

IN THE INDUSTRIAL TRIBUNAL

Case No. Ind Tri 29/2016

BETWEEN:

JOHNNY STUART THICK

Complainant

-AND-

ENDASH LIMITED

Respondent

DECISION

The decision of the Tribunal is that the Complainant was not unfairly dismissed by the Respondent.

Chairperson: Gabrielle O'Hagan
For the Complainant: In person
For the Respondent: Kathryn Moran, Litigaid Law

Facts and facts in dispute

1. The Complainant, Mr Thick, was employed by the Respondent as a Yard Storeman from 6 June 2006. Having taken sickness absence from work since October 2015, he issued an Originating Application in the Tribunal on 30 August 2016. This named the employer as A&M Scaffolding and stated that the grounds on which it was claimed that the dismissal was unfair were: "*I had an accident at work last year and he is not admitting it and I have not received no monies since December*". In response to the question of what, if the Complainant was dismissed, in his opinion, was the principal reason for the dismissal, Mr Thick stated: "*he is trying to force me out on medical grounds where 3 months ago he was going to lay me off. He has changed the accident report which means I am not receiving any monies i.e. social*". He attached to the Originating Application an ETB Termination of Employment Form signed by R. Cross, Managing Director of Endash Limited, dated 12 August 2016 ("**the Termination Form**"), which stated the date of termination of employment (and date of notice) as 5

May 2016 and the reason for termination: "*retired on medical grounds*". The Termination Form is not signed by Mr Thick or stamped by the ETB.

2. In the Respondent's Notice of Appearance Grounds of Resistance filed on 13 September 2016, the Respondent stated: "*The Complainant has not been dismissed by Endash Limited. The Complainant simply has not returned to work following a period of sick leave*".
3. The Respondent denies that Mr Thick suffered an accident at work. It says that on 26 October 2015, Mr Thick attended work as normal and was told that he would be driving that day. He then absented himself to go to the hospital from where he telephoned to say he was having his back checked. He did not return to work. On 29 October 2015, Mr Thick's wife attended the Respondent's office with 2 sick notes - for sciatica and lumbago with sciatica. Further sick notes were provided covering most of the period until 21 March 2016. The Respondent says that sick pay was paid to Mr Thick until 8 January 2016 (under the applicable CATA agreement).
4. The Respondent says that the first mention of an accident at work by Mr Thick was on 9 March 2016, "*some 5 months after he allegedly suffered*" the accident, when he attended the Respondent's office with an accident at work document, which referred to an accident having occurred on 23 October 2015. The Respondent says that this followed Mr Thick being advised by the DSS that he would receive no further benefits unless his illness was caused by an accident at work. The Respondent says that it completed the form, confirming that no accident at work had been reported by Mr Thick or anyone else, and returned this to the Health and Safety Officer, as requested.
5. The Respondent goes on to say that on 5 May 2016 Mr Thick attended the Respondent's office and informed the Respondent that he wished to resign. The Respondent completed an ETB Termination of Employment Form ready for him to sign when he came back in. However, when Mr Thick did come back in some weeks later, he had changed his mind and said that he did not wish to sign it. The Respondent says: "*We accepted his position although we understand that this was as a result of the Complainant being informed by the ... DSS,,, that he would not be receiving any further payments*".
6. On 19 May 2016, the Respondent made a loan to Mr Thick of £800.
7. According to the submissions made by the Respondent for Hearing on 22 March 2017 (dated 8 March 2017), in August 2016, Mr Thick again attended the Respondent's office and again informed the Respondent that he wished to resign. The Respondent completed the Termination Form, signed it and dated it 12 August 2016 (with the termination date being given as 5 May 2016) and Mr Thick later came in and asked to take the Termination Form away for review. Mr Thick did not come back to the office.
8. The Respondent's position is that it has "*always endeavoured to allow the Complainant the opportunity to return to work when he is physically able*".
9. Mr Thick denies that he informed the Respondent that he wished to resign and he said in evidence that it was being given the Termination Form that he viewed as constituting

his dismissal by the Respondent. He also said that the reason he did not sign the Termination Form was because he was advised not to do so by the DSS.

