EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Cohen	v	Netbit (UK) Limited

PRELIMINARY HEARING

Heard at: **Watford** **On:** **2 September 2020**

Before: **Employment Judge Tynan**

Appearances:

For the Claimant: **In person**
For the Respondents: **Ms S Hougie, Solicitor**

JUDGMENT

1. The claimant's claims against the respondent that he was unfairly dismissed and that he is owed arrears of pay and other payments are struck out on the basis that the claims were not presented in time.

REASONS

1. By a claim form presented to the employment tribunals on 31 May 2019 following early conciliation between 5 April and 5 May 2019, the claimant brought claims against the respondent that he was unfairly dismissed, that he is entitled to a redundancy payment and that he is owed arrears of pay and other payments. The claimant notified his potential claims against the respondent to ACAS pursuant to the early conciliation scheme on 5 April 2019. Accordingly, by virtue of s.111(2) of the Employment Rights Act 1996, the employment tribunal has no jurisdiction to consider any complaint by the claimant that he was unfairly dismissed by the respondent unless his effective date of termination of

employment was on or after 5 January 2019. s.164 of the Employment Rights Act 1996 provides that an employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the 'relevant date', a complaint relating to dismissal has been presented by the employee under s.111. Finally, s.23 of the Employment Rights Act 1996 provides that a complaint by a worker that their employer has made an unlawful deduction from their wages must be presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made.

2. S.111 and s.23 of the Employment Rights Act respectively provide that a tribunal may allow a complaint to be presented outside of the normal time limit where it is satisfied that it was not reasonably practicable for the complaint to be presented in time. It is the claimant's case that his complaints were presented in time. He has not sought to argue that in the event the complaints were not presented in time this was because it was not reasonably practicable for him to do so.

3. The claimant represented himself at tribunal. He submitted an unsigned and undated witness statement for the hearing, together with a bundle of documents comprising 14 tabs, each containing various numbered documents. The claimant gave evidence and affirmed the contents of his witness statement. He was cross-examined by Ms Hougie.

4. The respondent relied upon a witness statement by its managing director, Mr Leslie Slutzkin. Mr Slutzkin lives in Israel. In the light of quarantine requirements for individuals travelling to the UK from Israel it was not practicable or proportionate for Mr Slutzkin to attend the hearing in person. No arrangements had been made for him to give evidence remotely. The claimant was therefore denied the opportunity to question Mr Slutzkin about his evidence.

5. Ms Hougie submitted a written skeleton argument and I confirm that I have re-read it. I heard brief oral submissions from both parties and, again, I confirm that I have considered these before coming to a Judgment.

6. It is not in dispute between the parties that the claimant resigned his employment. The issue I have to determine is whether, as the claimant asserts, he resigned his employment on 22 March 2019 or whether, as the respondent asserts, his employment terminated before 5 January 2019 so that his unfair dismissal and unlawful deductions of wages claims are out of time.

7. Issues often arise in cases because words or actions give rise to ambiguity. That may be because of the nature of the words or actions or because of the circumstances in which they took place. The test of whether ostensibly ambiguous words amount to a dismissal or resignation is an objective one, in which all the surrounding circumstances must be considered. If the words remain ambiguous even once the surrounding circumstances have been considered the employment tribunal should ask itself how a reasonable employer or employee would have understood them in the circumstances. In Graham Group plc v Garratt the EAT indicated that any ambiguity was likely to be construed against the person seeking to rely on it. In considering all the circumstances, tribunals will look at events both preceding and subsequent to the

incident(s) in question. It will also take account of the nature of the workplace at which the misunderstanding arose. As a preliminary observation I note that Mr Slutzkin and the claimant are cousins. This explains the relatively informal nature of aspects of their working relationship.

8. The exchanges relied upon by the respondent are at pages 8-10 of the exhibit to Mr Slutzkin's witness statement. They comprise a series of text messages between the claimant and Mr Slutzkin. The context was an ongoing and increasingly strained dialogue regarding outstanding pay and commission due to the claimant, related to the issue of whether or not the claimant was expected to work from the respondent's offices and to clock in and clock out on arriving at and leaving work. Mr Slutzkin is largely based abroad and accordingly not regularly in the UK to oversee the company's operations. During the course of 16 October 2018 their text messages became somewhat heated. At 10.01am the claimant wrote:

> "This is enough
> You know I am leaving
> I think it best we just get the money straight and I go
> I cannot work under these conditions or atmosphere
> Send the commission"

9. There then followed further text messages in which the claimant made clear that he would not agree to clock in and out of work. He said:

> "When we spoke last week I told you I would not be clocking in and I am leaving
> That was understood by you
> All that is left is to correct my pay, give me my commissions and let me hand over
> I am done here"

10. The claimant's evidence at tribunal was that his text messages had been sent in the heat of the moment. He was challenged on this by Ms Hougie who referred to earlier emails exchanged on 4 October on the issue of clocking in and clocking out. Whilst I accept her point that the issue was not a new one, looked at objectively, the text messages of 15 and 16 October 2018 do evidence an escalation of tensions between the claimant and Mr Slutzkin. Be that as it may, the difficulty for the claimant in suggesting in the course of his evidence that the texts were in the heat of the moment is that his case is not pursued on the basis that he resigned in the heat of the moment and, as in Martin v Yeoman Aggregates Ltd [1983] ICR 314, that he should have been given the opportunity of withdrawing his comments, his case instead is that he did not resign on 16 October 2018. His evidence and case is that he was in discussion with Mr Slutkin about becoming a consultant but that his agreement to any such arrangement was conditional upon agreement first being reached between them as to the sums outstanding to him.

