



EMPLOYMENT TRIBUNALS

Claimant

Ms C. Simpson

Respondent

Fairoak Estate Management Limited

v

Heard at: Watford

On: 25 July 2017

Before: Employment Judge Heal

Appearances

For the Claimant: in person

For the Respondent: Mr. G. Ridgeway, consultant.

JUDGMENT

1. The claimant was an employee of the respondent from 26 September 2013 to 17 October 2016.
2. The respondent did not dismiss the claimant.
3. The complaint of breach of contract/unpaid holiday pay is well founded and there will be a two hour remedies hearing to assess compensation on **6 September 2017** at 10.00 am.

REASONS

1. By a claim form dated 28 February 2017 the claimant made complaints of unfair dismissal, breach of contract, unpaid holiday pay and a failure to provide a written statement of terms and conditions of employment.
2. I have had the benefit of two bundles of documents. The bundle provided by the respondent runs to 55 pages. The claimant provided her own bundle which was unpaginated. There was a significant degree of overlap between the documents provided in the 2 bundles. Mr Ridgeway also produced a copy of the claimant's CV and she did not object to that being admitted in evidence.
3. Neither party had seen each other's bundle. Without hearing arguments about who was to blame, I allowed the parties half an hour to become familiar with each other's bundle. After that time, both parties were content to proceed.

4. Privileged documents were removed from the claimant's bundle before I had an opportunity to read them.
5. I have also heard oral evidence from the claimant Ms Caroline Simpson and from Ms Nicola Hopkins, the owner of the respondent business. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which I read before the witness was called to give evidence and then the witness was cross examined and re-examined in the usual way.
6. Mr Ridgeway for the respondent also applied to submit in evidence two further witness statements. These were a statement from Brook-Leah Murrells who was employed by the respondent from 10 October 2016 and a statement from Stephen Bright who is Ms Hopkins' partner and who also now works in the respondent business. I explained to Miss Simpson that she could object or agree to those witness statements being admitted in evidence on paper. If she objected, I would hear argument on the subject and if she agreed and/or I allowed the application then I would admit that evidence subject to the fact that the weight I gave it was likely to be reduced because I had not heard those 2 witnesses cross-examined.
7. Miss Simpson agreed to the 2 witness statements being admitted on that basis.

Issues

8. At the outset of the hearing and with the cooperation of the parties I identified the following issues to be decided.
 - 8.1 The respondent accepted that if the claimant was an employee, she had sufficient service to qualify to claim unfair dismissal and her claim was in time.
 - 8.2 Was the claimant an employee of the respondent or was she self-employed?
 - 8.3. If the claimant was an employee, did the respondent dismiss her at a meeting on 17 October 2016?
 - 8.4 If the respondent did dismiss her, was the reason one related to conduct which is a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996?
 - 8.5 If the claimant was dismissed, the respondent does not attempt to say that it followed a fair procedure.
 - 8.6 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct in that she used unacceptable language and aggressive behaviour? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

8.7 Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

8.8 If the claimant was an employee, was she entitled to holiday pay and was she paid holiday pay during the course of her employment?

Facts

9. I make the following findings of fact on the balance of probability. I do so because I do not possess a perfect method of discovering absolute truth. Instead, I listen to and read the evidence placed before me by both parties and on that evidence only, I decide what is more likely to have happened than not. That is what the balance of probability means.
10. The respondent is a limited company in the business of property management. On 26 September 2013, the claimant began her working relationship with the respondent initially, as a 'property administrator'.
11. There was no written contract, whether of employment or at all.
12. There was no correspondence before me between the parties leading up to the beginning of the relationship.
13. Prior to the relationship beginning, the claimant and Ms Hopkins met for a discussion which could properly be called an interview. At this point the respondent company had been running for about 6 months. The claimant did not tell Ms Hopkins what were her rates or fees but they discussed salary and agreed that the claimant would be paid £15 an hour initially which would equate to £30,000 per annum when the claimant worked full-time. The claimant was to work from 9 am to 3 pm because she had school-age children. The claimant was to have her place of work at Ms Hopkins home and they discussed her working at the 'dining room table'.
14. Ms Hopkins asked the claimant if she was prepared to be self-employed for the first few months and the claimant agreed. I find that the claimant did not fully understand the legal implications of this. She had been self-employed before, but the evidence did not explore the exact circumstances of this self-employment so I do not have sufficient evidence to decide whether this was a similar or a different relationship to that which she had with the respondent or whether it should have led her to understand exactly what self-employment means.
15. The claimant did understand that at least in terms of national insurance there was a financial benefit to her in being self-employed. She did not understand whether there would be a tax benefit.
16. The claimant began work for Ms Hopkins, not in fact using the dining room table, but using Ms Hopkins' own desk which was provided for her. She used Ms Hopkins' computer and Ms Hopkins set up an email address for

her and provided appropriate stationery so that she could correspond on the respondent's behalf.