10. The matter came before this Tribunal for Preliminary Hearing on 11 October 2016. Neither party was represented. Given the contents of Mr Thick's Originating Application, which did not substantiate the fact of dismissal and the Respondent's denial of the same, I made an Order that a Hearing be listed to determine the preliminary issue of whether Mr Thick had been dismissed (and that 2 days before the hearing the parties exchange evidence and submissions). As a result of neither party being legally represented, I explained at the 11 October 2016 Preliminary Hearing and spelled out in the Order that "dismissed" meant that Mr Thick's contract of employment had been terminated by the Respondent or Mr Thick had terminated his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct (Section 64(2) of the Employment Act).
11. This preliminary issue Hearing was listed for 19 October 2016, but postponed to 15 November 2016 and then to 14 December 2016, at the parties' request. In that period, Mr Thick retained Ullger Chambers to represent him and the Respondent retained Litigaid Law. At the preliminary issue Hearing on 14 December 2016, I accepted that Ullger Chambers had not been advised of the 11 October 2016 Order (as by then amended) and made an Order that the preliminary issue would be heard at a further Hearing on 1 March 2017. Given that the Originating Application did not include sufficient information for the Respondent to identify the particulars of Mr Thick's claims, so that it could prepare a defence, I also ordered, *inter alia*, that Mr Thick file and serve an amended Originating Application with the correct Respondent name and with full particulars of each of his complaints to be considered.
12. On 13 January 2017, Ullger Chambers applied to come off the record for Mr Thick and this was granted.
13. By letter dated 8 March 2017, Litigaid Law for the Respondent made submissions in support of the Respondent's case that Mr Thick had not been dismissed and also made an application for Mr Thick's Complaint to be struck out due to Mr Thick not having particularised (or substantiated) his claim for unfair dismissal, as an abuse of process and due to Mr Thick not having complied with the 14 December 2016 Order.
14. On the application of Mr Thick, to which the Respondent objected, I granted a last postponement of the Hearing to 22 March 2017. Mr Thick said that he needed the time because he was in the process of instructing a new lawyer.
15. At the Hearing on 22 March 2017, the Tribunal heard submissions and evidence from Mr Thick (still unrepresented) and submissions from Ms Moran of Litigaid Law. Mr Cross, Managing Director of the Respondent, was also present.
16. Mr Thick had not prior to the Hearing filed written submissions or evidence, nor had he complied with the 14 December 2016 Order that he file and serve an amended Originating Application with the correct Respondent name and with full particulars of each of his complaints to be considered. As a result, Mr Cross having previously confirmed that Mr Thick's employer company was Endash Limited, I ordered at the

commencement of the 22 March 2017 Hearing that the name of the Respondent in these proceedings be amended to Endash Limited.

The law

Dismissal

17. Section 59 of the Employment Act provides:-

"Right not to be dismissed unfairly.

59.(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer."

18. Section 64 provides:-

"Interpretation.

...64.(2) ... an employee shall be taken to be dismissed by his employer if, but only if

(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice;

...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

19. The burden of proving that a dismissal has occurred is on the employee.

Strike out

20. Rule 16(1) of the Industrial Tribunal Rules provides that: "*Subject to the provisions of these rules, the tribunal may regulate its own procedure*". This has been held to include power to strike out a claim if it would be just and fair to do so (Ruiz-v-Gibdock Limited (Ind Tri 3/2012) dated 10 June 2015) and also power to exclude a party who has failed to comply with the Tribunal's orders from further participation in the proceedings (Barwil Agencies Limited-v-Salmon (1997-98 Gib LR)). In Barwil, it was held: "*By r.16(1), the Tribunal may regulate its own procedure. That must include sanctions similar to those of the Supreme Court to hold a party out of its process if that party proves himself unworthy of access to it. ... It should be remembered that it is only where there is a real risk that justice cannot be done that a party should be excluded from the proceedings*".

