EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4100159/2017

Held in Glasgow on 4 May 2017

Employment Judge: F Jane Garvie

Mr D Sharkey	**Claimant** **Represented by:-** **Mr D Stillie – Solicitor**
Dalriada Scaffolding Ltd	**Respondent** **Represented by:-** **Ms L Walker – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim should be dismissed.

REASONS

Background

1. In his claim, (the ET1) presented on 23 January 2017 the claimant alleged that he was unfairly dismissed. He gave as the date of dismissal 5 October 2016. Attached to the claim form was an ACAS Early Conciliation notification with a date of receipt of 15 December 2016 and a date of issue of 16 January 2017. By letter dated 24 January 2017 the respondent was advised that the claim had been accepted and a response required to be lodged by 21 January 2017. By letter dated 6 February 2017 Mr Stillie's firm advised they were now representing the claimant. That was acknowledged and copied to the claimant by letter dated 8 February 2017.

2. A response, (the ET3) was received under cover of an e-mail of 21 February 2017. The respondent resists the application alleging that there was no dismissal of the claimant.

3. This was acknowledged by letter dated 21 February 2017. An Order was issued dated 22 February 2017 setting out various directions on the Order of Employment Judge Laura Doherty.

4. Notices were issued to the parties on 8 March 2017 advising that the Final Hearing would take place on 4 and 5 May 2017 and that it would be heard by an Employment Judge sitting alone. There had been an earlier Notice issued in error which mentioned 8 May 2017.

5. By e-mail dated 23 March 2017 Ms Walker noted that information had been provided on behalf of the claimant to her by letter dated 15 March 2017. This was acknowledged by letter dated 27 March 2017.

The Final Hearing

6. At the start of the Final Hearing it was noted that in the ET1 the claimant gave his start date of employment as 1 March 2000. In the ET3 the respondent disputed this, asserting that the claimant's start date was 23 July 2012 since although the claimant had previously been employed by the respondent this was between 7 August 2006 and 22 June 2012 and so there was no continuous employment. Accordingly, the start date that is relevant is 23 July 2012. This was accepted for the claimant.

7. It was confirmed that the claimant would give his evidence first followed by that of his witness since dismissal is not admitted by the respondent.

8. Evidence was given by the claimant and by a Mr Kevin Haywood who is a Trainee Scaffolder with the respondent.

9. Evidence was given on behalf of the respondent by Mr Colin Beattie who is a Director of the Company and the respondent's General Manager, Mr Jarad Boyd.

Findings of Fact

10. The Tribunal found the following essential facts to have been established or agreed.

11. It was accepted by both parties that the claimant's employment came to an end on 5 October 2016. It was not agreed between the parties as to whether there had been a dismissal as the claimant contends or a resignation as the respondent contends.

12. The respondent was employed by the respondent as a qualified Scaffolder. He was a site supervisor which means that he can be in charge of a squad of men involved in erecting and dismantling scaffolding.

13. On 5 October 2016 the claimant was working alongside Mr Haywood who is a trainee Scaffolder at a site in Kilmarnock. This site was a residential site where a new build property was being constructed. The respondent had a contract with the main contractor to carry out the erection and dismantling of scaffolding.

14. The claimant was aware that there was not much room on this site as it was a very restricted space. There had been a delay in starting the erection of the scaffolding as permission had to be sought from the neighbouring property's owner to allow the Scaffolders to erect part of the scaffolding in their garden. That permission was sought by the site agent but obtaining the neighbour's permission meant that the work did not start as soon as anticipated.

15. There was in addition a further complication in that a trench was being dug at the front of the site. This made it was quite difficult to manoeuvre the scaffolding into position. By 5 October 2016 the claimant and Mr Haywood had been on site for three days so this was their fourth day on site.

16. At around 11am Mr Beattie arrived at the site. The claimant maintained that he said to him "Hello Colin, Are you alright?" He heard Mr Beattie mumble something "under his breath" which caused the claimant to again ask if Mr Beattie was alright followed by asking him, "Is it the job?" Mr Beattie responded saying, "Give me a minute David, I want a word with Kevin".

17. The claimant saw Mr Beattie and Mr Haywood go inside the building which was under construction. He thought there was some discussion but he could not hear what was being said. The claimant carried on with the scaffolding which was being erected.

18. Mr Haywood reappeared and the claimant asked him what Mr Beattie had said to him. He understood from Mr Haywood that Mr Beattie asked him (Mr Haywood), "Are you not bringing the materials fast enough for Davie to erect the job?" Mr Beattie then went on, "It doesn't matter the job is on a price anyway".

19. The claimant understands that when a job is "on a price" this means that the employees, including the claimant, are paid by the square metre rather than being paid an hourly rate. The claimant responded when Mr Haywood told him this by saying, "It is not on a price". At this point the claimant saw Mr Beattie standing in front of him.

20. The claimant was asked whether he had carried out an alteration for the joiners who were on site. The claimant responded that the alteration had already been done.

21. Mr Beattie then said, "The job is on a price anyway". The claimant replied, "No its not – we get paid by the hour". Mr Beattie replied, "Aye it is".

22. The claimant accepted he swore saying, "Is it f***".

23. Mr Beattie responded to the claimant saying, "If you don't like it you can fuck off".

24. The claimant could tell that Mr Beattie was very angry. He knew this by the tone of his voice.

25. The claimant had already formed the impression that Mr Beattie was angry when he arrived on site in the first place.

26. Mr Beattie had never addressed the claimant in this way before. The claimant understood that by saying this to him Mr Beattie intended that the claimant was "sacked" and that he should go/leave.