17. The claimant sent Ms Hopkins invoices for the hours she worked. She was not paid holiday pay or sick pay.
18. If the claimant wanted to take holiday, she asked for permission from Ms Hopkins and they reached mutual agreement about the claimant's holidays so that they would not both be away at the same time. If the claimant was ill she rang in to say that she was sick.
19. During the course of her work for the respondent, the claimant attended a training course for which Ms Hopkins paid.
20. Although the claimant started as a property administrator, both Ms Hopkins and the claimant envisaged and expected that in time the claimant would be trained by Ms Hopkins as a property manager.
21. The claimant hours gradually increased, by mutual agreement, as the claimant's children became older and more independent and as the respondent's business grew.
22. The claimant completed tax returns during this period on the basis of self-employment and were shocked to discover that she had to pay tax on account. She said that she had not experienced this before.
23. At first, the claimant worked for 6 hours a day from Monday to Thursday. From 1 December 2014, this increased by agreement to 7 hours a day from Monday to Friday.
24. In September 2015 Ms Hopkins approached the claimant and suggested an increase to have pay of 50p per hour. The claimant agreed to this.
25. Ms Hopkins told the claimant who were her clients and told the claimant what to do on a day-to-day basis.
26. The claimant did not in fact work for anybody else while she was working for Ms Hopkins because she did not have time to do so. It appears that the parties never actually applied their minds to whether this would be permitted. The claimant told me that she only worked for Ms Hopkins '*because it was my job*'.
27. The claimant did not ever send anyone to do her work in her place and nor did she attempt to do so. Again, it does not appear that the parties ever gave this matter any thought. The claimant's surprised reaction to my question about this in evidence is some indication that neither of them actually envisaged that the claimant could or would send someone else to do her work in her place. The claimant said that if she had tried to do so she thought Ms Hopkins would have laughed.

28. Until the very end of the relationship there is no evidence of any need for disciplinary action being taken. The claimant told me that if she did something that Ms Hopkins thought was wrong she would simply put it right during the course of her work, as she would in any place of work.
29. During the course of the relationship the claimant continued to submit invoices to Ms Hopkins and although she occasionally dropped hints about her employment status she did not actually say that she was unhappy with the situation or attempt to say that she was in reality an employee.
30. During July and August 2016 Ms Hopkins began to develop concerns about the claimant's performance and that she was spending time away from her work.
31. By email dated 10 August 2016 Ms Hopkins wrote to the claimant while the claimant was on holiday. She expressed concern that the claimant appeared not to want to work 'here' recently and in particular on the day before. She said that the claimant had been turning up for work later and later without explanation. She said that the claimant had been taking personal appointments during the day which upset Ms Hopkins and made her question the claimant's 'commitment to [her] job'.
32. Ms Hopkins said that the workload had increased recently and the role required someone to be focused on completing the required tasks and for everyone to pull together to ensure that everything got done.
33. Ms Hopkins then set out a bullet point list of 6 items of work which she said the claimant had left undone. (She conceded in evidence that the first 2 had in fact been done after all).
34. She concluded the email:

'Your role requires someone to be here who is committed and focused to work 7 hours a day between 9am and 5:30pm plus up to an hour for lunch. When you are focused you are excellent at your job.

Please do not contact me before or during your holiday. I suggest you take time whilst you are away to think about what you want so that we can both agree on how we move forward on your return.'