21. Applications are brought under Rule 17(2): "*a party may at any time apply to the tribunal for directions on any matter arising in connection with the proceedings*".

Costs

22. Costs are governed by Rule 15 of the Industrial Tribunal Rules:-

"Costs.

15.(1) Subject to subrules (2) and (3), the tribunal shall not normally award costs but where in its opinion a party to any proceedings (and if he is a respondent whether or not he has entered an appearance) has acted frivolously or vexatiously the tribunal may make an order that that party shall pay to another party either a specified sum in respect of the costs incurred by that other party or, in default of agreement, the taxed amount of those costs.

(2) Notwithstanding the provisions of subrule (1) where on the application of a party to the proceedings the tribunal has postponed the day or time fixed for the hearing or has adjourned the hearing, the tribunal may make orders against that party as at subrule (1) as respects any costs incurred as a result of the postponement or adjournment."

Decision

Was Mr Thick dismissed?

23. As a result of Mr Thick failing to file any submissions or evidence prior to the 22 March 2017 Hearing, the available evidence relevant to this issue was limited to the contents of the letter from Litigaid Law dated 8 March 2017, the Notice of Appearance, the Originating Application with the Termination Form and the oral submissions and evidence given by Mr Thick. During the Hearing, Mr Thick referred several times to recordings of conversations he had had with Mr Cross, but he had not put these into evidence. Equally, at the Hearing, Ms Moran also referred to witness evidence, but again this had not been filed and was not before me at the Hearing.
24. The Respondent's position has always been that it has not terminated Mr Thick's employment and that indeed he is still employed. It was submitted at the 22 March 2017 Hearing that had the Respondent wanted to terminate Mr Thick's employment, it could and would have done so.
25. Mr Thick's position at the 22 March 2017 Hearing was that he had not resigned, but that he was dismissed (on medical grounds) by the Respondent effective 12 August 2016, the termination resulting from the Termination Form, which he denied was only prepared following his telling the Respondent he wanted to resign.
26. Mr Thick also completely denied the 5 May 2016 meeting described by the Respondent in its Notice of Appearance in which the Respondent alleges Mr Thick came to the office to put in his resignation for the first time.
27. Mr Thick consistently responded to direct questions I put to him that he had not resigned. On the basis of Mr Thick's own submissions, I can therefore only examine

whether Mr Thick was dismissed by the Respondent as per Section 64.(2)(a) of the Employment Act: Mr Thick's employment contract was terminated by the Respondent.

28. Having weighed up all these matters and the available evidence and submissions, I do not accept Mr Thick's denial that he put in his resignation. It is implausible that the Respondent would have prepared the Termination Form, entirely unprompted by Mr Thick, without any reason, without any discussion, in the full knowledge that these forms ideally have to be signed by employees for filing at the ETB. Further, the fact that the Termination Form was not filed at the ETB, that the Respondent apparently never completed a P7A or any other tax/social security termination documentation for Mr Thick and that Mr Thick remains on the Respondent's list of employees (attached to Litigaid Law's 8 March 2017 letter), in my view, makes it more likely than not that the Respondent did not intend by its completion of the Termination Form to dismiss Mr Thick and was waiting for Mr Thick to advise what he intended to do, including in respect of the Termination Form. Mr Thick himself appeared to concede at the 22 March 2017 Hearing that he believed that his refusal to sign the Termination Form meant that his employment would not terminate. In response to a direct question I put to him as to what he thought the effect of not signing the Termination Form was, given that this created the impression that he did not want his employment terminated, Mr Thick agreed and said that he did not want his employment terminated because he wanted what he was entitled to.
29. The only evidence I heard contrary to this finding is that the Respondent has not paid Mr Thick any holiday pay since his absence from work, although his employment has not been terminated; and this was not in dispute. However, the Respondent's position on this was that it did not believe it owed Mr Thick any holiday pay and on balance I am inclined to accept this explanation.
30. Mr Thick has thus not established on the balance of probabilities that the Respondent dismissed him or even that the Respondent intended to terminate his employment contract. All that he has established is that the Respondent completed the Termination Form. Although dismissal may be implied from an employer's conduct, the Termination Form was never filed at the ETB, no other conduct by the Respondent inconsistent with the employment contract has been proffered and the conduct of the Respondent following the date of the Termination Form shows rather that the Respondent viewed the employment contract as alive. The relationship remained in stasis with neither party communicating to the other that it had terminated, in either party's view.
31. Obiter, it seems to me that, on the facts available, Mr Thick might have had a stronger case for constructive dismissal under Section 64.(2)(c) of the Employment Act i.e. that he treated being given the Termination Form and the surrounding circumstances as bringing his employment contract to an end and so resigned in response; but Mr Thick chose not to plead such a constructive dismissal case.