27. The claimant immediately removed his spanner belt and walked to the lorry which was parked at the site. He strapped the lorry down and headed back to the respondent's yard which was a couple of miles away from the site.

28. He returned to the yard to drop off the lorry and collect his car which was parked there as usual during the day.

29. The claimant felt "gutted" by Mr Beattie's reaction. He was feeling very emotional in any event as his 5 year old granddaughter had been very seriously ill for some weeks and he was aware that Mr Beattie knew this too.

30. When the claimant arrived at the yard he parked the lorry. As he was walking towards his car the General Manager, Mr Boyd came up and spoke to him. The claimant explained what had happened on site. He believed that Mr Boyd replied, "Colin doesn't give a shit about anybody". Mr Boyd did not recall making this remark

31. The claimant told Mr Boyd what had happened.

32. The claimant denied he then said to Mr Boyd, "You can ram it" meaning the job. Mr Boyd was clear that this was what the claimant said to him. He was also very clear that the claimant was angry when he spoke to him in the yard.

33. The claimant accepted that the discussion between himself and Mr Beattie on the site had been heated. The claimant denied saying to Mr Boyd that he had said he was leaving his employment, that is that he was resigning.

34. As to the events on site on 5 October 2016, Mr Haywood confirmed that following his discussion with Mr Beattie which was along the lines of Mr Beattie asking him questions about the site and what was happening, Mr Beattie then left Mr Haywood and went to speak to the claimant. Mr Haywood was by then about five feet away from then and so he overheard what was discussed.

35. He heard the claimant explain to Mr Beattie the problems on the site in that it was a tight site and the difficulties with the trench being dug at the front of

the property and that access to the next door neighbour's garden was required.

36. Mr Haywood was very clear that he overheard Mr Beattie say to the claimant "If you don't like it you can f*** off". Mr Haywood understood from this that the claimant was being told to leave the site and leave the job. He did not know how else to take it. It was "pretty much" that Mr Beattie told the claimant "to go".

37. After the claimant and Mr Beattie had left the site Mr Haywood did not know what to do. He was flustered so he telephoned Mr Boyd. He asked him what he should do. He understood from Mr Boyd that he would send someone else out to the site and so he, Mr Haywood, could stay working at the site. Mr Haywood knew he could not continue working on site alone as he was a trainee and so unqualified.

38. While Mr Beattie was at a local bank he had been called on his mobile phone by the administrative staff in his office to say that they had received a call from the site agent or contractor as there seemed to be an issue with the site. Mr Beattie had his car outside the bank which was close to the site so he drove there, accompanied by his son who was sitting in the car. When they arrived on site his son remained in the car.

39. Mr Beattie went to the site to see what was happening. Mr Beattie understood that Mr Haywood is a relative of the claimant but this was denied.

40. Mr Beattie wanted to clarify what was happening on the site. The claimant was at the front of the building. Mr Beattie decided to speak to Mr Haywood first as he wanted to understand what was happening on the site from him before speaking to the claimant.

41. Mr Beattie recalled that when he spoke to the claimant he informed him that "the job was costing a lot of time" and he wanted to know what was the problem.

42. Mr Beattie thought the claimant's reaction was very angry. The claimant started shouting and swearing and acting aggressively towards Mr Beattie. So far as Mr Beattie was concerned, there were a lot of excuses being given.

43. Mr Beattie did not deny that he responded by saying to the claimant, "If you do not like it, you can f*** off". He was not proud of having done so but, so far as he was concerned, in saying to him, "If you don't like it" he was referring to the fact that he knew there were plenty of jobs for Scaffolders as there is a lack of trained Scaffolders. So far as Mr Beattie was concerned, he did not say anything to the effect that the claimant should leave or that he was being dismissed from employment.

44. Mr Beattie left the site and returned to the office. He did not see the claimant again. When he returned to the yard the claimant had already left. Mr Beattie understood from Mr Boyd that the claimant had been shouting and told Mr Boyd that he "jacked it in" and "what was he (this being a reference to Mr Boyd) going to do."

45. The claimant and Mr Beattie rarely met. In the past Mr Beattie's brother had dealt with the supervision of the various sites where Scaffolders and other employees worked. Mr Beattie did not do so on a regular basis.

46. Over the next few days the claimant contemplated what to do. He decided to contact friends or contacts to see if he could find alternative employment. He also waited for a few days to see whether Mr Beattie would contact him but he did not hear from him.

47. Instead, the claimant received a letter from the respondent dated 5 October 2016, (page 21). He thought he received this the next day or the day after. This letter reads:-

> "Dear David
>
> **Resignation Acceptance**

> I refer to our conversation that took place today at (address is redacted since it is not relevant) Kilmarnock whereby you verbally gave me your resignation with the Company.
>
> This letter confirms our acceptance of your resignation with the Company and note your last working day is 5 October 2016.
>
> Your final pay will be calculated to include days worked up to and including your last working day, any holiday entitlement and the release of your holiday/savings. Your final pay will be paid into your bank account on Thursday 13 October 2016."

48. Later in the month the claimant received a second letter dated 12 October 2016 which set out the details of his final pay and enclosed his P45.

49. During this time the claimant had contacted various contacts. He found alternative employment within approximately ten days of his employment ending.

50. The claimant wrote to the respondent by letter dated 26 October 2016 (page 23) as follows:-

> "I am writing to appeal against my dismissal from the company on October 5th 2016 at approximately 11am.
>
> I was ordered by you to leave the site at Kilmarnock on that date. No formal disciplinary proceedings were carried out in line with either company policy or ACAS guidelines. Instead, I was unfairly and summarily dismissed without reasonable grounds."