35. On the claimant's return from holiday Ms Hopkins and the claimant had a discussion. It emerged that the claimant had in fact completed some of the tasks as set out above. The claimant told Ms Hopkins that she did wish to continue to work for the respondent and the parties moved forward.
36. On 30 September 2016 Ms Hopkins offered the claimant the role of assistant property manager. She did so saying,
- 'you can be employed but you will have to contribute to a pension'.*

37. The claimant said that she would have to look into it. As at the time the contract terminated, the claimant had not accepted this role.
38. No further matters of concern were raised until a new member of staff passed on information to Ms Hopkins during the first week of October 2016. These were concerns about the claimant's attitude to her work. Mr Bright told Ms Hopkins as well that the claimant had deleted Internet history from the respondent's computer. Ms Hopkins therefore became worried that the claimant was doing other work activities when she was contracted to work for the respondent.
39. Ms Hopkins therefore arranged to meet the claimant in Costa Coffee on 17 October 2016. She did not tell the claimant what the conversation was to be about.
40. I find that Ms Hopkins' recollection of this meeting is more likely to be reliable than that of the claimant, in part because the claimant herself told me that she could not remember Ms Hopkins' exact words. The claimant accepts, at least in parts, Ms Hopkins' account. It seems highly likely from the way both sides accept that the meeting developed that the claimant was very upset and I consider that for that reason too she was unlikely to have a precise recollection of what was said. Ms Hopkins' account appears to me to best explain why the relationship terminated. If the meeting was calm and collected as the claimant suggests, I consider it unlikely that it would have resulted in the contract terminating. Ms Hopkins has a more detailed recollection of what was said which is an indicator that she at least remained calm. Neither party took any notes and nor was there an independent notetaker.
41. Ms Hopkins started by saying to the claimant that it was apparent that she was no longer happy working at Fairoak. Ms Hopkins told the claimant that she had been rude and derogatory about Ms Hopkins herself and others, including clients. She said that the claimant had deleted her Internet history. She said that the claimant needed to consider her position at Fairoak. Ms Hopkins wanted to but did not then go on to say that she was disappointed about what she had learned in the previous week about how much work the claimant had done and they needed to talk about it and agree what to do.
42. Ms Hopkins did not continue as she planned because as soon as she said that the claimant needed to consider her position at Fairoak, the claimant said,

'Are you sacking me, then?'

43. The claimant spoke quite loudly and spoke over Ms Hopkins repeatedly so that Ms Hopkins could not continue. Ms Hopkins did attempt to continue to explain her concerns but she fell silent because the claimant was speaking over her and not listening to her.

44. On the balance of probability, I consider it more likely than not that the claimant did call Ms Hopkins, *'you fucking bitch'*. I think that is consistent with the degree of upset displayed by the claimant who at that stage believed, albeit mistakenly, that Ms Hopkins intended to dismiss her.
45. Ms Hopkins did not immediately interrupt the claimant to correct the mistake because the claimant was not allowing her to speak.
46. The claimant began to move towards the door as if to leave but then she came back.
47. At this point, Ms Hopkins asked the claimant for her keys. These were the keys to the claimant's place of work which were also the keys to Ms Hopkins home.
48. She did so because although she had not intended to dismiss the claimant and did not believe that she had uttered words of dismissal, she now formed the view, as she put it, that the claimant had, *'dismissed herself'*. By that somewhat legal terminology, I consider that she means that the claimant was closing down the relationship herself by her absolute opinion that the relationship had ended and her refusal to allow discussion. Ms Hopkins accepted that the claimant was not open to further discussion.
49. Ms Hopkins did not set out to persuade the claimant to stay in the working relationship because she felt that the conversation had run its course and because the claimant was angry. The conversation therefore ended.
50. The claimant later went to Ms Hopkins house to retrieve her possessions and Ms Hopkins gave them to her. It is not clear precisely on which day this took place.
51. After the events of 17 October, neither party attempted to retrieve the relationship.

Concise statement of the law

Was the claimant an employee?

52. Section 230 of the Employment Rights Act 1996 provides:

"(1) in this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) in this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is expressed) whether oral or in writing.

53. My starting point has to be the written or express terms of any agreement between the claimant and the respondent. Where, as here, one party asserts that the express terms of the agreement do not reflect the true contract between the parties, then I may look at the parties' conduct so as to establish what the parties themselves have in fact agreed. Without the irreducible minimum of mutuality of obligation there can be no contract of employment. However, if the mutuality of obligation does exist that is not conclusive. I then have to look for the other factors (control, organisation, economic reality, whether any other factor is inconsistent with the existence of a contract of employment and whether the claimant was in fact in business upon her own account) to determine whether or not this was in fact a contract of employment. The key is to determine what the parties had in fact agreed, not what the relationship *looks like*.

Has there been a dismissal?

