

INDUSTRIAL TRIBUNAL
17 AUG 2011
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IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

IND TRI 02 of 2006

BETWEEN

KEVIN HOSKEN

Complainant

-and-

ALEX DURNELL

Respondent

The Honourable Mr Joe Bossano for the Complainant

Mr Alex Durnell, the Respondent, as litigant in person

RULING

1. FACTUAL BACKGROUND

1.1 At the material time the Respondent carried on business as Fire Service International from premises at 17/4 Chatham Counterguard, Gibraltar. The business was small in nature consisting of the Respondent and three full time employees. He employed the Complainant as a Systems Technician from the 20th September 2004 until the 4th December 2005. The dates are evidenced in the ETB documentation and in any case are not in dispute.

1.2 The Complainant was initially employed on a 3 month trial basis. He was hired as a result of a successful interview with BEA employment agency. After the first week of employment he attempted to hand in his notice as he did not feel he had the ability to become competent for the job but the Respondent persuaded him to stay and afforded him with on the job

training. The Complainant was paid £7.00 an hour well above the CATA rate and was on standard CATA terms. He was paid weekly and the ETB contract made provision for one week's notice on termination.

- 1.3 It is undisputed that the Respondent was a fair employer both as regards the salary rates and general terms of employment and also in respect of discipline where he had a give and take approach. The Employer preferred talking through issues with employees than running the business with cast iron discipline which he considered would not be beneficial to the workings of such a small entity. As such the environment was a flexible one with the Employer making allowances for lateness, for time off for personal and medical appointments to include matters such as attendance at funerals and the like.
- 1.4 It is common ground that up until the 4th December 2005 the Complainant considered the Respondent a good Employer. The Respondent on the other hand had a series of complaints against the Complainant, from timekeeping to attitude which according to his evidence he endeavoured to resolve in a positive way on numerous occasions but without fruitful results.
- 1.5 The only two witnesses before the Tribunal were the Complainant and the Respondent. In some respects there is a clear divergence in the evidence expressed by the Complainant on the one hand and the Respondent on the other.
- 1.6 I shall deal with the difference in the evidence in addressing each parties case, however, it is noteworthy to record that the parties do agree on the following facts:-

- 1.6.1 That the Respondent was a “fair” Employer and the Complainant accepted that that was the case up until the incident of the 4th December 2005;
- 1.6.2 That the Complainant did have a history of lateness albeit minor, did on occasions play games on the PC and listened to music on his headphones;
- 1.6.3 That there was a heated exchange on the 4th December 2005 and that the Respondent did ask the Complainant to leave and go home.

2. THE CLAIM

- 2.1 The Complainant brings a Claim for unfair dismissal against the Respondent pursuant to Section 59 (1) of the Employment Act (“the Act”).
- 2.2 The Complainant avers that the actions of the Respondent in requesting him to “leave” and/or “go home” on Friday 4th December 2005 amounted to a dismissal. He seeks a finding of unfair dismissal in his favour claiming that the Respondent effected a summary dismissal without implementing a proper disciplinary process.
- 2.3 At paragraph 4 of the Originating Application lodged by him in the Industrial Tribunal (“the Tribunal”) on 28th February 2006 the Complainant identifies the grounds on which he claims the dismissal to be unfair as “*I do not accept that I committed the alleged disciplinary offences, or alternatively the correct disciplinary procedures were not followed*”. . At paragraph 14 when describing what, in his opinion, was the principal reason for dismissal he states “*Don’t know*”.

2.4 The Respondent filed a Notice of Appearance on the 12th March 2006. In the Notice the Respondent accepts that there was a dismissal and that the reason for this was gross misconduct. At paragraph 3 the Respondent sets out in some detail the grounds on which the claim is resisted which are as follows “*Constant lateness, being away from his place of work, disobeying a direct instruction to work at a particular site, playing computer game from 0800 to 0900 in the office with another member of staff instead of being at his place of work on the day he was dismissed*”. It is noted that the ETB notice of termination was prepared on similar terms. According to the Respondent this was completed on the 27th January 2006 after being chased by the Labour Inspectorate.

2.5 Despite the stance adopted in the Notice of Appearance the Witness Statement filed by the Respondent on 23rd January 2010 setting out his account of events and subsequently from his live evidence it became evident that the Respondent did not consider that the events of the 4th December 2005 amounted to a dismissal. He stated that his referral to dismissal was to the Respondent’s failure to return to the workplace on the following working day i.e Monday 7th December.

2.6 Although there was no formal application by the Respondent to amend his notice of appearance this is a case where neither side was represented by Counsel and where flexibility and I dare say informality in approach was adopted by both sides. I allowed the necessary latitude to both sides in that respect. Therefore in the interests of justice I do not propose to hold the Respondent to the contents of the notice of appearance but will assess the case based on an evaluation of the evidence as a whole and in particular will give due weight to the credibility of the live evidence given by each party.