51. By letter dated 8 November 2016, (page 26) the respondent replied to the letter noting the claimant wanted to appeal against dismissal. The letter continued:-

> "In responding to your letter, I must make it clear that you were not dismissed from the company's employment. As such, there is no dismissal in respect of which you may appeal against.

> As per my previous letter of 5 October 2016 (copy enclosed for ease of reference), your employment terminated that day as a result of your resignation.
>
> When you spoke to me on 5 October 2016, you said that you were not happy and that you were packing your job in. You also said to another employee that I could 'ram my job.'
>
> It was quite clear to me from your statements, and from the fact that you did not report for work after 5 October, that you were resigning from your post.
>
> As a result of your resignation, your P45 was processed and a letter was sent to you on 12 October 2016 setting out your final payments. A copy of this letter is also enclosed for ease of reference.
>
> I trust this letter clarifies the company's position."

52. The claimant replied by letter dated 16 November 2016, (page 27). He explained that his dismissal from the respondent was "a case of wrongful dismissal". He continued by setting out what had happened on the basis that the letter of 8 November in his view gave "an inaccurate account of what happened". He also referred to having a witness (this being a reference to Mr Haywood) on that day.

53. The claimant requested a reply within two weeks. By letter dated 29 November 2016, (page 28) Ms Walker's firm sent a reply to the claimant which again reiterated that the claimant had resigned from employment.

54. He understood that the claimant's position was that he was off by which Mr Boyd seemed to indicate that he was leaving the employment.

55. Subsequently Mr Beattie arranged for the letter dated 5 October 2016, (page 21) to be sent to the claimant. He had wondered if the claimant would be in touch later or the following day. Subsequently he received the claimant's letter dated 26 October 2016, (page 23) and he arranged for a reply to be sent dated 8 November 2016, (page 26).

56. Mr Beattie accepted that when he arrived on the site he was concerned that there had been a complaint as the site where the claimant was working was a new build for a prestigious client of the respondent. Mr Beattie was adamant the claimant knew that he, Mr Beattie had not "sacked him".

57. Mr Boyd who is the respondent's Yard Manager has been employed by the respondent for approximately 17½ years. As indicated above Mr Boyd was not present on the site but he was at the yard when the claimant arrived with the company's lorry. Mr Boyd approached the claimant to speak to him. The claimant was by this time standing at his car. When he asked the claimant what was happening the response he got was "you know what happened" Mr Boyd did not. He had received the phone call from Mr Haywood asking what to do. He had understood from Mr Haywood that the claimant had had "a rowdie with Mr Beattie on site." Mr Haywood had then explained that the claimant had jumped in the lorry and left the site and he, Mr Haywood wanted to know what to do.

58. Mr Boyd had the impression that the claimant was by this time very angry and that he said to Mr Boyd "I've had enough you can ram it."

59. At this point Mr Boyd walked away from the claimant.

60. Mr Boyd returned to the office and subsequently Mr Beattie arrived.

Submissions

61. At the conclusion of the Final Hearing on 4 May 2017 the representatives addressed the Tribunal.

The Claimant's Submission

1. It was accepted by Mr Beattie that he told the claimant, "If you don't like it (the job) you can f**** off." The claimant took this to mean that it was unambiguous and that he was being dismissed from employment.

2. Mr Beattie had never before spoken to the claimant in this manner. The claimant could only interpret it in one way and that was that he was being dismissed summarily from his job.

3. The Tribunal had heard Mr Haywood, who Mr Stillie submitted had more to lose in this potentially than anyone else, given he is still an employee of the respondent yet he gave a comprehensive account of that morning and his part in it. The Tribunal heard how he was called over by Mr Beattie on Mr Beattie's arrival at the site and asked why the progress on the site was so slow. Mr Hayward gave a lengthy and comprehensive answer to Mr Beattie and he gave his evidence on oath. This included the explanation that there was an issue with a neighbouring property, the site was tight and there was a hole/digging at the front of the property.

4. On the other hand, the Tribunal heard that, according to Mr Beattie, Mr Hayward had said next to nothing to him. The Tribunal heard that Mr Beattie then spoke to the claimant. Mr Beattie was already angry with the claimant as he had received a complaint from the contractor/site agent. There was then a heated discussion between the two men. Mr Beattie acknowledged he was angry and it was obvious from his tone and manner as to how angry he was. During the conversation Mr Beattie told the claimant that the job was on a price which the claimant disputed as he was being paid an hourly rate. The Tribunal has heard the difference between a price and hourly rate. Whether work was being done on a price or on an hourly rate would affect the claimant's take home pay. Mr Beattie then told the claimant as he has admitted that if he (the claimant) "don't like it you can f*** off."

5. The claimant took this as meaning that he had been dismissed.

6. Mr Haywood was the only independent witness as to the discussion between Mr Beattie and the claimant. His evidence was that he was standing five feet away and he was able to say what he heard and, from this, he took it to mean that the claimant had been dismissed.

7. Mr Beattie in his evidence to the Tribunal was not consistent with the statement he provided on 3 November 2016, (page 24) which bears to be his account of what happened on 5 October 2016.

8. In Mr Stillie's submission the claimant was entitled to take it that he had been dismissed, contrary to any proper procedure being put in place.

9. Mr Beattie had been clear that a complaint had been made to the company and that the claimant was the subject of that complaint. In Mr Stillie's submission, Mr Beattie intended to "get rid off" the claimant. He set about doing this by intentionally getting information from Mr Haywood. Mr Haywood had given a clear explanation as to the difficulties that were being encountered at the site. Against this, Mr Beattie had no knowledge of any problems on the site and he denied that Mr Haywood had said anything to him in relation to those issues.