11. When cross-examining the claimant Ms Hougie made the valid point that the language of his texts and emails with Mr Slutzkin at this time was the language of constructive dismissal. For example, on 4 October the claimant had deployed terms such as "offensive", "drains my morale", "embarrassment", "in breach of

the agreement made". Nevertheless, the claimant did not state in terms that he was resigning his employment. Amongst other things he said: "I am leaving" and "I am done here". Given this residual ambiguity it is necessary that I should consider all the surrounding circumstances.

12. Whilst I attach some weight to the claimant's use of the language of constructive dismissal, in my judgment there are two critical pieces of evidence that lead me to conclude that the claimant gave notice of resignation on 16 October 2018. Firstly, ten days later on 26 October 2018 (when he would have had ample time to reflect, particularly had he texted in the heat of the moment) the claimant sent an email to the company's administrator, copying in Mr Slutzkin, in which he wrote: "I will have left the company by then". "Then" is a reference to 22 and 23 November 2018, being dates proposed for a client training session. The claimant stated that another member of staff would have to do the training rather than himself. Secondly, after 24 December 2018 the claimant did not attend the respondent's offices again or perform any further work for it. Indeed, in or around January 2019 he took a job in a pub. In my judgment, it is significant that in a detailed witness statement the claimant does not identify any specific dates between 24 December 2018 and 22 March 2019 when he says he worked for the respondent. The essence of an employment contract is that the employee agrees to work for the employer, yet on the claimant's case he did no work for nearly three months.

13. I conclude that following his texts of 16 October 2018 the claimant intended and understood that he had resigned his employment and would be leaving the respondent's employment. It is unclear from those texts when he intended that his resignation would be effective except that by 26 October 2018 he was clear that he would have left the respondent's employment by 22 November 2018. By copying Mr Slutkin into his email he was also making this clear to Mr Slutkin.

14. During the early part of November 2018 there were further discussions between the claimant and Mr Slutzkin as a result of which the claimant agreed to continue working for the respondent beyond 22 November 2018 on the basis however that he would be paid only for those days he attended its offices. I further find that this reflected a casual agreement between them to extend the claimant's leaving date whilst they sought to agree the terms of any future consultancy and resolve the long standing vexed question of what monies were owed to the claimant. It was not on the basis that the claimant was withdrawing his resignation and I conclude that it was not intended to be an open-ended arrangement.

15. As to the date the claimant's resignation took effect, I note that on 24 December 2018 the claimant wrote in an email to Mr Slutzkin,

> "As we didn't reach an agreement to these new terms and there was no termination of employment by either side, the same terms continued up until we agreed I would cut my working days down; to reduce your wage bill (November and December 2018).

The claimant's suggestion that neither side had terminated the relationship is at odds with his comments on 26 October 2018, to which I attach greater weight. In any event, his comments on 24 December 2018 seem to me to be more concerned with what he should be paid for the work he had done up to that date rather than whether or not he had resigned his employment. As I have noted already, he did not do any further work for the respondent after 24 December 2018. That same day Mr Slutzkin instructed the claimant to turn the CCTV back on before he left and to return a company vehicle to another employee. This further supports that the claimant was leaving the respondent's employment.

16. Subsequently, on 26 December 2018, the claimant emailed Mr Slutzkin asking, "Is the final salary payment of £8,177.35 being made?". Again, his reference to his "final" salary payment is relevant. Whilst the claimant had some expectation that he would have continued use of the company vehicle into the new year, I find that this reflected his family relationship with Mr Slutzkin rather than a continuing employment relationship and that it was otherwise understood between them that the claimant's employment with the respondent was terminating and that 24 December 2018 would be the last day that the claimant would actively work for the respondent.

17. The Claimant may have worked an unconventional notice period, both in terms of its duration and in terms of his pattern of work and attendance at the office, but in my view this can only properly be seen in the context of a family relationship and ongoing protracted negotiations between the parties which they each hoped might result in a consultancy.

18. For completeness, I accept the respondent's submission that the claimant attended its offices on or around 10 and 11 March 2019 in order to generate certain reports required as part of the ongoing discussions between them as to the sums owed to the claimant. The claimant was not attending its offices to work or provide any services. Whilst ordinarily it would be unusual for an employee to attend their former workplace some months after their employment was said to have ended, in this case I take account of the fact that there was a family relationship between the claimant and Mr Slutzkin as well as ongoing discussions between them regarding a future consultancy arrangement. The claimant's attendance at the respondent's offices in March 2019 is to be viewed in that particular context.

19. In my judgment the claimant's employment with the respondent ended on 31 December 2018. Given, as I find, that he resigned his employment on 16 October 2018, the effective date of termination of employment for statutory purposes was 31 December 2018. In the circumstances his claims that he was unfairly dismissed and that the respondent made unlawful deductions from his wages are both out of time and shall be struck out on the basis that the tribunal has no jurisdiction to determine them. His claim to a redundancy payment has been brought in time as he had six months from his effective date of termination of employment to present his claim and did so.

20. However, given that the claimant claims he was constructively dismissed I am unclear on what basis the claimant claims he is entitled to a redundancy payment. There is no suggestion by him that the respondent's requirements for

him to do work of the kind which he was employed to do had ceased or diminished. In the circumstances I shall invite the claimant to show cause why his claim to a redundancy payment should not be struck out on the basis that it has no reasonable prospect of success.

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Employment Judge Tynan 15/10/2020

Sent to the parties on:15/10/2020

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For the Tribunal:

Jon Marlowe