3. COMPLAINANT’S EVIDENCE

3.1 In evidence the Complainant stated that the Respondent’s reaction on the 4th December 2005 had come out of the blue. He explained that on

Wednesday 2nd December he had been assigned to work at a block in Watergardens changing a fire alarm system from an old to a new system. He spent Wednesday and Thursday morning on the job and he then left on Thursday afternoon to attend a funeral, which he expressed was with the consent of his Employer.

3.2 On Friday 4th when he returned instead of going straight to Watergardens he went to the Office and sat there playing on the PC waiting for the other employee to arrive and to receive the Respondent's instructions. At approximately 9am the Respondent telephoned the Office and asked what he was doing there and told him to return to Watergardens to complete the works, which he did.

3.3 He claims that approximately 45 minutes later the Respondent arrived shouting at him that he was "*fucking useless*" and that he was told to go leave and go home. The Complainant adds that he was asked to return the keys to the Office and work moped.

3.4 The Complainant avers that he interpreted the Respondent's words and actions as a dismissal and therefore did not attend work on the following week only returning on Friday 11th December to receive his accrued wages.

3.5 The Complainant accepts that the Respondent had been a good employer up to that point but felt that the Respondent's behaviour was unjustified.

3.6 According to his evidence he commenced work with Balban Electrical contractors on a casual basis on Wednesday 9th December albeit that his contract specified Monday 7th December as the commencement date.

4. RESPONDENT'S EVIDENCE

4.1 The Respondent describes himself as a fair employer who remunerates his employees above the CATA basic rate and who rather deal with

disciplinary matters in an informal and constructive way than by way of written warnings and formal processes. He explained that the business was small and that productivity was vital to cash flow.

- 4.2 In his Witness Statement that he adopted as his evidence in chief he explained that timekeeping and attitude was a prevalent problem with the Respondent and that whilst he kept raising this with him and even organised a motivational course for employees this gave no positive results.
- 4.3 He explained in his evidence that the relationship between the Complainant and him was one of give and take but that he felt that at times all the Complainant did was take.
- 4.4 He relayed that in the weeks prior to the Complainant's departure he had been working at Watergardens installing a fire alarm system in a number of buildings. The work was described as straightforward and should have taken days to complete but the Complainant was taking weeks which was of concern to him. In the afternoon of the 3rd December, the day prior to the incident, the Complainant had left work to attend to a funeral without asking the Respondent for permission.
- 4.5 On the morning of the 4th December 2005 the Respondent tried to contact the Complainant by phone but was unable to make contact. At approximately 9am he contacted the Office and the Complainant picked up. The Respondent asked why he was not on site completing the works as he should have been there since 8am and the Complainant replied that as the other employee was late he was waiting for him to arrive and playing on the PC in the meantime. The Respondent avers that he instructed the Complainant to attend to Block 3 Watergardens without further delay as the works had to be completed on that day. He pointed out that he could not invoice the residents until the work was completed and that he needed to do so to ensure cash flow so that he could pay his wages.

- 4.6 At approximately 10am that morning the Respondent arrived at Block 3 and could not find the Complainant. After a while he went to Block 4 only to find the Respondent there, still wearing his jacket with the haversack on his back. He appeared to be working on a cool point. The Respondent confronted the Complainant as to why he had ignored his instruction to work at Block 3. He avers that the Complainant's attitude was surly and he said he preferred to work on Block 4. The Respondent states that they had a heated exchange and he recalls that he asked the Complainant to leave and go home and he finished the words instead.
- 4.7 When asked whether he had asked the Complainant to return the keys to the Office and moped he did not recall but was adamant in his evidence that he expected the Complainant to return to work on Monday when matters would have been discussed. He accepted that they had an exchange of words but at no point did he say to the Complainant that he was fired or that he should not bother returning to work or any words to that effect.
- 4.8 The Respondent explained that on Monday 7th December when the Complainant did not report for work he enquired about the Complainant with another employee and he was told that the Complainant had left and taken up employment with Balban Electrical Contractors. It was his evidence that this Employment commenced on Monday 7th December 2005. The ETB notice submitted by the Complainant verifies the 7th as the commencement date albeit that the Complainant avers that the contract was for work on Wednesdays, Thursdays and Fridays.
- 4.9 The Respondent claims that his reference to gross misconduct on the ETB notice and Notice of Appearance was meant to cover a series of incidents to include the Complainant disobeying his instruction to complete the works on Block 3 and his final act of not returning to work.

5. **LEGAL TEST TO BE APPLIED IN DETERMINING WHETHER AN EMPLOYEE HAS BEEN UNFAIRLY DISMISSED**

5.1 The central issue before this Tribunal that is, WHETHER THE COMPLAINANT WAS UNFAIRLY DISMISSED? must be determined by reference to the 3 limb test set out hereunder:-

5.1.1 Was the Complainant dismissed? If no, then that is the end of the matter.

5.1.2 If yes, was he dismissed for one of the permitted reasons (justifiable grounds) set out at Section 65 of the Act? If no, then the dismissal will be held to be automatically unfair. If yes, then the question at 5.1.3 below needs to be addressed.