10. In Mr Stillie's submission this was just not a credible position. Mr Beattie approached the claimant in the knowledge that the property was at a site for a "prestigious client" and his company's reputation was in his mind and, in his view, this was being undermined by the claimant. He therefore attended the meeting on that morning with the intention of dismissing the claimant and did so effectively.

11. It is not credible to say that the claimant resigned. In these circumstances we have heard evidence that there was some turmoil in the claimant's life as his granddaughter was very unwell so the last thing that he would have wanted to do would be to be out of work and have to start looking for a new job.

12. Mr Stillie submitted that, in the alternative, there was a constructive unfair dismissal as a result of the action taken by the respondent and the claimant would be entitled to compensation.

13. In the event the Tribunal found that there was an unfair dismissal then, because there was no procedural process followed, the dismissal was substantively unfair.

14. If the Tribunal was not with the claimant then, in the alternative, the claim would be that there was a constructive unfair dismissal because of the employer's conduct.

15. In the circumstances of this case, Mr Stillie submitted that if the Tribunal was with him then there would be no circumstances for a ***Polkey*** deduction to be made and in relation to an ACAS uplift he suggested that 50% should be applied.

16. In response, Ms Walker suggested that any uplift under ACAS for failure to follow the ACAS code should be limited to the maximum percentage which is 25%.

17. Mr Stillie confirmed that he did not wish to refer to any case law.

Respondent's Submissions

1. The claimant claims unfair dismissal or, in the alternative, constructive unfair dismissal. The respondent's position is that the claimant was not dismissed but that the claimant resigned with immediate effect. Since the dismissal was denied the onus is on the claimant to establish that there was a dismissal. Ms Walker submitted that the claimant had not done this. The Tribunal was invited to find on an objective test that the words used by the respondent did not amount to unambiguous words of dismissal. In this connection, Ms Walker referred the Tribunal to ***S Futty v Brekkes D & D Limited [1974] IRLR 130***

2. Turning to the evidence there was no dispute between the parties that the claimant's employment came to an end on 5 October but there is a dispute as to the means to which it came to an end. Mr Beattie's evidence was that he was not aware of issues that had arisen and this was corroborated by Mr Boyd who had not passed information on to Mr Beattie in that regard. Mr Beattie's evidence was that a complaint came to him from the "girls" in the office and as he was close at hand

to the site he drove from the bank where he had been with his son to the site to establish if there was any merit in the complaint.

3. Mr Beattie did not consider that it would be unusual for him as the owner of the business to attend the site where a complaint had been made. There was a discussion essentially over the level of work carried out with Mr Beattie finding it not satisfactory and making a suggestion to the claimant that he put him on a price. The evidence was confusing. The Scaffolders are paid on an hourly rate for each job. If, however, the work is done for example more quickly than anticipated then they receive a bonus and this is what is referred to as a price for the work.

4. It was difficult to understand why the claimant was so definite that there was no price because he could earn more than the hourly rate. According to Mr Beattie, there became a quite heated discussion. Mr Beattie's position was that the claimant was on a price.

5. At the end of the discussion it was accepted by Mr Beattie that he swore back at the claimant but not that he used the phrase described by the claimant as above.

6. Mr Beattie's position was that the language used was commonly used in the construction industry and what he meant was that if the claimant wanted to leave there were plenty of other jobs he could go to elsewhere.

7. It was accepted by the respondent that the claimant was perhaps more sensitive than he might otherwise have been given his family circumstances with his granddaughter being seriously ill at the time.

8. Following the discussion Mr Beattie left to return to the yard.

9. When he returned, Mr Boyd told him that Mr Hayward had been on the telephone to him to discuss what he Mr Hayward should do next.

10. Mr Boyd's evidence was that when the claimant returned to the yard he told him Mr Boyd that "he (Mr Beattie) can ram his job".

11. Mr Boyd then went to the office and told Mr Beattie what had been said by the claimant and the letter from the respondent of 5 October was prepared and signed by Mr Beattie on 5 October 2016, (page 21).

12. The claimant confirmed that he received this the following day but it took him three weeks to respond. His explanation was that he was looking for work and it took him time to contact ACAS. The claimant accepted that what he would be doing would be contacting other Scaffolders and that it would only mean his being involved in a couple of telephone calls a day. If the claimant was really asserting that he had been dismissed, then he would have reacted much more quickly than he did.

13. The claimant was then sent the further letter dated 12 October 2016, (page 22) setting out the final pay due to him. The claimant did not contact the respondent until his letter of 26 October and Ms Walker submitted this was because the claimant knew he had not been dismissed.

14. The respondent's reply was that there was no dismissal to appeal against and Mr Beattie had explained that, had the claimant written in alternative terms and perhaps withdrawn his resignation, then the outcome might have been quite different.

15. On the issue of constructive unfair dismissal there was no submission or evidence asserting that there had been a breach giving rise to a constructive unfair dismissal claim. It was not set out in the claim form, (the ET1) and so that aspect of the claim should fail.

16. Ms Walker then referred the Tribunal to the judgment in ***Futty*** (see above) which in her submission was relevant to the current case, and in particular, she referred to the facts as set out on page 1 of the printout provided.

17. In relation to the second judgment ***Tanner v D T Kean [1978] IRLR 110*** it would be reasonable for the Tribunal to find that Mr Beattie was angry that day, saw that the work on site had not progressed as quickly as expected and did not consider there was any reason for that. The claimant had then shouted back at him and Mr Beattie had then sworn at him and used the phrase already set out.

