this truncated content did not, as the Claimant suggested, support the Claimant's contention that he had been making enquiries about his pay before he had been dismissed.
13. The finding about the wages and the payslips led me to consider that, on balance, the Respondent's evidence was more reliable than that of the Claimant. That did not prevent me from testing the other aspects of the evidence, particularly about the dismissal itself.
14. Returning to the chronology of events, I accepted the evidence of Ms Lawless that on 4 July 2016 or thereabouts, the Claimant asked her for passwords and other banking information for the Respondent company. She declined to provide that information and this led to an altercation. She left the family house and went to stay in a caravan owned by the parties. She took her laptop and other documentation with her. I rejected the Claimant's assertion that the argument arose because he questioned the position about the alleged pension fund. I considered that if he had raised that subject and been concerned about the response, he would have instructed his solicitor to raise it when they wrote to the Respondent (see below).
15. I accepted the evidence of Ms Lawless that on 8 July 2016 when she returned to the caravan her laptop, diary and other documentation were missing from the caravan. There were no signs of forced entry. It was her evidence that the Claimant was the only other person who had keys to the caravan. It was the Claimant's evidence that the key was kept under a pot near the door of the caravan. Ms Lawless disputed this. She said that she returned to the family house to confront the Claimant and the Claimant did not deny taking the items and refused to return them until she provided the relevant passwords. The Claimant denied that such a conversation had taken place. I noted that Ms Lawless reported this matter to the police and I accepted her evidence about that, particularly as I noted that the Claimant's evidence was that the police had stopped him in the van and confiscated it; I found that this was because it had been reported stolen. (see below). I found that this demonstrated that there had been a report to the police.
16. Later, Ms Lawless noted that the spare keys for the Respondents' vehicles were also missing together with keys to the Respondent's premises. Upon visiting the premises, she found that various files and other items had been removed and damage caused to a filing cabinet.
17. On 10 July 2016 the Claimant moved to the caravan and Ms Lawless moved back to the family house.
18. On 17 July 2016 I found that one of the Respondent's employees, Mr Laville, telephoned Ms Lawless to say that the Respondent's van, which had been

parked at his house for the weekend, was missing. He assumed that it had been stolen. I accepted Ms Lawless's evidence about this because I noted that there were contemporaneous texts from her to the Claimant asking about the whereabouts of the van and saying that she would report it stolen if he had not got it. She asked him to return it immediately. He confirmed that he had the van and he was using it to work. He did not respond to subsequent texts and did not return the vehicle. I noted that the Claimant's evidence was that he had agreed with Mr Laville that he would take the van. Neither party called Mr Laville to give evidence. I found that the contents of the contemporaneous texts supported the version of events given by Ms Lawless, and showed that Ms Lawless believed that either the van had been stolen or that the Claimant had removed it without authority. This led her to report it to the police (see above).

19. There was a dispute about whether or not Ms Lawless telephoned the Claimant on 19 July 2016 in order to dismiss him. The Claimant said that he received no such call. On balance, I accepted Ms Lawless's evidence about that. I found that she told him that he was dismissed and she wanted her property back; he simply hung up. I noted that the dismissal was confirmed in writing by Ms Lawless's solicitor in a letter of 9 August 2016.
20. That letter was in response to a letter from the Claimant's solicitor dated 2 August 2016 in which they questioned whether or not he had been dismissed, because, they said, he had been told by customers that they had heard that he was no longer employed. The Claimant suggested that this showed that he had not been told that he was dismissed. I accepted that the Claimant may not have believed that he had been dismissed, but I accepted that Ms Lawless had made the telephone call to him and during that call had terminated his employment.
21. I noted that the letter from the Claimant's solicitor did not request reasons for the dismissal, it simply asked whether or not he had been dismissed and suggested that if there were no response then action would be taken.
22. In their response, the solicitor for Ms Lawless explained in detail the recent events, which coincided with her evidence, and confirmed that he had been dismissed summarily for gross misconduct on 19 July 2016. They set out clearly the reasons for the dismissal, including the details of the missing items which had disappeared from the caravan and the company van disappearing. They noted that the company vehicle had still not been returned by the Claimant. They confirmed that the Claimant had been paid in cash every four weeks and said that any claim would be "vigorously defended". They asked the Claimant to return the company vehicle immediately. I noted that the Claimant's solicitor's letter of 2 August 2016 did not suggest that he had not been paid his salary.

A BRIEF SUMMARY OF THE LAW

23. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of

an employee holding the position which the employee held.

24. In this case, the reason relied upon by the Respondent is conduct. In the case of British Home Stores v Burchell [1978] IRLR 379 it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see Post Office v Foley; Boys and Girls Welfare Society v McDonald). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09). So, the burden of proof is neutral in respect of the second and third questions laid down in Burchell namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.
25. In Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 it was held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss.
26. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.
27. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision

or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement to that deduction.

