

JERSEY / JUDGMENT

Daimon Clarke v Window Glaze Servicing Limited

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IN THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER: BETWEEN
DAIMON CLARKE CLAIMANT AND WINDOW GLAZE SERVICING LIMITED RESPONDENT
TRIBUNAL JUDGMENT Reference: [2020] TRE 181 Hearing Date: 8 March 2021 Before: Advocate F
B Robertson, Deputy Chairman Appearance: For the Claimant: In Person For the Respondent: Mr
Neil Keeble, Managing Director of the Respondent THE DECISION For the reasons set out below
the Claimant's claims for Unfair Dismissal and Unpaid Holiday Pay are rejected. The Respondent
shall pay the Claimant £720.00 compensation for its failure to provide Pay Statements.

REASONS

Introduction

1. By a Claim Form presented on 19 October 2020 the Claimant brought the following complaints: (i) Unfair Dismissal (ii) Accrued but unpaid holiday pay (iii) Failure to provide itemised pay statements 2. In summary, the grounds for the Complainant's claims in the Claim Form were that: (i) the Respondent dismissed the Claimant on grounds of redundancy without following any process and at a time when new staff were being taken on. (ii) the Respondent ascribed holiday days to the Claimant on days when he was contracted to work but was told not to do so as there was insufficient work for him to do. (iii) the Claimant was not provided with any payslips on or before the date he was paid. 3. By a Response Form dated 9 November 2020 the Respondent denied the Claims. In summary, the Respondent's defence was that: (i) in the circumstances a fair redundancy procedure was followed. (ii) the Claimant would have been dismissed in any event and/or the Claimant contributed to his dismissal through his own conduct. (iii) the Respondent accepted that payslips were not provided at the time of payment but asserted that all payslips had now been provided. 4. The Respondent also asserted a Counterclaim in relation to alleged losses as a result of the Claimant allegedly failing to work his contracted hours. The Counterclaim was withdrawn at the substantive Hearing of this matter. 5. The Tribunal received written evidence and heard oral evidence from the Claimant and Mr Keeble on behalf of the Respondent. 6. When making this Judgment I considered all of the evidence, both oral and written, provided by each of the Parties and made findings of fact as set out below. In this Judgment only the facts that are relevant to the issues to be determined have been summarised. Where there have been factual disputes to resolve, I have done so on the basis of my assessment of the

credibility of the witnesses and the consistency of their accounts with the rest of the oral and written evidence. Material Facts and Evidence 7. The Claimant commenced work with the Respondent (a glazing company which also conducts small building works) on 30 July 2018 and was employed until 28 September 2020. His rate of pay was £720 per week. The Respondent's Statement of Terms of Employment in relation to the Claimant dated 30 July 2018 describes the Claimant's Position Title as "General Builder". The Claimant asserted in his evidence that although he was employed originally to carry out decking and other small building works, subsequently the vast majority of his time was spent window fitting with the other two employee window fitters, and occasionally he was instructed to fit windows on his own. This was denied by Mr Keeble. Mr Keeble's clear evidence was that the Claimant was simply employed to undertake general building duties and was never instructed to install windows or doors as he was not a trained or qualified window or door installer as claimed. Whilst the Claimant was very occasionally asked to assist the window installers on site for lifting and holding frames in place, his primary role was to undertake general small building duties. I find the evidence of Mr Keeble is to be preferred on this aspect. 8. The evidence of Mr Keeble was that the performance of the Claimant at work was unsatisfactory in that he often left site early and turned up late on a regular basis. This was supported by an undated letter from Mr Dean Lawrence (one of the Respondent's two employed window fitters) who did not however give oral evidence. These assertions were denied by the Claimant. Mr Keeble gave further evidence that on at least a couple of occasions customers were very concerned by the conduct of the Claimant on site and did not wish the Claimant to return to carry out work for them. This was supported by a letter dated 30 June 2020 from a Mr Neil McEwan in which the writer stated he was "appalled by (the Claimant's) behaviour" and concluded by stating "I don't want him on any of my jobs or coming to my house". The Claimant in his evidence stated that Mr McEwan was a friend of Mr Keeble and that he had no idea why Mr McEwan should make the comments in the letter about him. The Claimant further indicated that the incident was never discussed with him by the Respondent. There was also in the Tribunal bundle a letter dated 13 February 2020 from a Mr Josh Wilde, a Site Foreman for Ashby Construction. In the letter Mr Wilde made a number of complaints about the Claimant's behaviour and concluded by stating they were not prepared to have the Claimant on site in the future. The complaints included allegations of the Claimant "getting fiery" around other employees and threatening "to knock out" another employee. The Claimant indicated he had no recollection of that alleged incident and denied the other allegations. It was accepted that the Respondent did not raise the matters alleged with the Claimant. 9. Whilst the matters referred to above are not material to the grounds for dismissal, in carefully assessing the evidence and demeanour of the witnesses I concluded that the evidence of Mr Keeble was more credible and to be preferred to that of the Claimant. 10. Mr Keeble gave further evidence that the Respondent's business had decreased dramatically during the period April – August 2020 as a result of the Covid-19 pandemic. In particular there was a very significant decrease in the amount of general small building work which was carried out by the Claimant. The Respondent's other two employees, Robert Garnier and Dean Lawrence were qualified and experienced window and door fitters and