18. In order to dismiss the respondent requires to use clear and unambiguous terms and, whilst the claimant took what was said to him to mean dismissal, Mr Beattie did not intend to dismiss him and Mr Boyd was asked what he had heard.

19. In relation to the extract from ***Harvey*** Mrs Walker had nothing further to add other than to draw attention to what was set out there under the heading, "Was there in fact a dismissal" followed by the reference to "the problem of ambiguous or unambiguous language".

20. There was also reference to the summary set out in ***Harvey*** and the position of the employer, and the problem of repentance, was the act of dismissal by the employer, notice of dismissal and intimation of future dismissal contrasted.

21. Ms Walker accepted that the respondent had failed to follow the ACAS procedure but submitted that it would be unreasonable to have done so while the employee was shouting at the manager/owner. However, she accepted that there was no disciplinary procedure followed in the event that the Tribunal find that there was a dismissal. Her position was that an uplift of 25% which is the maximum possible should be applied should the Tribunal find there was a dismissal. Again, she emphasised that the respondent's position was that there was no dismissal in law.

22. Following the conclusion of the Final Hearing the representatives were asked by letters dated 5 May 2017 to provide short written submissions on, the issue of were the Claimant to be successful, whether there should be a reduction in the basic award in terms of

section 122 (2) of the Employment Rights Act 1996 (the Act), a reduction to the compensatory award for contributory conduct in terms of Section 123(6) of the Act and/or a reduction in terms of the principles applied in ***Polkey v AE Dayton Services Ltd*** **[1987] IRLR 503.** These were duly provided and are set out below.

Claimant's written submission

The Claimant has had sight of the Respondent's draft submission to the Tribunal in response to the Tribunal's direction. The Tribunal's direction is specific in relation to the narrow issues it requires to be addressed, i.e. reduction to the basic award and reduction to the compensatory award. The Claimant is disappointed that the Respondent uses its submission to rehearse and supplement evidential arguments lead at the hearing. For the Claimant, his position remains as stated at the hearing and in his Claim Form, that he was dismissed unfairly or constructively, and he submits, respectfully, that he has proven his case on the balance of probabilities and does not burden the Tribunal unnecessarily by rehearsing those arguments again herein.

The Claimant submits following:

Section 122(2) of the Act

1. Section 122 (2) of the Act provides: "

> *''Where the Tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."*

2. The Tribunal heard in evidence, and it was not disputed, that the Respondent's managing director/owner, Mr Beattie attended the work site on the morning of the dismissal and insisted immediately on speaking with Mr Kevin Heywood, the Claimant's trainee, ignoring more than once the Claimant's queries directly to Mr Beattie as to whether everything was okay.

3. After returning from speaking with Mr Heywood, Mr Beattie immediately went on the attack against the Claimant. Thereafter a heated conversation took place, resulting, on the Claimant's case, in his dismissal.

4. The Tribunal heard that Mr Beattie had received a telephone call from a third party about the Claimant on the morning of the dismissal. Mr Beattie, without further discussion with anyone else, attended the work site, the Claimant submits, with the sole intention of dismissing the Claimant. Nothing the Claimant could have done or said on that morning could have prevented his dismissal. Similarly, no matter how he conducted himself on that morning, he could not have prevented his dismissal that day.

5. It is submitted, on behalf of the Claimant, that he did not say anything that could equate to his conduct contributing to his dismissal. It is admitted that he was engaged in an argument with Mr Beattie, but it is submitted that that occurred at Mr Beattie's instigation and the raised voices were as a result of Mr Beattie's provocation.

6. It is further submitted, that the Claimant did not conduct himself in any non-verbal way that could be considered would contribute to his dismissal.

7. Mr Beattie was unequivocal in his direction to the Claimant, as admitted by Mr Beattie in evidence, that the Claimant should "*Fuck off*".

8. The Tribunal heard in evidence from Mr Heywood, who was standing no more than five feet away, what he understood this to mean, i.e. the Claimant had been sacked.

9. In the circumstances, on behalf of the Claimant, respectfully we submit that prior to his dismissal, there was no conduct of his such that there are any circumstances where it should be considered just or equitable to reduce the amount of the basic award, pursuant to section 122 (2)

of the Act, should he be successful in this case and accordingly no reduction should be made.

Section 123 (6) of the Act

10. Section 123(6) of the Act provides: "

> *"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

11. For the same reasons stated at paragraphs 2 to 8 above, respectfully, we submit that prior to the Claimant's dismissal, there was no action of his that should be considered as having contributed to his dismissal such that there should be any reduction to the compensatory award, pursuant to section 123 (6) of the Act, and accordingly no reduction to the compensatory award should be made.

Polkey deduction

12. The Tribunal heard that the Claimant had long, albeit interrupted, service with the Respondent Company. It heard no evidence of any previous disciplinary issues or formal concerns raised in relation to the Claimant's conduct or ability to carry out his duties during his long period of employment.

13. If there were in fact complaints made to the Respondent's Mr Beattie from a third party about the Claimant's conduct or standard of workmanship, and these were considered credible, then the Respondent had a duty to investigate those matters properly. Given the Claimant's long employment without any previous conduct or performance issues or concerns, on behalf of the Claimant, it is submitted to the Tribunal that any investigation of a complaint in relation to the Claimant would not have resulted in his dismissal.

14. On the Claimant's case, there is no possibility that he would have been dismissed in any event, in the circumstances of this case, therefore,

there should be no reduction to the amount of compensation under the basic award or the compensatory award applying the *ratio* in ***Polkey***.