28. Sub section (3) provides that where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable by him on that occasion, the amount of the deficiency shall be treated as a deduction from the worker's wages.
29. Section 27 defines 'wages' as any fee, bonus, commission, holiday pay or other emolument referable to the worker's employment, whether payable under his contract or otherwise.
30. The Extension of Jurisdiction Order 1994 provides for Tribunals to consider claims of breach of contract. The question in this case is whether the Claimant acted in such a way as to justify summary dismissal, or whether he was entitled to notice pay.
31. Section 92 of the Employment Rights Act 1996 sets out the right to a written statement of reasons for dismissal. A request must be made for the entitlement to arise.
32. Section 38 of the Employment Act 2002 provides that where a claim is successful, and at the time that the claim was presented the Claimant had not been given written terms of employment, then the Tribunal shall consider an award of compensation calculated as set out in the section.

SUBMISSIONS

33. On behalf of the Claimant, Mr Islam-Choudhury began by noting that the Respondent had conceded that no procedure was followed in respect of the dismissal, neither had there been any investigation. Ms Lawless simply presumed that the Claimant was guilty of theft; she did not check at the caravan site office to see whether there was any information to be obtained and failed to establish any facts. She simply decided to summarily dismiss the Claimant. The dismissal was therefore procedurally and substantively unfair because there was no proof of the Claimant's guilt. There could not therefore have been genuine belief that he was guilty. It was fundamentally wrong to suggest that Respondent's van had been stolen by the Claimant. There was no evidence that he had taken the laptop or the documents. There was no evidence that the Claimant had access to the Respondent's bank account.
34. He submitted that the real reason for the dismissal was because the Claimant challenged Ms Lawless about the payment of his wages. The email in the bundle showed that the Claimant was asking about that before he was dismissed.
35. He submitted that a close relationship between the parties did not absolve the Respondent from following best practice.

36. As far as the claim in respect of the failure to provide written reasons for dismissal was concerned, there was no documentary evidence that the Respondent told the Claimant on 19 July 2016 that he was dismissed. The Claimant denied that he was told that and that explains why his solicitor wrote to the Respondent on 2 August. The dismissal was not mentioned in a letter from the Respondent to the Claimant on 25 July.
37. He submitted therefore that the Claimant became aware of his dismissal upon receipt of the solicitor's letter of 9 August 2016.
38. With regard to the claim of wrongful dismissal, he submitted that the Claimant had not acted in such a way as to justify summary dismissal. There was no evidence to support the Respondent's assertion that the vehicles were eventually returned in a damaged state. He suggested that the Respondent was exaggerating or fabricating these allegations and noted that there was no evidence that the police had taken any action.
39. With regard to the claim for wages, clearly there was a factual dispute and it would be necessary to decide who to believe. It was the Claimant's case that he was not sophisticated with regard to administrative matters and that he trusted Ms Lawless. It was unusual in an employment relationship for that to occur, but the parties were cohabiting at the time and he was entitled to trust her. He thought the money was paid into a pension fund.
40. He submitted that the payslips were full of errors, for example they said that the Claimant was paid by BACs and he was not and they referred to the Respondent as a limited company even before that company had been registered. There was no reference to holiday pay in any of the payslips.
41. With regard to the bank statements, they showed that a number of payments were made to the account of Ms Lawless and she had not produced the statements for that account in addition to the statements for the Respondent business.
42. He asked that consideration of Polkey and contributory conduct should be addressed when liability had been decided. I pointed out that usually it would be decided in tandem with liability, but Mr Islam-Choudhury suggested that this was an exceptional case and would depend on the findings of fact. It was therefore agreed to defer consideration of those points.
43. On behalf of the Respondent, Ms Palmer referred to her outlined written submissions. She pointed out that the Claimant had never requested written particulars of employment and that it was difficult to see this relationship as a master and servant situation. He knew the terms of his employment and he was on equal bargaining terms with Ms Lawless. She considered it telling that the Claimant never requested written terms of employment and so she submitted that it would not be just and equitable to make any award of compensation for any failure to provide them.