there remained window fitting work for them to carry out. In addition, the Respondent had to employ a new window fitter technician on 13 July 2020 as Mr Keeble had to spend more time in the office to concentrate on promoting sales in the Respondent's showroom. None of the window fitters were requested to carry out, or carried out any general building works, as that was solely within the domain of the Claimant. 11. Mr Keeble's evidence continued that the general building work was in sharp decline in 2020 (as Mr Keeble put it "there was no work for the Claimant to carry out"). On or about 3 September 2020 Mr Keeble, having informed the Claimant that there was no work for him, asked the Claimant if he would carry out general building work at a new property he had recently purchased. The Claimant reacted angrily and swore repeatedly at Mr Keeble indicating in very firm terms that there was no way he was going to work at Mr Keeble's property. A few days later according to Mr Keeble the Claimant stormed into Mr Keeble's office demanding a pay rise to £27 per hour (from £18 per hour). The following day the Claimant again asserted that he was not going to work at Mr Keeble's house but indicated he wanted to be paid £22 per hour. The Tribunal was shown a letter dated 5 February 2021 from Mr Garnier which stated "This is to confirm that whilst working with Daimon Clarke at Window Glaze he made it very clear that he was in no way prepared to work at Neil's new house". 12. The Claimant in his oral evidence denied that he had sworn at Mr Keeble and stated that he had simply informed Mr Keeble that he was unable to work at Mr Keeble's new property as it was too big a job for him. In his written statement dated 23 November 2020 the Claimant however stated "I asked about working at Mr Keeble's house and he told me he had already got a firm in to do the work". As regards the pay increase issue the Claimant indicated in his said written statement; "I did ask Mr Keeble for a pay rise. He asked me what I would like, I said £22 per hour. 13. In relation to the matters referred to at paragraphs 11 and 12, I have no hesitation in finding the Respondent's evidence the more credible and to be preferred to that of the Claimant. 14. The parties agreed that following the discussions on or about 3 September 2020 the Claimant took a day's holiday on 16 and 18 September and a week's holiday during the period 21 – 26 September

2020. Following the Claimant's return to work on Monday 28 September, Mr Keeble and the Claimant had a telephone conversation. Mr Keeble's evidence was that during the conversation he again told the Claimant there was no work for him to do and that he had to "let him go". The Claimant's evidence was largely in accordance with this. The Claimant stated that in the conversation Mr Keeble had said he was having to "lay (the Claimant) off" and was "making him redundant". 15. Following the conversation, Mr Keeble wrote to the Claimant that day in the following terms: "This is to confirm that your employment with Window Glaze Servicing ended with immediate effect on Monday 28 September 2020. Period of notice as per signed contract 4 weeks full pay Redundancy 2 weeks full pay Holiday entitlement 3 days remaining The above will be deposited by bacs payment Friday 2 October". 16. It is to be noted that the Terms of Employment provided for 2 weeks' notice. (The Claimant was in any event entitled to 2 weeks' notice as a matter of law given the length of his term of employment). In any event Mr Keeble confirmed that the sums

referred to in the letter of 28 September 2020 were paid to the Claimant. The Claimant accepted this. The Law 17. Article 2 Employment (Jersey) Law 2003 (“EJL”) provides as follows: “2 Redundancy (1) For the purposes of this Law an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to- ... (b) The fact that the requirements of that business – (i) for employees to carry out work of a particular kind...have ceased or diminished or are expected to cease or diminish. 18. The burden of proof falls on the employer to show the reason for the dismissal and in this case, the Respondent submitted that the reason for the Claimant’s dismissal was redundancy. The leading case is Safeway Stores plc v Burrell [1997] IRLR 200 (EAT) which was approved by the House of Lords in Murray and another v Foyle Meats Ltd (Northern Ireland) [1999] IRLR 562. In Safeway, the EAT set out a three-stage test for applying the English law equivalent to Article 2 EJL 2003.