Conclusion

15. For the reasons stated above, respectfully, on behalf of the Claimant, we submit that there should be no reduction in the basic award in terms of s. 122 (2) of the Act, no reduction in the compensatory award in terms of s.123 (6) of the Act, and no ***Polkey*** reduction.

Respondent's written submission

In addition to the oral submissions presented to the Tribunal on 4 May 2017, these written submissions are provided to the Tribunal, further to the Tribunal's letter of 5 May 2017.

1. In that letter, the Tribunal asks whether there would have to be a reduction in the basic award in terms of Section 122(2) of the Employment Rights Act 1996 as well as a reduction to the compensatory award for contributory conduct in terms of Section 123(6) of the 1996 Act should the decision be that the claim succeeds. The Tribunal comments that it will be necessary to consider the issues of whether there should be a reduction to the basic award and the compensatory award by way of contributory conduct as well as whether a Polkey reduction should be applied.
2. For completeness, and as stated during the oral submissions, the Respondent's position is that the Claimant was not dismissed. Rather, the Respondent's position is that the Claimant resigned with immediate effect. As such, the Respondent's position is that there was no dismissal so there can be no unfair dismissal.

3. Since dismissal is denied, the burden of proof is on the Claimant to establish that a dismissal took place. It was submitted to the Tribunal during the Final Hearing on 4 May 2017 that the Claimant failed to do so. It was further submitted that, applying an objective test, the words that were used by the Respondent did not amount to unambiguous

words of dismissal and, accordingly, the Tribunal was invited to dismiss the Claimant's claim.

4. If the Tribunal is not with the Respondent on this point and finds that the Claimant was dismissed (which is denied), as was stated during the Final Hearing on 4 May 2017, the Respondent accepts that the dismissal would have been procedurally unfair in that no procedure was followed prior to dismissal.

5. However, the Respondent would invite the Tribunal in these circumstances to reduce the basic award by 50% and to reduce the compensatory award by 50% on the basis that the Claimant's conduct contributed to his dismissal.

6. In relation to whether there should be a Polkey reduction, the Respondent accepts that this would not be applicable in this case since, even if the Claimant had been disciplined by the Respondent in respect of his conduct on 5 October 2016 or the slow progress of the job at the site, this would not have led to a sanction as severe as dismissal being imposed on the Claimant. It is also noted that the Claimant secured alternative employment some 10 days later and has no losses beyond that date, and the Respondent accepts that it would not have dismissed the Claimant during that 10 day period.

7. The submissions below deal only with the questions posed by the Tribunal in the letter of 5 May 2017 rather than reiterating points raised during the oral submissions on 4 May 2017.

Evidence

8. We heard from Mr Beattie in evidence that there was a disagreement between the Claimant and the Respondent's Colin Beattie on site on 5 October 2016.

9. Mr Beattie's position is that the disagreement was over the level of work that had been carried out on site, and a suggestion by Mr Beattie that he would put a price on the job.

10. Mr Beattie's evidence is that he was not made aware of any issues with the site prior to arriving at the site on 5 October 2016.

11. We heard from Mr Beattie that the work (details of the site removed by the Tribunal as it is not relevant) was being undertaken for a prestigious client, and that it was important to complete the work on time to uphold the Respondent's reputation.

12. It is submitted that the Claimant ought to have tried harder to make Mr Beattie aware of the issues with the site, and to explain why the work was taking longer than anticipated.

13. Mr Beattie priced the job for the client and Mr Beattie explained in his evidence that, in his opinion, the site was not any more difficult to work on than any others.

14. The Claimant was the site supervisor, so he was ultimately responsible for the progress of the work at the Mount Place site.

15. It is submitted that the Claimant's conduct, in not carrying out the work quickly enough and not trying harder to bring these matters to Mr Beattie's attention, as well as the manner in which he swore and shouted at Mr Beattie, contributed to the terms of his discussion with Mr Beattie and, if the Tribunal finds that the words used by Mr Beattie amounted to a dismissal, then it is submitted that the Claimant's conduct contributed to this.

16. In relation to whether the Claimant would have been dismissed had a fair procedure been followed, the Respondent accepts that, even if the Claimant had been disciplined by the Respondent in respect of his conduct on 5 October 2016 or the slow progress of the job at the

site, this would not have led to the Claimant being dismissed. As stated above, it is also noted that the Claimant secured alternative employment some 10 days later, and the Respondent accepts that it would not have dismissed the Claimant during that 10 day period.

Response to Claimant's further Submissions

62. In response to the Claimant's further submissions, the Respondent's position is as follows. For ease of reference, I refer to the paragraphs as numbered by the Claimant's representative.

- Paragraph 2 – Mr Beattie's evidence was that he attended the site on the morning of 5 October 2016 in order to ascertain whether there was merit in the complaint that had been received from the client. Mr Beattie did not 'insist' on speaking with Mr Heywood, rather he merely approached Mr Heywood and asked him about the progress on site with a view to ascertaining whether there was a reason for the delay in erecting the scaffolding. Mr Beattie's evidence was that he was then going to speak to the Claimant, hence why Mr Beattie did not stop to speak with the Claimant initially on his arrival at the site.

- Paragraph 3 – The evidence does not support a finding that Mr Beattie 'immediately went on the attack against the Claimant.' Rather, we heard in evidence that, after discussing matters with Mr Heywood, Mr Beattie spoke with the Claimant with a view to ascertaining the reason for the delay with the works. It was following a suggestion that the job was 'on a price' that the Claimant's attitude changed and he replied to Mr Beattie 'is it fuck.' We heard in evidence that the Claimant was shouting and swearing at Mr Beattie during this discussion. Mr Beattie explained that the Claimant was aggressive during this time and it was clear by his demeanour that he did not like being questioned as to the reason for the job being delayed. If the Tribunal finds that the Claimant was dismissed, which is denied, then it is submitted that the Claimant's conduct, namely shouting

and swearing at Mr Beattie, the Respondent's Managing Director, materially contributed to his dismissal.