44. With regard to the claim of unfair dismissal, she submitted that Ms Lawless's evidence was consistent with the letter from her solicitor of 9 August 2016. That referred in detail to the removal of the items from the caravan, the refusal to return them, the removal of the keys to vehicles and the failure to return the vehicles despite requests. The reason for dismissal was quite clearly conduct.
45. She noted that the Claimant's case was that the reason that he was dismissed was that he had challenged Ms Lawless about his pay. However, in his claim form he said that the reason for dismissal was that their relationship had broken down.
46. She noted his assertion that Ms Lawless did not have a genuine belief and it was accepted that the personal relationship breaking down may have been a contributory factor to the dismissal. However, she pointed out that the timing of the dismissal, which was shortly after the items had been removed from the caravan and the vehicle removed without permission, showed that the Respondent's case was more likely to be accurate.
47. She pointed out that this was a very small employer. In addition to Ms Lawless, there were only two other employees and the Claimant. As far as the investigation was concerned, there was nothing much to investigate. Ms Lawless had a reasonable belief that he was responsible for taking items from the caravan; he had a key and there was no forced entry. The Claimant has said in evidence that others had access to the key but he also said that they were all trustworthy. If that was right, then it must have been the Claimant who accessed the caravan and took the items. He did so because he wanted the details of the bank account.
48. The Claimant had accepted that he had taken the van from the premises of one of the employees, without notifying the Respondent or that employee. It was clear from the text messages that that employee thought it had been stolen and he alerted Ms Lawless as soon as he noticed that.
49. Ms Palmer submitted that although the investigation might be described as basic, there was enough to found the belief that there had been misconduct. There was no dispute that by 19 July the parties had fallen out on a personal level and more meetings would have been futile. Indeed, the Claimant himself described Ms Lawless as "ranting" at that time.
50. She submitted that there had been a genuine belief that the Claimant was guilty of misconduct and that trust was particularly necessary in such a small business. The decision to dismiss fell within the band of reasonable responses open to a reasonable employer.
51. With regard to **Polkey**, as the Claimant had not made submissions, she simply referred to her submissions in her written skeleton.

52. With regard to wrongful dismissal, she submitted that if the Respondent's belief was genuine, then they were entitled to dismiss the Claimant without notice.
53. With regard to the claim for written reasons for dismissal, there had been a telephone call in which the Claimant was dismissed and that was followed by a solicitor's letter which gave details of the reasons for dismissal.
54. With regard to the claim for unpaid wages, she submitted that the bank statements corroborated the evidence of Ms Lawless. At around the time of the date of each payslip a cheque was made out to cash which tallied with the amount due to the Claimant. That had not been fabricated. The evidence of Ms Lawless was clear that she had paid the cash to the Claimant. The bank statements for 2015 and 2016 corroborated her evidence. The P60s produced by the Respondent also confirmed the amounts shown on the payslips. In contrast, the Claimant had no evidence to support his assertion that he thought that his wages were paid into a pension fund. If so, it was curious that it was only last week that he made that assertion. That assertion was not made in the claim form, nor was it made in the letters from his solicitor. It lacked credibility.

CONCLUSIONS

55. Having made the findings of facts set out above, I returned to the list of issues in order to draw these conclusions.
56. I was satisfied that the reason for dismissal was conduct. I accepted that Ms Lawless had a genuine belief that the Claimant was guilty of misconduct in respect of the removal of the items from the caravan and the removal of the company vehicle without permission. I concluded that although there was a very brief investigation into those matters, there was little else that she could have done in order to investigate, other than ask the Claimant. I had accepted her evidence that she did ask the Claimant, as set out above, and was not satisfied with the response. I concluded therefore that the test in **Burchell** was made out.
57. With regard to the procedure, it was clear that the procedure recommended in the ACAS Code was not followed. The question was whether this was such an exceptional case that a failure to follow any procedure was reasonable. I concluded, in all the circumstances, that it was. It was a very small employer. The parties were a divorced couple who had been living together at the time of these events. I concluded that it would have been futile to hold a disciplinary hearing to give the Claimant the opportunity to put his case. Ms Lawless already knew that he denied taking the items and she suspected very strongly, on reasonable grounds, that he had done so. He accepted in a text that he had taken the company vehicle, and did not return it. In the particular circumstances of this case, I concluded that the failure to follow the Acas code was not unreasonable. For all of these reasons, I concluded that the dismissal was not unfair in all the circumstances.

58. With regard to the claim for wrongful dismissal, I accepted that there was no hard evidence to support the belief of the Respondent that the Claimant had taken the items from the caravan, save for the evidence of Ms Lawless that there was no forced entry. However, there was evidence to show that he had taken the company vehicle without permission and then failed to return it when asked. In those circumstances I considered that the Claimant had acted in such a way as to justify summary dismissal and he was not therefore entitled to notice pay.
59. With regard to the claim for unpaid wages, I concluded that the documentary evidence supported the Respondent's case that the Claimant had been paid regularly and therefore that claim must be unsuccessful.
60. With regard to the claim that written reasons for dismissal were not provided to the Claimant, I was satisfied that written reasons had been provided by way of the solicitor's letter from the Respondent on 9 August 2016. In any event, I could find no request from the Claimant for such details. The claim must therefore be unsuccessful for both reasons (failure to request reasons and reasons having in any event been supplied).
61. In respect of the claim that the Claimant had not received payslips, I concluded that in fact he had received payslips, and I had been shown copies of those. I noted that there were some discrepancies which could not be explained, but given that the amounts tallied with amounts in the bank statements that I was referred to, I was prepared to accept that payslips had been provided by the Respondent's accountant and, although they were available to the Claimant, he had allowed Ms Lawless to deal with the paperwork because, as he said in evidence, it was not his strong point. That claim was therefore unsuccessful.
62. The claim under section 38 that he had not received written particulars would only arise if he were to be successful in respect of any of his claims. As none of the claims was successful then that claim did not arise.

Employment Judge Wallis
27 February 2017