Strike out

32. Given my finding that Mr Thick was not dismissed, the Respondent's strike out application does not need to be considered. However, for completeness, I also find for

the Respondent on this application. Mr Thick had more than 3 months between the 22 March 2017 Hearing and the 14 December 2016 Order to file and serve an amended Originating Application with the correct Respondent name and with full particulars of each of his complaints to be considered. He also retained at least one set of lawyers in that period. As a litigant in person, Mr Thick is not to be held to the same standards as lawyers. However, given the number of preliminary hearings and the guidance and explanations I have given him, he should have been able to understand that he was required to prepare an amended Originating Application, including particulars of dates and events in order to form the basis of his complaints. However, on 22 March 2017, the Originating Application still remained un-amended and so failed to formulate a valid claim against the Respondent. It is my finding that this was extremely unfair to and prejudiced the Respondent as 7 months after the Originating Application was served it still did not know the basis or details of the case it was supposed to be answering.

33. In addition, Mr Thick failed to comply with the Order that he file submissions and evidence in advance of the 22 March 2017 Hearing. This breach resulted in Mr Thick prejudicing his own position at the Hearing, since very little evidence and submissions supporting his case were before me.

Costs

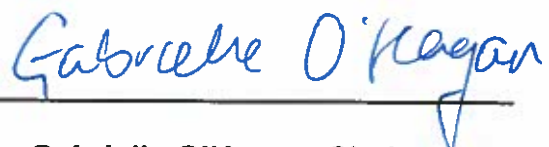
34. Ms Moran for the Respondent has applied for a costs order to be made against Mr Thick on the grounds that Mr Thick had acted vexatiously. Ms Moran did not pursue this application particularly vigorously, against the background of the reminders I gave her at the 22 March 2017 Hearing (and also previously) that costs orders under Rule 15 of the Industrial Tribunal Rules are quite rare and that the vexatious conduct ground generally requires the employer to show that the employee has brought a hopeless claim not with any expectation of recovering compensation but out of spite to harass his/her employers or for some other improper motive. Despite Mr Thick's breach of the case management Orders considered above, I do not consider that the necessary impropriety on the part of Mr Thick was established in this case, rather a misconceived claim ab initio and a failure by Mr Thick to come to grips with the Tribunal proceedings, as is often the case with litigants in person. I decline to make any Order as to costs.

Conclusion

35. Mr Thick has failed to prove that he was dismissed by the Respondent. I therefore find that Mr Thick was not unfairly dismissed.

36. Even if I had found otherwise, I would have struck out all of Mr Thick's Claim No. 29/2016 on the grounds that, as drafted, it has no reasonable prospect of success and Mr Thick did not comply with Tribunal Orders, inter alia, to amend the same.

37. No Order as to costs.



**Gabrielle O'Hagan, Chairperson
5 April 2017**