- Paragraph 4 – The evidence, as put forward by Mr Beattie, was that the office staff took the telephone call from a third party. A member of the office staff then telephoned Mr Beattie to relay the complaint. We heard in evidence that Mr Beattie went to the site after receiving notification of the complaint. Mr Beattie explained that he was nearby at the time, and that it did not take him long to get to the site. It is submitted that this approach is entirely reasonable for a Managing Director to take, having been notified of a complaint by a prestigious client. It is strenuously denied that Mr Beattie attended the work site with the sole intention of dismissing the Claimant. Mr Beattie's evidence could not have been clearer in showing that his intentions were to ascertain, firstly, whether there had been a delay in the works and, secondly, the reasons for this. The suggestion that Mr Beattie would attend the site with the sole aim of dismissing the Claimant is absurd, and not supported by the evidence.

- Paragraphs 5 and 6 – We have heard in evidence that Mr Beattie was, until the day in question, unaware of any delay on site, or the reasons for it. As far as Mr Beattie was concerned, he explained in evidence that this site was not unusual. It is submitted that the Claimant's conduct did contribute to his dismissal (if the Tribunal finds that the Claimant was dismissed, which is denied) in that he did not carry out the work quickly enough or try hard enough to bring these issues to Mr Beattie's attention.

- Paragraph 7 – It was not admitted by Mr Beattie in evidence that he said 'that the Claimant should "Fuck off" and the Claimant's submissions are plainly inaccurate in this regard. In fact, what was admitted by Mr Beattie, and what the Respondent understands was the evidence put forward by the Claimant, was

that Mr Beattie said to the Claimant 'if you don't like it, you can fuck off.' This is an important difference of substance and typical of the industrial language used in the industry. It is submitted that the Claimant's evidence was quite clear on this point and was consistent with Mr Beattie's evidence. In evidence, the Claimant explained that it was not so much the words that were used by Mr Beattie, but the way he said these words, that gave him the impression he was being dismissed. It is submitted that the manner in which words are said cannot convert ambiguous words into unambiguous words of dismissal. Further, it is submitted that the Claimant knew that he had not been dismissed, and this was evidenced by him saying to Mr Boyd on his return to site that Mr Beattie could 'ram his job.'

- Paragraph 8 – Mr Beattie could not recall precisely how far away Mr Heywood was at the time of his discussion with the Claimant. However, although Mr Heywood may have believed these words to mean that the Claimant 'had been sacked,' when Mr Boyd was asked the same question, he confirmed that he understood the words to mean 'if you do not like it, you can leave,' (ie it would be the Claimant's choice whether to leave or not). Further, Mr Heywood also confirmed in evidence that he had heard people being told to 'fuck off' before, but had usually taken this as 'a laugh.'

- Paragraph 12 – The question of whether the Claimant had any previously disciplinary issues or formal concerns is one that was brought up by the Claimant's representative at the hearing. The Respondent had not had fair notice of this being brought up since it was not mentioned in the Claimant's ET1, hence the reason why there was no documentation relating to previous disciplinary matters in the bundle of documents. The Respondent had no intention of relying on previous disciplinary issues for the purposes of a Polkey argument, however the Respondent's representative did seek to challenge the Claimant on this matter

as it was relevant for the purposes of establishing the Claimant's credibility. It is the Respondent's position that the Claimant had previously been issued with formal letters regarding his conduct and performance and the Claimant's evidence in this regard is therefore disputed by the Respondent. However, to be clear, the Respondent has at no time suggested that these formal letters would have been relevant to the questions of law to be determined in this case.

Applicable Law

63. Section 122(3) of the Employment Rights Act 1996 provides as follows:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

64. With reference to the above evidence, it is submitted that it would be just and equitable for the Tribunal to reduce any basic award by 50% in light of the Claimant's conduct.

65. Section 123(6) of the Employment Rights Act 1996 provides as follows:

> "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Conclusions

66. With reference to the above evidence, it is submitted that it would be just and equitable for the Tribunal to reduce any compensatory award by 50% in light of the Claimant's contributory conduct.

67. It is acknowledged that a ***Polkey*** reduction would not be applicable in this case given the circumstances narrated above.

Relevant Law

68. Section 95 of the Employment Rights Act 1996 sets out the position in relation to dismissal as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) …. only if) –
>
> (a) The contract under which he is employed is terminated by the employer (with or without notice),
>
> (b) …..
>
> (c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to termination it without notice by reason of the employer's conduct."

69. The issue in this case is whether there was, as the claimant contends, a dismissal or whether, as the respondent contends, the claimant resigned. In the event the Tribunal were to find that there had been a termination of the employment then the respondent accepted that no proper procedure had been carried out and accordingly it would not be possible to show that the dismissal was fair nor would it be possible to show that the respondent had carried out the appropriate procedures.

Observations on the Witnesses

70. It was apparent to the Tribunal that both the claimant and Mr Beattie must have had an argument, particularly when Mr Boyd referred to Mr Haywood having telephoned him and telling him that the claimant had "had a rowdie" with Mr Beattie. While Mr Beattie had conceded that he had indeed used the words described by the claimant to the effect, "If you don't like it you can f*** off." Mr Haywood and the claimant both thought Mr Beattie was in a bad mood which was perhaps understandable given he had received the

telephone call from the office indicating that the client or the agent was dissatisfied with the progress at the site.