5.1.3 Did the employer, in the circumstances, act reasonably or unreasonably in treating it as a sufficient reason to dismiss the employee? This question must be determined in accordance with equity and the substantial merits of the case.

6. **THE FIRST ISSUE – WAS THE EMPLOYEE DISMISSED BY THE EMPLOYER?**

6.1 The first issue that arises from the factual matrix above and which needs to be addressed is:

6.1.1 *Did the Respondent's request to the Complainant to leave and go home on Friday 4th December amount to a dismissal?*

6.2 The Complainant has stated in evidence that he understood the Respondent's request that he leave and go home as a dismissal. Having said this he accepts that the Respondent did not actually say to him anything to

the effect that he was fired or that he should not bother to return to work or any form of words to this effect. He premised the act of dismissal on his impression that because they had had a heated exchange and he had been told to go home that that meant that he was dismissed.

6.3 Neither party has referred me to any cases, which is understandable in the context that they are laymen. I have thus researched the authorities myself so as to seek the necessary guidance. The leading case of *Willoughby -v- CF Capital plc* EAT/0503/09 establishes the legal principle that unambiguous words of dismissal can only be retracted in exceptional circumstances. The same principle applies when an Employee uses unambiguous words of resignation. By unambiguous the Tribunal means words as clear as '*your employment is terminated*', '*you are fired*' or words to that effect which would leave the employee and indeed the reasonable listener with no doubt whatsoever as to the Employer's intention. In cases where unambiguous words are used, according to the EAT, the fundamental question is whether or not the person to whom the words were addressed was entitled to assume that the decision expressed was a conscious, rational decision. In those circumstances the Employer can in special circumstances retract.

6.4 However, the words used in this instance are far from unambiguous. The undisputed evidence on both sides is that the Respondent told the Complainant to leave and go home after a heated exchange. According to the Respondent he said nothing else, according to the Complainant's evidence he was told in the same context that he was "*fucking useless*" and he was asked to return the keys. The Complainant interpreted the words and actions to mean that he was fired whilst the Employer has declared that he expected the Complainant to return to work on the Monday. There is no independent evidence to support either account so the issue becomes one of credibility.

- 6.5 It is established law that it is essential to distinguish clearly words of dismissal from words which are equivocal and uttered in the heat of the moment. Where words are not obvious but the employee has interpreted them as amounting to a dismissal, tribunals have been counselled to concentrate on the employer's intention and the employee's reaction to it. In *Tanner -v- D. T Kean Ltd (1978)* the Respondent lost his temper on finding that the employee had taken the company's van and he said to the employee "*You're finished with me*". The EAT decided that these words were spoken in anger, and were not meant to be an effective dismissal. In *J & J Stern -v- Simpson (1983) IRLR 52* the Complainant was told to "*go, get out, get out*" by Mrs Stern who was ill at the time and had just overheard a heated discussion between her son and the Complainant. Again the Tribunal ruled that the words were not intended to be a dismissal and in *Futty -v- Brekkes (D & D) Ltd (1974) IRLR 130* a foreman had a conversation with an employee which ended with the foreman saying "*if you don't like the job, you can fuck off*". The Tribunal there decided that there was no dismissal, but only a "general exhortation".
- 6.6 When applying the law to the facts it is common ground that the Respondent was angry and that he told the employee "*to leave and go home*". Now it cannot be said that these words were unambiguous and this in itself is obvious from the evidence given by both parties. On the Complainant's own account he considered the Respondent to be a fair Employer and the reaction displayed by him on the day in question had come out of the blue. The Respondent on the other hand admitted that he was angry and that there was a heated exchange. He came across in his evidence as a frustrated Employer who had asked an Employee to undertake certain works and they remained unfinished. In the context of a small business of the nature run by the Respondent I have sympathy in understanding the pressure he was under to deliver on planned works.

- 6.7 What is clear from the Respondent's evidence is that he avers that he went no further than to ask the Complainant to leave and go home and that he never intended this statement to be a dismissal nor did he consider that the Complainant had understood it that way. I found the Respondent truthful in his account and his recollection and I do not believe that he either used words that would have been construed as a dismissal nor did he intend such a result. Moreover, I do not consider that the reasonable listener would have interpreted that the words spoken amounted to a dismissal.
- 6.8 The Employee would have been best served by returning to the workplace on the Monday and discussing matters with the Respondent instead of assuming a dismissal and setting off to obtain alternative employment thus severing his Employer – Employee relationship with the Respondent.
- 6.9 In conclusion this is a case where the evidence is finely balanced. After considering the totality of the evidence before me and assessing the credibility of the witnesses on a balance of probability I rule in favour of the Respondent. I do not consider that the Complainant was dismissed and hereby dismiss the Complainant's claim for unfair dismissal accordingly.

Gillian M Guzman
Chairperson

17th day of August 2011