- a) was there a dismissal?
- b) if so, had the requirements of the business for employees to carry out work of a particular kind ceased or diminished?
- c) if so, was the dismissal of the employee caused wholly or mainly by that state of affairs? 19. Only if the answer to all three stages of the above test is ‘yes’ will there be a redundancy dismissal. 20. The parties agreed that the Claimant was dismissed. The first part of the three-stage test for redundancy was therefore satisfied. 21. As to the second limb of the test, I am satisfied on the evidence that the requirements of the Respondent for employees to carry out general building work or work other than qualified window or door fitting work had ceased or diminished. 22. As regards the third limb, I am satisfied on the evidence that the Claimant’s dismissal was entirely due to the lack of any work for him to do. 23. In view of these findings, I conclude that the Claimant’s dismissal was by reason of redundancy. Fairness of dismissal 24. Article 61 EJL 2003 states that an employee has the right not to be unfairly dismissed and Article 64 governs the fairness of a dismissal. Article 64(2) sets out four potentially fair reasons for dismissal, one of which is redundancy. 25. Article 64(4) EJL 2003 in essence provides that, when assessing the fairness of a dismissal, the Tribunal must consider all the circumstances of the case (including the size and administrative resources of the employer’s business) in determining whether or not the employer acted reasonably in making the employee redundant. The Tribunal in reaching its view shall have regard to the substantial merits of the case. 26. The key principle is that it is not for the Tribunal to substitute its own opinion for that of the employer. Rather, the Tribunal’s role is to determine whether the employer has acted in a manner in which a reasonable employer might have acted in the circumstances of the case. A summary of the relevant authorities is to be found in the decision of the Royal Court in *Voisin v Brown* [2007] JLR 141, which has been considered. 27. As a general rule, an employer is normally expected to give as much advance warning of redundancy as is reasonable and to consult with an employee as part of the redundancy process. As stated in *Voisin v Brown* however, it is important to note that it is not the case that any failure to follow the procedural requirements will necessarily result

in a finding of unfair dismissal. As indicated in *Polkey v AE Dalton Services Limited* [1988] AC. 344 in passages approved by Voisin. “If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by [Article 64(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [Article 64(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [Article 64(4)] may be satisfied”. Lord Mackay...was of a similar view.. If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not [carry out a consultation]. Failure to observe the requirement...relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.” 28. The Tribunal must therefore determine whether the process which was adopted was one that a reasonable employer might have adopted in the circumstances of the case. 29. In this case whilst the Respondent did not expressly warn the Claimant of the risk of redundancy, the Tribunal finds on the evidence that there were discussions between Mr Keeble and the Claimant in at least early September 2020 that there was little or no work for the Claimant to undertake. Further, there was an offer made to the Claimant to carry out building works at Mr Keeble’s property given that there was no other work available to him from the Respondent. Whilst there was no formal warning of redundancy or formal consultation with the Claimant, I find in the circumstances of the case (including that the Respondent is a very small company employing only 3 trained window fitters and that the Claimant was the only employee employed to carry out general small building works) that any further formal procedural redundancy steps including consultation would have been futile and could thus be dispensed with. In light of the findings above, I conclude that the Respondent’s decision to dismiss the Claimant on the grounds of redundancy was fair. Consequently the Claimant’s claim of unfair dismissal fails. Under Article 60C EJR the Claimant was entitled to two weeks’ redundancy pay, which was paid by the Respondent. Holiday Pay 30. The Terms of Employment provided that the Claimant was entitled to 15 days’ holiday per annum and that the Respondent’s holiday year ran from 1 January – 31 December. There was a significant dispute between the parties as to the amount of holiday taken by the Claimant in 2020, one of the main issues being the extent to which the Claimant was forced to take holiday if there was no or insufficient work for him to do. For the reasons set out below it is, however, not necessary to determine this issue. 31. In an updated schedule dated 8 March 2021, the Claimant claimed he had taken 9 days’ holiday in 2020 and claimed for 5 days unpaid holiday (as he believed he was entitled to 14 days’ holiday per year). As indicated above, the Claimant

was entitled to 15 days' holiday per year. Given he was made redundant at the end of September 2020, his pro rata entitlement for 2020 was thus 9/12 of this ie 11.25 days. Thus on the Claimant's own calculations he was entitled to an additional 2.25 days' holiday. It was however accepted by the Claimant that he was paid an additional 3 days' holiday pay following the redundancy. There is thus no outstanding holiday entitlement and this claim fails. Itemised Pay Statements 32. The Claimant claimed he had never received pay statements at the time or before wages were paid. This was accepted by the Respondent. The Respondent alleged that all outstanding pay statements had now been provided. The Claimant in his memorandum dated 8 March 2021 asserted he was still missing a significant number of pay statements. 33. Article 51 EJJ provides that an employee must be given written itemised pay statements at or before the time the payment of wages is made. Article 54 EJJ grants a discretion to the Tribunal to pay compensation to the employee of an amount not exceeding 4 weeks' pay in relation to a failure to provide pay statements in accordance with Article 51 EJJ. 34. The Tribunal declares that the Respondent failed to provide the Claimant with pay statements in accordance with Article 51 EJJ and orders the Respondent to pay compensation to the Claimant of one week's pay, namely £720.00.

Conclusion

35. The Claimant's claims for unfair dismissal and outstanding holiday pay are rejected. The Claimant is awarded £720.00 compensation in relation to the Respondent's failure to provide pay statements in accordance with Article 51 EJJ. Advocate F B Robertson, Deputy
Chairman Date: 19 April 2021

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