71. Mr Haywood gave his evidence in a clear manner as did Mr Boyd. In relation to whether the claimant did indeed say to Mr Boyd when he was in the Yard, "You can ram the job" the Tribunal concluded it was more likely than not, on the balance of probabilities, that he did say this to Mr Boyd. The Tribunal could see no reason why Mr Boyd would have recalled this unless it had been said to him by the claimant. Mr Boyd denied having said to the claimant words to the effect that Mr Beattie "doesn't give a s*** about anyone."

72. While the claimant gave his evidence in a measured manner he did accept that there was an exchange of words between him and Mr Beattie. It may be that the claimant was upset generally as a result of his granddaughter's serious medical situation and this may perhaps have made him more sensitive about Mr Beattie's tone. As indicated above the claimant and Mr Beattie rarely met. In the past, Mr Beattie's brother had dealt with the supervision of the various sites where Scaffolders and other employees were based. Mr Beattie did not do so on a regular basis.

Deliberation and Determination

73. The issue for the Tribunal was whether the claimant was dismissed as he contends or whether he resigned as the respondent contends. Ms Walker pointed out that the onus was on the claimant to establish that there was a dismissal given this was denied by the respondent.

74. The Tribunal noted that the issue of constructive unfair dismissal does not arise given this was not asserted in the claim, (the ET1).

75. The Tribunal gave careful consideration to the two decisions referred to by Ms Walker, (see above).

76. In relation to ***Tanner*** the summary set out in the extract from Harvey points out that ***Mr Tanner's*** reaction to the employer saying to him "That's it; you're finished with me" was not a dismissal but the Tribunal concluded that it was rather language used "by way of a reprimand and not by way of dismissal and had the claimant there thought about it there was no reason why he should not have so understood." On appeal, the Employment Appeal Tribunal refused the appeal pointing out that this was a conclusion that the Tribunal was entitled to arrive at and so there was no error of law.

77. In ***Futty*** a very similar phrase to that used by Mr Beattie was used where the foreman told the employee "If you do not like the job, f*** off". The employee interpreted this as being a dismissal, left and found another job. The employer thought that the employee would have returned when he got over his "huff" and denied having dismissed him. It was also indicated that the words used were to be interpreted "not in isolation but against the background of the fish dock". Other employees had heard the incident and did not consider the claimant had been dismissed unlike here where Mr Hayward thought the claimant had been dismissed.

78. In ***Futty*** the Tribunal agreed finding that in the fish trade "once the question of dismissal becomes imminent bad language tends to disappear and an unexpected formality seems to descend upon the parties." In that case the Tribunal found that the foreman's words were "no more than a general exhortation to get on with his job" and that the employee had not been dismissed.

79. Where language is ambiguous it is suggested in ***Harvey*** that there are three possible solutions:-

    (1) To concentrate on the intention of the speaker: did he intend to dismiss or resign (as the case may be when he uttered the relevant words?

(2) To concentrate in the way in which words were in fact understood by the listener, i.e. did he genuinely believe that this was because he was intending to dismiss him or to resign? ('the subjective approach' i.e. subjective to the listener).

(3) To concentrate on how a reasonable listener would have understood the words uttered, i.e. in construing the words as words of dismissal or resignation, did the listener not merely genuinely construe them in that way, but was he acting reasonably in all the circumstances in so construing them? (the 'objective approach').

80. While, on one view the words spoken do not appear ambiguous, the Tribunal had to take into account that what Mr Beattie said to the claimant was in effect conditional in that he prefaced his remark to the claimant by saying "If you don't like it". That is the conditional tense. It is very different from Mr Beattie simply saying to the claimant, "f… off." What Mr Beattie intended was that the claimant could leave if he did not like the job. The Tribunal concluded, albeit with some reluctance, that the claimant was not entitled to treat what was said to him as a dismissal but rather that Mr Beattie had, in effect, said that it was up to the claimant to decide what to do if he did not like the job.

81. In all the circumstances the Tribunal concluded that the claimant was not, as he maintained, dismissed but that he was given an option by Mr Beattie to stay or leave. Since the conclusion the Tribunal has reached is that there was no dismissal it therefore follows that this claim cannot succeed.

82. However, in the event that the Tribunal is wrong in reaching this conclusion and there was a dismissal then as indicated above, it had invited the representatives to provide written submissions as to what the position would be in relation to any compensation.

83. Both parties provided further written submissions and the Tribunal was grateful to them for doing so.

84. In relation to an increase in respect of the respondent's failure to follow the ACAS procedure the Tribunal would have concluded that it would have been appropriate to increase the award by 25%, this being the maximum available on the basis that had there indeed been a dismissal it was accepted that no procedure was followed by the respondent.

85. In relation to the issue of contributory conduct, the Tribunal had to take into account that there was no doubt there was a heated exchange between the claimant and Mr Beattie. It did so since Mr Haywood when reporting to Mr Boyd specifically told him that the claimant had "had a rowdie with Colin", (i.e. Mr Beattie).

86. That being so the Tribunal would have had to conclude that it would be appropriate to make a reduction in relation to contributory conduct and it would have found that the contributory conduct was such that the claimant was at least partially to blame for the argument which took place between him and Mr Beattie. In those circumstances, the Tribunal would have concluded that contribution of fifty per cent would have been the appropriate percentage to apply.

87. However, given the Tribunal has concluded that the claimant was not dismissed and therefore was no dismissal in law, it follows applying the facts to the law that this claim must be dismissed.

Employment Judge: F Jane Garvie
Date of Judgment: 14 June 2017
Entered in register: 15 June 2017
and copied to parties