54. The situation sometimes arises where the employer uses language which she did not intend to amount to a dismissal but which the employee understands as a dismissal. If the employee reacts to the words used and leaves, this will be a dismissal if the words did indeed amount to a termination by the employer, but a resignation by the employee if they did not.

55. If the words used by the employer are on their face ambiguous, then the test is how the words would have been understood by a reasonable listener. In other words, the test is objective rather than subjective and the question of whether or not there has been a dismissal or resignation must be considered in the light of all the surrounding circumstances.

Analysis

Employment status

56. The claimant and the respondent originally expressly agreed that claimant would be self-employed. The express agreement was never varied. The claimant says however that this agreement does not reflect the true situation between the parties. Therefore, I look at the conduct of the relationship to see whether that shows what they had in fact agreed.

57. I consider that there was mutuality of obligation. Although the claimant never tested whether she had any right to send a substitute to do her work, it is plain that for her to do so would have been unacceptable. She was working in Ms Hopkins' own home, was integral to the business and I do not consider that it ever occurred to either party that the claimant might send someone else in her stead. The possibility was certainly never discussed. Ms Hopkins' letter to the claimant requiring full commitment and focus for 7 hours per day shows that she took the view that the claimant had to be completely committed to her work. It is unlikely that Ms Hopkins could write that had she not implicitly taken the view that she was committed to provide the claimant with work.

58. As is so often the case, there are some factors which point to a relationship of self-employment and other factors which point to an employment relationship. In favour of self-employment are the express agreement itself, the claimant's tax situation, the fact that the relationship continued officially as one of self-employment without the claimant formally challenging it or seeking overtly to change it, and the fact that even on 30 September 2016 when the claimant was offered a new role, Ms Hopkins did so saying that the claimant could be an employee if she liked. The claimant accepted the financial benefit of a self-employed situation at least some of which she understood.

59. I turn then to the factors which might demonstrate that this was a contract of service. The claimant worked exclusively for the respondent and regarded her work for the respondent as her 'job'. She worked at the respondent's home premises, using the respondent's desk and computer, email account and stationery all of which were provided for her. Both parties expected Ms Hopkins to train the claimant for a more senior role and when the claimant was sent on a training course, Ms Hopkins paid. Ms Hopkins was in control of the claimant's work and told her what to do on a day-to-day basis. When Ms Hopkins was not happy with the claimant's work, she wrote to her and expressed her displeasure using the directive terminology that one might use to an employee. In particular, she expected the claimant's full commitment and focus for 7 hours a day. She offered the claimant a more senior role as if it were a promotion. She did not agree to pay the claimant's fees but instead offered and later increased what she, the respondent, was prepared to pay. The economic reality was that of an employment relationship. The claimant sought permission to go on holiday and could not go away exactly when she chose. The claimant was an integral part of the respondent's business and was not in a separate business on her own account. When Ms Hopkins had serious concerns about the claimant's behaviour, it was she who called the claimant to a meeting to discuss it.

60. Weighing all that up, I consider that, despite the label the parties placed on the relationship and the tax situation, the other factors show that the parties had by their conduct in fact agreed that this was an employment relationship.

61. Therefore, I have to consider whether the claimant was dismissed from the employment on 17 October 2016.

62. I am satisfied that Ms Hopkins did not intend to dismiss the claimant however I do not consider that that is a relevant factor. I am satisfied too that the claimant firmly believed that she was being dismissed. I do not consider that that of itself is a relevant factor. I have to look at the words Ms Hopkins actually used and ask whether they would be considered objectively to amount to a dismissal if heard by a reasonable listener.

63. That listener would have heard Ms Hopkins start the conversation by saying that it was apparent that the claimant was no longer happy working at FairOak. Miss Hopkins also went on to say that the claimant had been rude and derogatory about her and others and clients. She raised the allegation of deletion of the Internet history. So, that is the context in which the vital following words were said. The context was plainly one of a serious discussion about difficult subject matter which the claimant's approach to her work and to her employer were in issue and in which her future was potentially at issue at least at some point.
64. Ms Hopkins then said that the claimant needed to consider her position at FairOak. The reasonable listener who was attending carefully would have heard that it was the claimant who needed to consider her position, not that the respondent was considering the claimant's position. So, what Ms Hopkins was saying, objectively, was that she wanted the claimant to reflect about her situation not that she, Miss Hopkins at present was placing the claimant's future in jeopardy.
65. I consider that an objective listener would not understand the words used to be words of dismissal.
66. Unfortunately, the claimant was already upset and was not listening carefully. She heard words about considering her position and jumped to the conclusion, in the context of the seriousness and subject matter of the discussion, that she was being dismissed. This was a misunderstanding. Understood objectively, the claimant was not being dismissed.
67. It is plain, however, that the contract did terminate. What, then, terminated the contract?
68. I find that what ended the contract was the strength of the claimant's reaction to her misunderstanding. She believed with such conviction that she had been dismissed that she therefore behaved as if she had been dismissed and put Ms Hopkins in a situation where she was sufficiently overwhelmed by Ms Simpson's behaviour to accept the end of the contract. Ms Hopkins therefore asked for the claimant's keys, did not attempt to dissuade her and went along with the ending of the relationship. Even though her behaviour was based on a misunderstanding, it was Ms Simpson's reaction that ended the contract.
69. Having found that the claimant was not dismissed, any further issues become academic. There cannot have been an unfair dismissal where there was not dismissal. The claimant has not advanced any alternative case.
70. In case I am wrong about any of the above and the claimant was dismissed then I would find that that dismissal was by reason of the claimant's conduct which is a potentially fair reason for the purposes of section 98 of the Employment Rights Act 1996. That conduct was the behaviour which led Ms Hopkins to call the meeting on 17 October.

71. Ms Hopkins had not carried out a full investigation into that behaviour, the claimant had not been given a warning of the allegations against her before the meeting and she had not had an opportunity to present her own defence or to be represented, so that for all those reasons the dismissal would have been unfair.
72. In the circumstances however I would also find that the claimant had contributed to her dismissal by her own culpable conduct. By that, I do not mean the behaviour that led Ms Hopkins to call meeting: I simply do not have sufficient evidence to decide on the balance of probability whether the claimant was in fact guilty of making derogatory remarks or being rude to clients or not being fully committed to her work. None of this was fully investigated at the time. It was not deeply explored before me.
73. However, the claimant overreacted to Ms Hopkins' attempt to open a discussion. She jumped to conclusions, failed to listen calmly to Ms Hopkins, and after a certain point, to give her a chance to speak. Had Ms Hopkins given the claimant a fair warning about the subject matter of the meeting and perhaps an opportunity to have a friend, representative or witness present it may be that the claimant would have reacted less strongly. One of the benefits of following a set procedure is that by that means the emotional temperature of discussions is reduced. Taking all that into account I consider that had there been a dismissal, it would have been appropriate to reduce any compensation that might be paid to the claimant by 90%.
74. What is the percentage chance of a fair dismissal in any event? I doubt that there was a measurable risk of a fair dismissal for the matters which led to the meeting of 17 October. Ms Hopkins had not reached the stage of conducting any formal investigation. Given the prior good relationship between the parties and the fact that the claimant's work when focused was excellent I consider that these matters would have been resolved without dismissal.
75. However, there is a high percentage chance that the claimant would have been dismissed for her words and conduct on 17 October, had the situation been retrieved sufficiently for the parties to enter a formal disciplinary process. Acting fairly, Ms Hopkins would have taken into account that the claimant had no warning of the subject matter of the discussion and had misunderstood what was said. She would have taken into account that the claimant was deeply upset. I assess the chance of a fair dismissal on this ground as 70%. I take into account the fact of the existing reduction for contributory fault. Bearing in mind *Rao v Civil Aviation Authority* [1994] IRLR 240 I would not consider it just to make an additional reduction so that the total reduction would remain at 90%.
76. That leaves the complaint about unpaid holiday pay. The claimant was an employee and was therefore entitled to be paid holiday pay. It is not in dispute that none was paid, so this claim succeeds. How much the

claimant should have been paid will be the subject of the remedies hearing on 6 September 2017.

77.I note too that the claimant was not provided with a written statement of particulars of employment and this remained the case when the proceedings were issued. Whether framed as breach of contract, unauthorised deductions from wages or a breach of the Working Time Regulations 1998, the claim in which the claimant has succeeded is contained in schedule 5 to the Employment Act 2002. It appears therefore that section 38 of the 2002 Act applied and at the hearing on 6 September I shall also consider an award under section 38(3) of that Act.

Employment Judge Heal

28/7/17

Date:

19/8/17

Sent to the parties on:

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For the Tribunal Office